# NORMATIVE POLITICAL COMMUNITIES

# NORMATIVE POLITICAL COMMUNITIES

Foundations for a Hartian Theory of State and Non-State Law

By

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# LAY ABSTRACT

This dissertation outlines a theory of law capable of explaining both state and non-state legal phenomena. This theoretical framework aims to formulate and resolve questions about the common features shared by different types of legality and the distinctive legal character of non-state legal phenomena, and to help to set the stage for further inquiries about them. My account draws liberally from HLA Hart's theory of state law. The argument proceeds as follows. Chapter 1 sets the stage of this inquiry. Chapter 2 explicates the key insights of the Hartian framework. Chapter 3 defends the applicability of this framework to non-state contexts. Chapter 4 illustrates its explanatory virtues by applying it to two regimes of international trade law. The conclusion summarizes the central insights of this view and highlights the avenues for future research.

#### ABSTRACT

This dissertation outlines a theory of law capable of explaining both the legal systems of domestic states and other types of legal phenomena different from state law that I will call non-state legal phenomena. Central examples of non-state law include indigenous and customary laws, the international legal order, the European Union, and transnational commercial law. This theoretical framework aims to formulate and resolve questions about the common features shared by different types of legality and the distinctive legal character of non-state legal phenomena. It also sets the stage for doctrinal and politico-moral inquiries about these phenomena.

My account draws liberally from central themes of HLA Hart's theory of state law that I deem applicable outside the domestic context. One key idea is the notion of normative order or unified complexes of interrelated rules that regulate specific domains of action. The refined Hartian view that I develop here distinguishes between two kinds of normative orders, sets and systems, which differ in their characteristic features and that allow for different doctrinal and moral inquiries. While these tools can be used to explain both state and non-state normative phenomena, I shall consider as law the normative orders of political communities, i.e. groups whose participants efficaciously employ intense forms of social pressure to secure conformity to norms that regulate pressing politico-moral issues. With these elements in place, the legal domain can be characterized as a constellation of sets and systems that constitute political communities at the state, nondomestic, international, supra-national, and potentially global levels.

The argument proceeds as follows. Chapter 1 sets the stage of this inquiry. Chapter 2 explicates the key insights of the Hartian framework. Chapter 3 defends the applicability of this framework to non-state contexts. Chapter 4 illustrates its explanatory virtues by applying it to two regimes of international trade law. The conclusion summarizes the central insights of this view and highlights the avenues for future research.

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## DECLARATION OF ACADEMIC ACHIEVEMENT

I, Jorge Luis Fabra-Zamora, declare this dissertation to be my own work. I am the sole author of this document. No part of this work has been published or submitted for publication or for a higher degree at another institution. My supervisor, Dr. Stefan Sciaraffa, and the members of my supervisory committee, Dr. Michael Giudice and Dr. Violetta Igneski, have provided guidance and support at all stages of this project.

# Introduction

## The Objective

In this dissertation I outline the foundations of a theory of law capable of explaining both the legal systems of domestic nation-states and putative forms of non-state legal phenomena. Commonly discussed examples of non-state law include indigenous and customary laws, the international legal order, the European Union, semi-autonomous regimes of international law such as the World Trade Organization, transnational commercial law, and some alleged instances of global law. The theoretical framework developed here attempts to formulate and begin to resolve vexing questions concerning the nature and legal character of non-state legal phenomena and set a firmer ground for doctrinal, politico-moral, and empirical inquiries about state and non-state law.

The argument tries to provide a timely remedy to a notable gap in the literature. Theoretical inquiries about non-state legal phenomena have unfortunately remained neglected by lawyers, empirical scholars, and practical philosophers. Lawyers and empirical scholars interested in non-state law have primarily focused on the study of specific doctrinal and empirical developments, often disconnected from more abstract debates. The assumption among many of these scholars seems to be that non-state law has reached a "post-ontological era," in which its status as law can be confidently presumed so we can directly turn to "more urgent and interesting" inquiries.<sup>1</sup> Furthermore, the poor

<sup>&</sup>lt;sup>1</sup> I borrow this expression from Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995), 5–6.

record of success of theoretical explorations advises against engaging in these conceptual questions. The failure of answering these "ancient, unresolved debates," as Simon Roberts puts it, "vindicates the view... that it is best to avoid becoming embroiled in general efforts at definition at all."<sup>2</sup>

However, claims about a post-ontological era are both premature and unwarranted. As I discuss below, there remain substantial controversies about the legal character of nonstate law and these controversies hinder the ability of theorists and practitioners to fruitfully engage in doctrinal, politico-moral, and empirical inquiries about these phenomena. Moreover, this recurrent skepticism seems to be based on confusions about what counts as a satisfactory account of law. For Roberts and other scholars, for example, conceptual puzzlement is resolved with a new, more comprehensive definition of law. But if law is not the kind of object that can be captured in a definition,<sup>3</sup> and definitions do not remedy the theoretical puzzlement and provide sufficient guidance for further inquiries, we can understand why the numerous efforts of providing one have failed. Still, when skeptical

<sup>&</sup>lt;sup>2</sup> Simon Roberts, "After Government? On Representing Law Without the State," *The Modern Law Review* 68, no. 1 (2005): 22. Similar skeptical positions have been advocated by other scholars. Roderick A. MacDonald claimed that the recognition of non-state legal phenomena "invites us to reject questions like 'what is law?," while Paul Schiff Berman claims that these phenomena "[free] scholars from needing an essentialist definition of law." Roderick A. Macdonald, "Pluralistic Human Rights? Universal Human Wrongs?," in *Dialogues on Human Rights and Legal Pluralism*, ed. René Provost and Colleen Sheppard (Dordrecht: Springer, 2013), 27; Paul Schiff Berman, "The New Legal Pluralism," *Annual Review of Law and Social Science* 5, no. 1 (2009): 236; Paul Schiff Berman, "Global Legal Pluralism," *Southern California Law Review* 80 (2007): 1178–9.

<sup>&</sup>lt;sup>3</sup> It is widely accepted that Hart offered a decisive argument against the use of *per genus and difference* definitions in law. H. L. A. Hart, *The Concept of Law*, ed. Joseph Raz and Penelope Bulloch, 3rd ed. (Oxford: Clarendon Press, 2012), 13–14; H. L. A. Hart, "Definition and Theory in Jurisprudence," in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 33–35. For other criticism of the project of providing a definition of law, see Jules L. Coleman and Ori Simchem, "'Law," *Legal Theory* 9 (2003): 1–2; William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009), 65. See also, John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford: Oxford University Press, 2012), chap. 7.

scholars are called to justify why they selected some types of normative phenomena as law and excluded others, or how they distinguish these objects from non-legal ones, they inevitably get embroiled in the questions they were trying to avoid. In this sense the theoretical question about law is unavoidable; it appears at the beginning of empirical, politico-moral, or doctrinal inquiries or returns through the backdoor when justifying a certain account, resolving difficult cases or providing fine-grained details.

Philosophers neglect the theoretical question of law for different reasons. In moral and political philosophy, little attention has been paid to the particularities of legal orders and institutions that are supposed to give efficacy to the general requirements of morality or justice outside the domestic context. For example, while references to international or global law or legal systems are widespread in the thriving work on cosmopolitanism and global justice, these notions are seldom explained, often assuming that state-centred theories of law can deliver the required clarifications.<sup>4</sup>

For their part legal philosophers remain unresponsive to putative forms of law outside the state. In particular, legal theorists of the Anglo-American tradition remain focused on determining the winners and losers of increasingly sterile intramural debates in the context of state law, while ignoring possible instances of non-state legal phenomena. Although recent efforts have started to remedy this neglect,<sup>5</sup> the most influential theories

<sup>&</sup>lt;sup>4</sup> For example, Allen Buchanan's interesting work in the legitimacy of the international legal system devotes no more than a few lines to explain such a system. Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2003); Allen E. Buchanan and David Golove, "Philosophy of International Law," in *The Oxford Handbook of Jurisprudence & Philosophy of Law*, ed. Jules L. Coleman and Scott J. Shapiro (Oxford: Oxford University Press, 2002), 868–934.

<sup>&</sup>lt;sup>5</sup> See for example, Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, USA, 2002); Andrew Halpin and Volker Roeben, eds.,

of law, both positivist and non-positivist alike, continue to be accounts of law within the nation-state.

The argument of this dissertation attempts to address this need for systematic engagement with putative instances of non-state legal phenomena. I will try to show that such involvement is not only a matter of widening the purview of current theories of law but also requires reconsideration of well-established assumptions, such as the explanatory centrality that traditional accounts have assigned to state law. Moreover, I will identify instances where the discussion of non-state legal phenomena also sheds new light on old problems and helps to reformulate some of the unresolved questions of legal theory.

## The Argument

Here, I develop the foundations of what I shall call—using categories that will be developed in Chapter 1—a general, unified, and demarcationist theory of law. My account is *general* as it is not limited to a specific form of legality, such as state law, transnational arbitration, customary law, or global law, but aims to explain all types of state and non-state legal

Theorising the Global Legal Order (Oxford: Hart Publishing, 2009); Emmanuel Melissaris, Ubiquitous Law: Legal Theory and the Space for Legal Pluralism (Farnham: Ashgate, 2009); Keith C. Culver and Michael Giudice, Legality's Borders: An Essay in General Jurisprudence (New York: Oxford University Press, 2010); Detlef von Daniels, The Concept of Law from a Transnational Perspective (Aldershot: Ashgate, 2010); Mariano Croce, Self-Sufficiency of Law: A Critical-Institutional Theory of Social Order (New York: Springer, 2012); Nicole Roughan, Authorities: Conflicts, Cooperation, and Transnational Legal Theory (Oxford: Oxford University Press, 2013); Victor M. Muniz-Fraticelli, The Structure of Pluralism (New York: Oxford University Press, 2014), chaps. 6-8; Thomas Schultz, Transnational Legality: Stateless Law and International Arbitration (Oxford: Oxford University Press, USA, 2014); Dennis Patterson, "Transnational Governance Regimes," in International Legal Positivism in a Post-Modern World, ed. Jörg Kammerhofer and Jean D'Aspremont (Cambridge: Cambridge University Press, 2014), 401-420; Roger Cotterrell and Maksymilian Del Mar, eds., Authority in Transnational Legal Theory: Theorising Across Disciplines (Cheltenham, UK: Edward Elgar Publishing, 2016); Nicole Roughan and Andrew Halpin, eds., In Pursuit of Pluralist Jurisprudence (Cambridge: Cambridge University Press, 2017); Keith C. Culver and Michael Giudice, The Unsteady State: General Jurisprudence for Dynamic Social Phenomena (Cambridge: Cambridge University Press, 2017); Liam Murphy, "Law Beyond the State: Some Philosophical Questions," European Journal of International Law 28, no. 1 (2017): 203–232.

phenomena. It is *unified* insofar as it seeks to identify some common features of form, structure, and content amongst all the types of legality. The instantiation of these features by a particular normative phenomenon justifies our characterization of them as instances of law. This unified project contrasts with fragmentary approaches to general jurisprudence which hold that there are no sensible generalities amongst the different forms of legality or that we are ill-equipped to grasp these generalities. Finally, my account is *demarcationist* for it seeks to differentiate a sub-set of normative practices which are appropriately characterized as legal. This approach opposes non-demarcationist accounts that do not establish a sharp distinction between legal phenomena and non-legal social normative phenomena, so some form of legality or legal character should be recognized in the rules of associations, universities, clubs, dating, and schoolyard games, among others.

The argument for this account liberally draws on methodological and substantive insights from the theories of state law advanced by HLA Hart.<sup>6</sup> My use of these resources is based on reasons of familiarity and consilience. The Hartian account is familiar to lawyers, legal scholars, and philosophers of different traditions, and has been recognized as the "ruling theory of law"<sup>7</sup> even by its utmost rivals. Moreover, the Hartian framework of legal thought is also consistent with the language and conceptual tools used in other areas of philosophy, legal scholarship, and some empirical disciplines. Thus, although this

<sup>&</sup>lt;sup>6</sup> Hart, *The Concept of Law*; H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983); H. L. A. Hart, "Commands and Authoritative Legal Reasons," in *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982), 241–268. Other sources of inspiration include Hans Kelsen, "The Concept of the Legal Order," trans. Stanley L. Paulson, *The American Journal of Jurisprudence* 27, no. 1 (1982): 64–84; Joseph Raz, *Practical Reason and Norms*, 2nd ed. (Oxford: Oxford University Press, 1999); Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (Oxford: Oxford University Press, 2009).

<sup>&</sup>lt;sup>7</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), vii.

framework was created with parochial ambitions, its resources are the closest we currently have to a *lingua franca* that allows for theoretical conversations across different academic disciplines and legal traditions.

It is not my interest to dwell here on exegetical disputes about the best interpretation of Hart's work or legacy. Instead, I shall focus on isolating and explaining some central themes of his approach which apply not only to state legal systems but also to "any form of social structure."<sup>8</sup> In my view Hart himself did not perceive the full explanatory capacity of these central themes, but with some refinements and clarifications we can use his tools to see and explain much more than he originally envisioned. To achieve this purpose I have not hesitated to clarify, adapt, or replace some of his views that I have found obscure, mistaken, or unfit for explaining non-state legal phenomena. For clarity, I refer to my account as a *Hartian* or *Hart-inspired* conception to differentiate it from Hart's own statebased formulation and other unified accounts of non-state legal phenomena that I tangentially discuss.

On the methodological aspects of this project I take from Hart the idea that the purpose of general jurisprudence is to improve our understanding of law by providing an "explanatory and clarifying account;"<sup>9</sup> an "illuminating form of description of a specific type of social institutions [that] will bring out clearly salient features."<sup>10</sup> As I understand his methodological proposal, the role of legal theory is to resolve puzzles and

<sup>&</sup>lt;sup>8</sup> Hart, *The Concept of Law*, vi.

<sup>&</sup>lt;sup>9</sup> Ibid., 239–40.

<sup>&</sup>lt;sup>10</sup> H. L. A. Hart, "Answers to Eight Questions (1988)," in *Reading HLA Hart's "The Concept of Law,"* ed. Luis Duarte d'Almeida, Andrea Dolcetti, and James Edwards (Oxford: Hart Publishing, 2013), 284.

misunderstandings about legal phenomena in order to productively engage in empirical, doctrinal, and politico-moral inquiries about these phenomena.

On the substantive side of things I use and refine resources from Hart's theory of law to identify what he called some *generalities of form, content, and structure* among the different forms of normative practices. The bedrock of this account is the notions of norms, normative communities, and normative orders. The first two are co-constitutive notions. *Norms* are the standards that guide the behaviour of a given community. The existence conditions of these norms refer to the behaviour and pro-attitudes of certain groups, or *normative communities*, as I shall call those groups efficaciously guided by the same standards. In turn, normative orders are complexes of normatively interrelated rules that regulate a domain of action. It is a central insight of the Hartian conception and many contemporary theories of law that the explanation of specific normative orders and the communities that constitute them is prior to the account of their constituent norms.

The Hartian account makes a further distinction between two different kinds of orders that I will refer to as sets and systems. Whereas a *set* is a normative order that lacks standards regulating the identification, modification, and application of its rules, a *system* includes norms that govern these normative activities and empower agents to perform them. The trio of rules constitutive of a legal system are the rules of recognition, change, and adjudication. Sets and systems are then distinct types of social normative objects and they allow for different doctrinal and moral inquiries. In sets doctrinal questions refer to the norms that officials accept in common. Moreover, in sets we can only inquire about the

legitimacy of the norms accepted by the community at large but systems give rise to further questions concerning the authority and legitimacy of the agents in charge of the creation and application of the collective rules.

For the Hartian theorist both state and non-state normative phenomena can be organized as sets or systems. On this construal the systematic character of a given normative order is not the feature that determines its legal character. Instead, law and the purview of jurisprudence relate to some communities that exercise intense forms of social pressure on morally relevant issues. I will refer to these groups as *political communities* or polities. These communities have a prominent role in our theoretical and practical reasoning due to the pressing demands they impose on their subjects. In this picture the state is one prominent form of a political community, but there are also many other political communities at the non-domestic, international, supra-national and potentially global levels.

These tools are useful for identifying and providing a starting point for explaining forms of non-state legal phenomena as the norms of stateless polities, and they also provide an illuminating framework for further inquiries into legal phenomena. Lawyers often study the norms of political communities since they guide the resolution of legal disputes. Political philosophers are generally interested in issues concerning the authority and legitimacy of normative orders constituted by political communities for their prominent role in our practical life. The Hartian framework provides further guidance for these inquiries because doctrinal and politico-moral questions about legitimacy, justice, authority, and duties of obedience are formulated differently in normative sets and systems. The refined Hartian account provided here contains several amendments to Hart's original theory, including modifications to his accounts of primary and secondary rules, legal officials, and the rule of recognition. This modified account emphasizes Hart's general distinction between two levels of norms applicable to legal and non-legal normative orders. The fundamental level is comprised by the social or customary norms that give rise to the normative order, i.e. constitutive rules. The other level is comprised by norms whose existence presupposes a backdrop of efficacious constitutive rules; the second norms are constituted rules. While constitutive rules are identifiable in any normative order, including sets, some orders are animated by a trio of constitutive rules that regulate the central normative activities of a given community (i.e. the identification, creation, and application of collective norms) and thereby constitute a sophisticated arrangement that I refer to here as a "system."

In keeping with this distinction I will further differentiate between two kinds of officials or agents who settle normative situations on behalf of a given community; constituted officials created by valid norms identified through the rule of recognition and constitutive officials created by the constitutive rules of change and adjudication. In my account, rules of change and adjudication are independent constitutive rules that operate in tandem with the system's constitutive rule of recognition. This distinction between a system's constitutive rule of recognition and its constitutive rules of change and adjudication enables the Hartian theorist to fend off a recurring objection that claims to find a vicious circularity in his account of legal systems.

A final group of amendments relates to the rule of recognition, the constitutive rule that identifies the binding norms of a normative system. The most important modification is my distinction between the notion of the rule of recognition and the hierarchical reconstruction of the rule, in which the different criteria of validity are unified through a hierarchical arrangement. As I shall clarify later the identification of the norms that belong to a normative system need not depend on some hierarchy of norms; rather, a legal system might harbour a set of norm-applying officials whose identity is fixed independently of any hierarchy of norms and who are nonetheless able to authoritatively settle disputes about the precise identity of the system's norms. A key conceptual resource that I develop here and draw on to develop this argument is a proto-doctrinal conception of the system's constitutive rules, including the rule of recognition. On this account the rule of recognition is constituted by the shared or unified perspective of norm-applying officials about the criteria that identify the rules of the normative system. The identification and description of the proto-doctrinal rule of recognition is a quasi-sociological exercise that describes key background conditions that constrain and inform officials' doctrinal disputes about the precise contours of their system's legally valid norms.

Finally, I should underline that the present argument is experimental and programmatic. As such it does not attempt to provide a definitive solution to the puzzles I raise or engage with all the existing views in the literature about the range of problems explored. Far from creating a brand-new comprehensive theory of law, my goal is to highlight and refine well-established tools of a particular philosophical tradition and use them to address what I take to be the most critical jurisprudential challenge of our time. I

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will be content if I can: show that insights from mainstream legal theory are useful to understanding legal practices; raise doubts about revisionist tendencies that call for a complete replacement of extant theoretical devices and, in some cases, common-sense categories; and to successfully propose the Hartian model as one potential candidate theory of law, among many others, that usefully frames and answers some of the most difficult questions about state and non-state legal phenomena.

#### The Plan

This argument for a general, unified and demarcationist Hartian account of state and nonstate law proceeds as follows. Chapter 1 advances preliminary considerations that motivate and clarify my argument. In the first half of the chapter I provide a catalogue of the most paradigmatic examples of non-state law and I isolate the alleged deficits they generate in traditional state-centred theories of law. In the second half two related conceptual questions spurred by these phenomena are identified. These concern the general or common features of form, structure, and content that all forms of legality share, and the distinction between legal and non-legal normative phenomena. The chapter concludes with a formulation of the argument for a general, unified, and demarcationist account of state and non-state legal phenomena.

In Chapter 2 I explicate the central components of the Hartian theory of law. Here, I introduce the Hartian project as a general account of normative practices, not a theory of state law. The central elements of this account are the notions of norms, normative communities, normative orders, and constitutive and constituted rules. I subsequently introduce the fundamental distinction between two kinds of normative orders, sets and

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systems. These two types of normative orders differ in the type of guidance they provide to their community, the structure of the communal practical authority, and the way they structure doctrinal discourse about the order's norms. Finally, I articulate the Hartian demarcationist approach based on political communities. The chapter concludes with a statement of the central insights of the Hartian framework—the centrality of normative orders and its particular order of explanation.

In Chapter 3 I defend the applicability of the Hartian theory beyond the state. I concentrate on two powerful objections posed by Keith Culver and Michael Giudice (henceforth C&G) against Hart's account of legal officials and secondary rules. They name these objections the problems of circularity and indeterminacy. In their view Hart can remedy these problems in domestic legal systems by relying on hierarchies of norms and officials. However, since such hierarchies are not readily available outside the state, these two objections debar application of the Hartian model in non-state contexts where hierarchies are not prominent. In response to this challenge I clarify and refine central components of the Hartian project. The core of this renewed reading are clarifications of Hart's accounts of secondary rules, legal officials and the constitutive rules of adjudication and recognition. Together, these elements allow me to develop a direct response to the problems of circularity and indeterminacy. I also take issue with the solutions to the problems that C&G propose based on the presumption of hierarchy. This renewed account is illustrated with a discussion of the C&G's application of their objections to international legal phenomena.

Chapter 4 illustrates the refined Hartian framework with a discussion of two prominent normative orders that have ruled over international trade law, namely, those created by the General Agreement on Trade and Tariffs from 1947 (GATT) and the World Trade Organization (WTO). I begin my inquiry by identifying GATT and the WTO as two distinctive normative orders constituted by the behaviour and attitudes of the community of international trade law. These practices can be appropriately characterized as legal orders since their participants systematically apply intense forms of social pressure to secure conformity to norms that regulate relevant politico-moral issues. I then use the refined Hartian typology to provide a more detailed account of these phenomena. I argue that GATT is best understood as a legal set, while the WTO law exhibits all the hallmarks of a legal system. The chapter closes with a summary of the main results of this exploration and an explanation of how the Hartian-inspired characterization of these legal phenomena usefully frames further doctrinal and politico-moral inquiries.

Chapter 5 recapitulates the answers given here to the dissertation's motivating questions and outlines a number of avenues for future jurisprudential research. As an illustration of the prospects of the resulting account I adumbrate a Hartian account of non-state law as a constellation of stateless normative polities at the non-domestic, international, supra-national, transnational, and global levels.

## **On Legal Pluralism**

Before turning to my argument I should note that this project avoids the label *legal* pluralism and related terms (pluralist jurisprudence or pluralist positivism) which are

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commonly used in debates about non-state legal phenomena.<sup>11</sup> Pluralism denotes scenarios where different types of state and non-state legal phenomena interact. Following John Griffiths's widely accepted formulation, legal pluralism is "*a state of affairs*, for any social field, in which behaviour pursuant to more than one legal order occurs."<sup>12</sup> Examples of these interactions include the situations of contact between colonial and customary laws; state and unofficial laws; and state norms and transnational norms in situations of so-called global legal pluralism. Thus construed legal pluralism "is not a theory of law or an explanation of how it functions," but a fact ascertainable by empirical observation. "It alerts observers... that law takes many forms and can exist in parallel regimes."<sup>13</sup> However, to know if there is a scenario of pluralism with more than one legal order in a given situation, we must have determined first whether the interacting orders are legal phenomena. The question about which features or generalities explain the legal character of a given

<sup>&</sup>lt;sup>11</sup> For seminal presentations of legal pluralism and its controversies, see John Griffiths, "What Is Legal Pluralism?," *The Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (1986): 1–55; Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22, no. 5 (1988): 869–896; William Twining, "Normative and Legal Pluralism: A Global Perspective," *Duke Journal of Comparative & International Law* 20 (2009): 473–517; Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global," *Sydney Law Review* 30 (2008): 376–410; Anne Griffiths, "Reviewing Legal Pluralism," in *Law and Social Theory*, ed. Reza Banakar and Max Travers, 2nd ed. (Oxford: Hart Publishing, 2013), 269–286; Gordon R. Woodman, "Ideological Combat and Social Observation," *The Journal of Legal Pluralism and Unofficial Law* 30, no. 42 (1998): 21–59; Baudouin Dupret, "Legal Pluralism, Plurality of Laws, and Legal Practices," *European Journal of Legal Studies* 1, no. 1 (2007); Ralf Michaels, "Global Legal Pluralism," *Annual Review of Law and Social Science* 5, no. 1 (2009): 243–262.

<sup>&</sup>lt;sup>12</sup> Griffiths, "What Is Legal Pluralism?," 2; Cf. Jacques Vanderlinden, "Le Pluralisme Juridique: Essai de Synthèse.," in *Le Pluralisme Juridique*, ed. John Gilissen (Brussels: Université de Bruxelles, 1971), 19; Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law," *The Journal of Legal Pluralism and Unofficial Law* 13, no. 19 (1981): 20–1; Merry, "Legal Pluralism," 970; Anne M. O. Griffiths, *In the Shadow of Marriage: Gender and Justice in an African Community* (Chicago: University of Chicago Press, 1997), 29–31; Roderick A. Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism," *Arizona Journal of International and Comparative Law* 15 (1998): 77; Michaels, "Global Legal Pluralism," 245.

<sup>&</sup>lt;sup>13</sup> Sally Engle Merry, "Legal Pluralism in Practice," *McGill Law Journal* 51, no. 9 (2013): 2; Griffiths, "What Is Legal Pluralism?," 4, 12.

normative practice is one of the objects of the present study. That is, the project of this dissertation focuses on explaining the normative phenomena and its legal character, not the explanatorily posterior study of scenarios of co-existence and interaction.

Furthermore, in avoiding such a label I hope to circumvent exegetical debates attached to it. Some of these disputes concern, for example, questions about who is really a pluralist, the correctness of Griffiths's description, and even whether the label captures something distinctive and interesting.<sup>14</sup> Two additional disputes deserve notice. The first one is the alleged debate between pluralists and philosophers, and the second one is an intramural debate concerning the theoretically relevant type of plurality.

Regarding the first dispute, self-styled legal pluralists do not use the label "pluralism" to include all those who recognize and attempt to explain the scenarios of legal plurality. Instead, they define their approach by juxtaposition with what they regard as the core tenets of orthodox or mainstream legal philosophy. According to a widespread view, legal philosophers are guilty of the vice of *centralism*, namely, the view that "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions."<sup>15</sup> Pluralists claim that the centralist's

<sup>&</sup>lt;sup>14</sup> For some of these challenges, see Chris Fuller, "Legal Anthropology, Legal Pluralism and Legal Thought," *Anthropology Today* 10, no. 3 (1994): 10; Cf. Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001), 171; Michaels, "Global Legal Pluralism," 251; Brian Z. Tamanaha, "The Promise and Conundrums of Pluralist Jurisprudence," *The Modern Law Review* 82, no. 1 (2019): 178–9.

<sup>&</sup>lt;sup>15</sup> See Griffiths, "What Is Legal Pluralism?," 2; Cf. Galanter, "Justice in Many Rooms," 1, 20–1; Griffiths, *In the Shadow of Marriage*, 29–31; and more recently, Turkuler Isiksel, "Global Legal Pluralism as Fact and Norm," *Global Constitutionalism* 2, no. 2 (2013): 164; Macdonald, "Pluralistic Human Rights?," 23–4. Sometimes the defect that all legal philosophers share is called "monism," idea that "law [is] a single coherent structure of norms derived from a clearly located source — the state." See e.g. Margaret Davies, "The Ethos of Pluralism," *Sydney Law Review* 27 (2005): 88; Daniel Bonilla, "Extralegal Property, Legal Monism, and Pluralism," *University of Miami Inter-American Law Review* 40, no. 2 (2009): 201. This idea of "monism,"

work can be "safely ignored" because it fails to acknowledge the diversity of legal phenomena.<sup>16</sup> Moreover, pluralists argue that the constellation of non-state legal orders "can only be adequately explained by a theory of legal pluralism."<sup>17</sup>

Most legal theorists are indifferent to the accusations advanced by the pluralists. On the few occasions they engage with them, jurisprudents have dismissed the pluralist's allegations as caricatures or systematic misrepresentations of their views. Per this rebuttal centralism captures some of the views heralded by nineteenth-century theories of law, but this mixture of descriptive and normative claims cannot be plausibly attributed to mainstream theories of the twentieth century.<sup>18</sup> As I discuss below, many theories of analytical jurisprudence do recognize political arrangements different from the modern state (e.g. Roman law), as well as some forms of non-state legal phenomena (e.g. international law or canon law), as borderline instances of law. Thus, legal philosophers are not always or uniformly guilty of the type of centralism that pluralists impugn. As Victor Muniz-Fraticelli has put it centralism as the foundational myth of pluralism is largely guilty of a fallacy aptly named the "antonym substitution;" pluralists have distorted some

however, differs from another idea that bears the same name. According to this latter idea, international and domestic law should be conceived as a unity.

<sup>&</sup>lt;sup>16</sup> John Griffiths, "Legal Pluralism and the Theory of Legislation—With Special Reference to the Regulation of Euthanasia," in *Legal Polycentricity: Consequences of Pluralism in Law*, ed. Henrik Petersen and Hahle Zahle (Dartmouth: Ashgate, 1995), 201.

<sup>&</sup>lt;sup>17</sup> Gunther Teubner, "Global Bukowina': Legal Pluralism in the World Society," in *Global Law Without a State*, ed. Gunther Teubner (Aldershot: Dartmouth, 1997), 4

<sup>&</sup>lt;sup>18</sup> See Muniz-Fraticelli, *The Structure of Pluralism*, chap. 5; Otto Pfersmann, "Contre le pluralisme mondialisationnaliste: pour un monisme juridique ouvert et différencié," *Archiv für rechts-und sozialphilosophie, ARSP. Beiheft*, no. 121 (2010): 138; Cf. Catherine Valcke, "Three Perils of Legal Pluralism," in *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives*, ed. Seán Patrick Donlan and Lukas Heckendorn Urscheler (Farnham: Ashgate, 2014), 126.

central jurisprudential ideas and replaced them with "antonyms of their own choosing, which were either ignored or explicitly rejected" by mainstream legal philosophers.<sup>19</sup>

As a result the confrontation between pluralist sociologists and lawyers against centralist philosophers does not usefully frame the theoretical debates generated by nonstate legal phenomena. I hope that by abandoning the label and focusing on the phenomena and the puzzles they generate, we can set the stage for a more fruitful engagement between the two camps that offer different approaches, evidence, and theoretical models for the project of general jurisprudence.

There is a second dispute concerning the kind of plurality of law that legal pluralism recognizes. In the traditional understanding, legal pluralism suggests a *plurality of the same object*, namely, that the multiplicity of legal orders identified through empirical research are fundamentally diverse kinds of the same thing. Griffiths's canonical formulation is explicit on this point: "Any sort of 'pluralism' necessarily implies that more than one of the sorts of the thing concerned is present within the field described. In the case of legal pluralism, more than one law must be present."<sup>20</sup> However, for some self-styled legal pluralists, the diverse kinds of non-state legal phenomena are not a multiplicity of the same uniform phenomena that share some common features of form, structure, and content. Rather, they are irreconcilable, incommensurable, and irreducible but equally important legal entities or concepts or explanations of such entities. In this second sense, a unified

<sup>&</sup>lt;sup>19</sup> Muniz-Fraticelli, *The Structure of Pluralism*, 125; originally in Stephen Holmes, *The Anatomy of Antiliberalism* (Cambridge, Mass: Harvard University Press, 1996), 253.

<sup>&</sup>lt;sup>20</sup> Griffiths, "What Is Legal Pluralism?," 1.

account of law is not possible.<sup>21</sup> That is, this second kind of pluralist rejects what they characterize as the "dogma of the singularity of the concept of law."<sup>22</sup>

These two types of plurality generate an internal division in legal pluralism. Pluralists of the second type reject the core assumption of pluralists of the first type, namely, that different types of law are instances of the same thing.<sup>23</sup> Moreover, to increase confusion, this plurality of legal objects is more clearly articulated by some theorists who self-identify as general jurisprudents, like William Twining and Brian Tamanaha. Although they are sometimes called legal pluralists, these scholars do not adopt that label. On the contrary they offer critiques and challenges to the standard tradition of legal pluralism.<sup>24</sup>

Moreover, the plurality of legal phenomena is also defended without any reference to the notion of pluralism. For example, Sionaidh Douglas-Scott endorses a similar view when she holds that law is not to be understood as "homogenous, insular and closed but instead to encompass very plural entities and diverse opportunities."<sup>25</sup> Likewise, Neil Walker's account of global law assumes that legal normativity in a globalized world takes multifarious and incommensurable forms that cannot be reduced to one single structure,

<sup>&</sup>lt;sup>21</sup> See for example, Margaret Davies, "Plural Pluralities of Law," in *In Pursuit of Pluralist Jurisprudence*, ed. Nicole Roughan and Andrew Halpin (Cambridge: Cambridge University Press, 2017), 239–259; Emmanuel Melissaris and Mariano Croce, "A Pluralism of Legal Pluralisms" (April 5, 2017), accessed October 15, 2018, https://dx.doi.org/10.1093/oxfordhb/9780199935352.013.22.

<sup>&</sup>lt;sup>22</sup> Margaret Davies, "Pluralism and Legal Philosophy," Northern Ireland Legal Quarterly 57 (2006): 755.

<sup>&</sup>lt;sup>23</sup> For discussion of the internal division of legal pluralism, see Melissaris, *Ubiquitous Law*, chap. 3; Michael Giudice, *Understanding the Nature of Law: A Case for Constructive Conceptual Explanation* (Cheltenham, UK: Edward Elgar Publishing, 2015), chap. 1; Culver and Giudice, *The Unsteady State*, chap. 2.

<sup>&</sup>lt;sup>24</sup> See Brian Z. Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," *Journal of Law and Society* 20, no. 2 (1993): 192–217; Twining, "Normative and Legal Pluralism"; Tamanaha, "Understanding Legal Pluralism."

<sup>&</sup>lt;sup>25</sup> Sionaidh Douglas-Scott, Law after Modernity (Oxford: Hart Publishing, 2013), 64.

function or concept.<sup>26</sup> Hence, this manifest fuzziness of the notion "pluralism" constitutes an obstacle for clear discussion.

To avoid these problems, I frame my argument in terms of two different explanatory projects. The first is pursued by legal philosophers and pluralists of the first type who seek to provide accounts of law that are unified in the sense that they identify generalities shared by all legal phenomena. By contrast, the second project responds to theorists such as William Twining and Brian Tamanaha and pluralists of the second type who seek to advance a theory of law that is fragmentary, i.e. a theory that does not specify unifying features among the diversity of legal phenomena.

<sup>&</sup>lt;sup>26</sup> Neil Walker, *Intimations of Global Law* (Cambridge: Cambridge University Press, 2015), chaps. 3 and 5.

#### Chapter 1: Setting the Stage

This dissertation outlines the rudiments of a theory of law capable of explaining forms of state and non-state law. In this introductory chapter I advance three considerations that motivate and clarify this project. The first section of this chapter frames this inquiry. Here I distinguish between putative forms of state and non-state legal phenomena; provide a catalogue of paradigmatic examples of non-state law; and rehearse the challenges that these non-state phenomena allegedly pose for state-centred theories of law.

In the second section I explicate the two central theoretical issues that these nonstate normative phenomena raise. The first issue concerns the common features of form, structure, and content that all forms of legality share and that allow the theorist to characterize them as law. Whereas unified theories of law attempt to identify such features, fragmentary accounts deny their existence or the possibility to grasp them.

The second issue concerns the distinction between law and non-law. Demarcationist theories hold that there is a meaningful distinction between legal and non-legal normative phenomena while non-demarcationist approaches claim that law or legality can be found in all sorts of social normative practices. The resolution of these two questions, I further claim, is necessary to frame and answer doctrinal and politico-moral questions about nonstate legal phenomena. The chapter closes with a formulation of my argument using the categories developed.

#### **1. Formulating the Problem**

## 1.1 State-Centred Legal Theories

During the twentieth century the most influential theories of law offered by self-styled legal philosophers have focused almost exclusively on *state law*, namely, the legal systems of modern nation-states.<sup>1</sup> HLA Hart claimed, for example, that "the clear standard cases" of law are "constituted by the legal systems of modern states, which no one in his senses doubts are legal systems."<sup>2</sup> Similarly, Joseph Raz embraces the "assumption of the importance of municipal law," that is, the "intuitive perception that municipal legal systems to deserve being studied for their own sake."<sup>3</sup>

In this context state law refers to the normative orders comprised by the norms enacted, practised, or recognized by agents and institutions that act on behalf of the nationstates and its subdivisions (provinces, municipalities, etc.). Although many features remain unsettled, near consensus has emerged about the fundamental features of state law. These are:

<sup>&</sup>lt;sup>1</sup> These theories do not necessarily equate "law" and "state" as is often attributed to them. Theoretically speaking, the view that law is equal to the state is clearly implausible. If law was "invented" with the modern state, there would have been no law in the Greek *polis* or the Roman Republic. To be clear, my claim is that an equation between law and the modern state was not maintained by the most important legal theories of the twentieth century. I do not wish to deny, however, that some legal and political philosophers of the nineteenth century, along with some lawyers and legal scholars in the twentieth century, held such a view and that it had a significant impact on legal doctrine and legal practice.

<sup>&</sup>lt;sup>2</sup> Hart, *The Concept of Law*, 4.

<sup>&</sup>lt;sup>3</sup> Raz, *The Authority of Law*, 109. As I understand it, "municipal law" or "modern municipal legal system" are used by Hart and Raz as synonymous with "state law."

(1) State law is systematic in the sense that it incorporates hierarchically arranged criteria of validity that determine the laws that belong to the system, and officials in charge of the creation, application, and monitoring of the system's norms.

(2) State law is capable of regulating all aspects within its jurisdiction free from external intervention.

(3) State law typically monopolizes the use of force in its jurisdiction.

(4) State law claims priority or supremacy over all other normative orders in its territory (e.g. the norms of associations, games, clubs, universities, etc.)

(5) State law is open in the sense that officials of the state can enforce and support the rules of other normative orders in its territory (e.g. associations, universities, etc.) and other state legal systems (e.g. norms of French law enforced by Canadian officials in the Canadian territory).<sup>4</sup>

For traditional theories, state law identified through these five features is the main object of our theoretical, doctrinal, and politico-moral reflection. The central debates of jurisprudence or legal theory concern the elucidation of the particularities of this central form of legal phenomena. For example, the dispute between positivist and non-positivists theories—the central conceptual debate of analytical jurisprudence—concentrates on the role that morality plays in the explanation of the existence and operation of state-legal systems and the reasoning of state officials. State law is also the central stage for our doctrinal inquiries, as lawyers typically practice law of a certain jurisdiction and use state norms to resolve the disputes. Normative jurisprudents and political philosophers also

<sup>&</sup>lt;sup>4</sup> This description is influenced by HLA Hart's and Joseph Raz's influential account of state law but I believe it also represents some non-positivist theories of law, some of which explicitly endorse some of these components. For instance, John Finnis's natural law theory explicitly accepts features 2 to 5, while Ronald Dworkin's "interpretativist" theory focuses on the legitimacy of the use of coercion by the state (feature 3). See John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford: Oxford University Press, 2011), 148; Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

typically discuss the legitimacy, justice and authority of state norms and the obedience that citizens owe to them. One reason for this focus is that the state has at its disposition forms of social pressure not available to any other social institution. Some practical philosophers have a more limited purview, and they focus only on their own "legal culture;"<sup>5</sup> cases of "liberal" and "well-ordered" state-based societies;<sup>6</sup> or "core cases" of state-based communities with working democratic and judicial institutions.<sup>7</sup> In sum, mainstream legal theories are state-centric; they are first and foremost theories of state norms and institutions.

#### 1.2 Putative Instances of Non-State Legal Phenomena

This well-established picture has been forcefully criticized for setting aside putative forms of legal phenomena different from state law. Here, I shall generically call all types of normative orders that lack the distinctive features of the legal systems of domestic nation-states *non-state legal phenomena* or *non-state law*.<sup>8</sup>

<sup>&</sup>lt;sup>5</sup> See e.g. Dworkin, *Law's Empire*, 102.

<sup>&</sup>lt;sup>6</sup> See e.g. John Rawls, A Theory of Justice (Harvard University Press, 1971).

<sup>&</sup>lt;sup>7</sup> See e.g. Jeremy Waldron, "The Core of the Case against Judicial Review," *Yale Law Journal* 115, no. 6 (2005): 1346–1407.

<sup>&</sup>lt;sup>8</sup> For familiar catalogues of non-state legal phenomena, see William Twining, *Globalisation and Legal Theory* (Cambridge: Cambridge University Press, 2000), 139–40; Tamanaha, *A General Jurisprudence of Law and Society*, chap. 6; Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2nd ed. (Cambridge: Cambridge University Press, 2002), chap. 4; Tamanaha, "Understanding Legal Pluralism," 397–400; Marc Hertog, "What Is Non-State Law? Mapping the Other Hemisphere of the Legal World," in *International Governance and Law: State Regulation and Non-State Law*, ed. Hanneke van Schooten and Jonathan Verschuuren (Cheltenham, UK: Edward Elgar Publishing, 2008), 23–24; Culver and Giudice, *Legality's Borders*, xvii–xxiii; Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford: Oxford University Press, 2013), chap. 2; H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 5th ed. (Oxford: Oxford University Press, 2014); Ralf Michaels, "What Is Non-State Law?," in *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism*, ed. Michael A. Helfand (Cambridge: Cambridge University Press, 2015), 46–7; Walker, *Intimations of Global Law*, chap. 3; Matej Avbelj, "Transnational Law between Modernity and Post-Modernity," *Transnational Legal Theory* 7, no. 3 (2016): 406–428. I have selected for discussion the most recurrent and representative examples.

We do not have to go far from the national level to find other putative forms of law whose authority over the most significant moral, political, and economic issues of a given community claim to be independent of the recognition of state officials, some of which antedates nation-states or operate irrespective of domestic borders. Central examples include customary law, the traditional norms and methods of dispute resolution that govern the life of many groups, particularly in the Global South;<sup>9</sup> indigenous law, the norms and institutionalized norms regulating civil and criminal affairs of major religious systems, such as Canon law, Sharia or Jewish Law, which remain operative even when they are not recognized by domestic law, as in the case of religious minorities.<sup>11</sup> Other scholars discuss what we can call "community-made laws" created to address those issues that state law is unable or unwilling to resolve. One commonly discussed example is the law of *Pasargada*, a private dispute resolution that arose in the favelas of Rio de Janeiro.<sup>12</sup> For brevity I shall generally call these categories of normative phenomena *non-domestic law*.

In addition, traditional legal theories have also failed to notice other forms of legal normativity that exist beyond the state and which have gained in prominence since the second half of the twentieth century. As Jeremy Waldron reminds us, non-state norms now

<sup>&</sup>lt;sup>9</sup> For an influential discussion of customary law in Africa and Asia, Werner F. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press, 2006).

<sup>&</sup>lt;sup>10</sup> For discussion of indigenous law in the Canadian context, see John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); Culver and Giudice, *Legality's Borders*, xvii–xx, 149–155. See on theoretically informed discussions of Colombia and New Zealand cases, see Lindahl, *Fault Lines of Globalization*, 56–9; Roughan, *Authorities*, chap. 13.

<sup>&</sup>lt;sup>11</sup> For a discussion of the legal component of several religious traditions, see Glenn, *Legal Traditions of the World*, chaps. 2 and 4.

<sup>&</sup>lt;sup>12</sup> For the classical yet controversial discussion, see Santos, *Toward a New Legal Common Sense* (2002), chap. 3.

regulate a diversity of issues ranging from the more urgent topics of our time (human rights, crimes against humanity, migration, war and peace, trade, and the environmental regulations required to address the current climate catastrophe) to seemingly "mundane" and "unexciting" subjects (such as banking, telecommunications, cross-border taxation, investments, sanitary and phytosanitary measures, etc.) which are nonetheless critical to "sustain our life."<sup>13</sup> Forms of *post-national* or *post-sovereign law*, as we can call them, can be divided into the following four imperfect, oft-converging categories.

The first sub-category is *public international law*. International law is a practice that regulates the relationships between states and other internationally recognized actors. Many scholars suggest that current international legal practice is no longer an undeveloped order limited to the horizontal relationship among states. Current practice now includes several non-consent-based components (e.g. *ius cogens* norms, *erga omnes* obligations, third-party effects of treaties, limitations of persistent objections, and similar doctrines), and some scholars suggest that within this practice there exist some hierarchically superior norms (e.g. treaties on human rights and disarmament) and even constitutional components in some sectors (e.g. the Charter of the United Nations). Furthermore current international law now comprises 560 multilateral agreements, around 7000 Intergovernmental Organizations, and about 20 international permanent courts and 100 international bodies interpreting international rules, many of which have a normative life and importance

<sup>&</sup>lt;sup>13</sup> Jeremy Waldron, "Cosmopolitan Norms," in *Another Cosmopolitanism*, by Seyla Benhabib (Oxford: Oxford University Press, 2008), 83–4. The examples I use are different from the ones provided by Waldron.
independent of state consent.<sup>14</sup> Another significant part of this transformation is the emergence of regimes of international law, complexes of norms that display a degree of independence from general international law, as they include their own norm-creating and norm-applying institutions that operate a restricted set of norms. <sup>15</sup> The most important examples of these regimes are the World Trade Organization, the International Human Rights System, and the International Criminal Court.

The second sub-category is *supra-national legal phenomena*. This category encompasses arrangements in which states delegate part of their sovereignty or functions to non-state institutions. The most familiar example is the law of the European Union,<sup>16</sup> but there are also similar but less comprehensive associations in other parts of the world such as the African Union and MERCOSUR in South America.<sup>17</sup> The second category also includes regional human rights systems like as the Inter-American System and the African System of Peoples' and Human Rights.<sup>18</sup> These arrangements have had a significant role

<sup>&</sup>lt;sup>14</sup> These statistics are taken from, United Nations, "United Nations Treaty Collection," last modified 2019, accessed June 22, 2019, https://treaties.un.org/; Union of International Associations, ed., *Yearbook of International Organizations 2018-9*, 55th ed., 6 vols. (Brussels: UIA and Brill, 2018); and Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton: Princeton University Press, 2014), 4, 388.

<sup>&</sup>lt;sup>15</sup> For the most authoritative discussion on these regimes, see International Law Commission Study Group on the Fragmentation of International Law, *Fragmentation of International Law: Difficulties from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, 2006, 123–190.

<sup>&</sup>lt;sup>16</sup> See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, 6th ed. (Oxford: Oxford University Press, 2015).

<sup>&</sup>lt;sup>17</sup> See Olufemi Amao, *African Union Law: The Emergence of a Sui Generis Legal Order* (Abingdon: Routledge, 2018); Marcílio Toscano Franca Filho, Lucas Lixinski, and María Belén Olmos Giupponi, eds., *The Law of MERCOSUR* (Oxford: Hart Publishing, 2010).

<sup>&</sup>lt;sup>18</sup> See Laurence Burgorgue-Larsen and Amaya Ubeda de Torres, *The Inter-American Court of Human Rights: Case-Law and Commentary*, trans. Rosalind Greenstein (Oxford: Oxford University Press, 2011); Charles C. Jalloh, Kamari M. Clarke, and Vincent O. Nmehielle, eds., *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (New York, NY: Cambridge University Press, 2019).

in the promotion and protection of human rights, and have created institutions to monitor state behaviour and to adjudicate disputes about state compliance with supra-national standards. Finally, I should also mention the more than two thousand bilateral, regional, and mega-regional trade and investment agreements, that cover a substantial share of the world's economy.<sup>19</sup> These treaties impose significant limits on the capacity of states to pursue public policy objectives, and some have started to create their norm-applying institutions to adjudicate disputes between investors and states, such as the Comprehensive Economic and Trade Agreement signed between the European Union and Canada.<sup>20</sup>

The third sub-category is comprised of forms of *transnational legal phenomena*. While the label "transnational law" was introduced to capture all kinds of non-state law, including public and private international law and cross-border application of state norms,<sup>21</sup> I shall restrict it to denoting only private and public-private complexes of norms that attempt to regulate issues beyond and across state borders. "Autonomous" legal orders created without the state have been consistently categorized as the central instances of transnational law. Among them, *lex mercatoria*, the system of transnational commercial law created by the practices of merchants whose disputes are resolved by non-state adjudicators, is often regarded as the most relevant form of transnational (some say "global") law. Other autonomous legal orders are the transnational law of construction

<sup>&</sup>lt;sup>19</sup> For the registry of trade and investment treaties, see International Centre for Settlement of Investment Disputes (ICSID), "Database of Bilateral Investment Treaties," accessed June 21, 2019, https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx.

<sup>&</sup>lt;sup>20</sup> See Global Affairs Canada Government of Canada, "CETA: A Progressive Trade Agreement for a Strong Middle Class," *GAC*, last modified October 30, 2016, accessed July 6, 2019, https://www.international.gc.ca/gac-amc/campaign-campagne/ceta-aecg/index.aspx?lang=eng.

<sup>&</sup>lt;sup>21</sup> See Philip Jessup, *Transnational Law* (New Haven: Yale University Press, 1956).

projects (*lex constructionis*);<sup>22</sup> the body of law governing sports organizations such as the International Olympic Committee or FIFA (*lex sportiva*);<sup>23</sup> and the norms around the internet and online transactions (*lex informatica* or *cyberlaw*).<sup>24</sup> Some have suggested that the normative systems created by multinational enterprises, like Exxon Mobile, Starbucks or the Coca-Cola Company, are also paradigmatic examples of transnational law.<sup>25</sup>

Finally, the fourth sub-category is composed of interesting but vague claims concerning the existence of some putative *global*, *world* or *cosmopolitan* legal phenomena—namely, forms of legal regulation with planetary influence, outside of the control of the nation-state or any other authority.<sup>26</sup> For a number of authors global law is a meta-legal system that governs over all states, international law and sub-global legal phenomena;<sup>27</sup> for others it is limited to issues that concern "humanity as a whole," like human rights or the punishment of war criminals;<sup>28</sup> for others it should be restricted to some "genuinely" global goods which are the common heritage of mankind like oceans, the

<sup>&</sup>lt;sup>22</sup> See Charles Molineaux, "Moving Toward a Construction a Lex Mercatoria: A Lex Constructionis," *Journal of International Arbitration* 14, no. 1 (1997): 55–66. See also, Lindahl, *Fault Lines of Globalization*, 59–64.

<sup>&</sup>lt;sup>23</sup> See Robert C. R. Siekmann and Janwillem Soek, eds., *Lex Sportiva: What Is Sports Law?*, ASSER International Sports Law Series (The Hage: T.M.C. Asser Press, 2012).

<sup>&</sup>lt;sup>24</sup> See Aron Mefford, "Lex Informatica: Foundations of Law on the Internet," *Indiana Journal of Global Legal Studies* 5 (1998 1997): 211–238; Joel R. Reidenberg, "Lex Informatica: The Formulation of Information Policy Rules through Technology," *Texas Law Review* 76 (1997): 553–594.

<sup>&</sup>lt;sup>25</sup> See Jean-Philippe Robé, "Multinational Enterprises: The Constitution of a Pluralistic Legal Order," in *Global Law Without a State*, ed. Gunther Teubner (Aldershot: Dartmouth, 1997), 45–79.

<sup>&</sup>lt;sup>26</sup> For the more influential discussion of global legal phenomena, see Walker, *Intimations of Global Law*.

<sup>&</sup>lt;sup>27</sup> See also, Harold J. Berman, "World Law," *Fordham International Law Journal* 18 (1994): 1617; Jost Delbruck, "Prospects for a 'World (Internal) Law'?: Legal Development in a Changing International System," *Indiana Journal of Global Legal Studies* 9, no. 2 (2002): 402–3; Giuliana Ziccardi Capaldo, *The Pillars of Global Law* (Aldershot: Ashgate, 2008), 1–5; Rafael Domingo, *The New Global Law* (Cambridge: Cambridge University Press, 2011).

<sup>&</sup>lt;sup>28</sup> See David Hirsh, Law Against Genocide: Cosmopolitan Trials (London: Routledge, 2012).

Arctic and outer space;<sup>29</sup> yet for others *lex mercatoria* and other transnational orders are the best examples of global law as they are not constrained by national borders.<sup>30</sup> A group of authors have even argued that global law concerns the processes by which doctrinal areas of law, like administrative or constitutional law, obtain planetary influence. For example, the notion of global administrative law has been used to refer to processes through which principles of administrative action (e.g. transparency, accountability, and others) have come to guide the operation of international and supranational organizations.<sup>31</sup> In an effort to unify this rhetoric about global legal phenomena, Neil Walker has provided an "adjectival" conception of global law that captures "law or law-like practices" that display a "practical endorsement of or commitment to the universal or otherwise global-in-general warrant."<sup>32</sup> With such a definition he aims to include in the concept of global law not only normative orders and processes derived from putative global law-making or law-applying institutions but also non-normative elements. For example, he includes as forms of "law" historical notions (e.g. the notion of *ius gentium*) and concepts (e.g. Klaus Gunther's "universal code of legality" i.e., some "meta-language" containing some basic legal concepts, common language and principles that allows communication between the different legal orders).<sup>33</sup>

<sup>&</sup>lt;sup>29</sup> Twining, General Jurisprudence, 70, 171, n.28.

<sup>&</sup>lt;sup>30</sup> Gunther Teubner, "Global Bukowina': Legal Pluralism in the World Society," in *Global Law Without a State*, ed. Gunther Teubner (Aldershot: Dartmouth, 1997), 3–30; Achilles Skordas, "Supranational Law," in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2008), para. 15.

<sup>&</sup>lt;sup>31</sup> See e.g. see Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, "The Emergence of Global Administrative Law," *Law and Contemporary Problems* (2005): 15–61.

<sup>&</sup>lt;sup>32</sup> Walker, Intimations of Global Law, 18.

<sup>&</sup>lt;sup>33</sup> Klaus Günther, "Legal Pluralism or Uniform Concept of Law: Globalisation as a Problem of Legal Theory," *No Foundations: An Interdisciplinary Journal of Law and Justice* 5 (2008): 5–21.

In summary, the near-consensus among contemporary theorists is that state law is not the only member of the legal universe; rather it is part of a larger and more complex constellation of legal phenomena that can be found at non-domestic, international, supranational, transnational, and global levels.<sup>34</sup>

## 2. The Deficits of State-Centred Legal Theories

The foregoing pre-theoretical catalogue of new and not so new forms of non-state legal phenomena amasses the attempts of a variety of lawyers, empirical scholars, and philosophers to highlighting putative forms of legal normativity that have been excluded from mainstream theories and which possibly challenge some of their assumptions. For these scholars, non-state legal phenomena indicate two deficits in mainstream state-centred theories of law.

The first deficit is straightforward. Non-state legal scholars hold that many contemporary theories of law, some of which claim to be explanations of law whenever and wherever it exists, too hastily exclude part of the pre-theoretical data that should be considered in a general theory of law. William Twining expresses this complaint as follows:

From a global perspective a reasonably inclusive picture of law in the world would encompass various forms of *non-state law*, especially different kinds of religious and customary law that fall outside 'the Westphalian duo' of state (municipal) law

<sup>&</sup>lt;sup>34</sup> To be sure, the acceptance of non-state law is a widespread but not unanimous position. Some believe that the legal domain should be restricted to norms deriving from a centralized government. See Roberts, "After Government?" Other scholars have suggested that different tools should be used to capture non-state normative phenomena. For example, scholars use the notion "governance" to capture non-state legal phenomena, which usually contrast with the norms of sovereign states. James N. Rosenau, "Governance in the Twenty-First Century," *Global Governance* 1, no. 1 (1995): 15; Lawrence S. Finkelstein, "What Is Global Governance?," *Global Governance* 1, no. 3 (1995): 369; Thomas G. Weiss, *Global Governance: Why? What? Whither?* (Cambridge, UK: Polity, 2013), 61. I will not engage directly with these positions, but I believe that my argument will address some of their concerns.

and classical public international law dealing with relationships between states. A map of law in the world that leaves out religious law, important forms of indigenous, customary, or Chthonic law, emerging forms such as *lex mercatoria* and other examples of 'soft law' at sub-, supra-, and international levels just leaves out too much.<sup>35</sup>

Per this deficit, state-centred theories of law ignore other possible instances of law that sometimes regulate billions of people on issues of the utmost moral, social, and political importance and that compete with or supersede state regulation. Non-state norms are often the relevant regulations in those situations where states are weak, frail, or unable to respond to the needs of their subjects; or on issues that are simply beyond the control of individual nation-states. In some cases, non-state norms are the working rules that actually guide the community's ordinary life while state norms are merely paper rules (e.g. the law of *Pasagarda*). In other situations, non-state norms are the laws with which the community truly identifies (e.g. indigenous communities are typically committed to their own laws and not to state law). And in other cases, non-state laws protect the rights of individuals, particularly when state agents are the wrongdoers or domestic law is unable or unwilling to provide a remedy. For example, international systems of human rights or international criminal law provide remedies to the victims of state action. It has been argued that the failure of legal theorists to engage with these putative legal phenomena is "nothing short of

<sup>&</sup>lt;sup>35</sup> William Twining, *Globalisation and Legal Scholarship*, vol. 4, Tilburg Law Lecture Series - Montesquieu Seminars (Nijmegen: Wolf Legal Publishers, 2011). Cf. Twining, *General Jurisprudence*, 66.

scandalous," particularly "when it is evident that they might have a substantial contribution to make."<sup>36</sup>

The second deficit that non-state scholars have identified pertains to the inadequacy of current state-centric explanations of the distinctive legal character of non-state forms of legal normativity. According to the standard state-centric picture, domestic nation-states provide the template for assessing the legal character of other putative forms of law, present, past, or future. Based on this state-centric template, many contemporary legal theories recognize legal character in other forms of law such as primitive law (i.e. complexes of norms without officials and criteria of validity), the current non-systematic practices of "international law," and Church law.<sup>37</sup> However, these phenomena lack some key features of state law or deviate from the central case. That is, these normative phenomena might not be systematic, might not have officials, might not claim supremacy, or they might not monopolize force, etc. As a result they are often characterized as borderline, secondary or non-central cases of legality that do not merit theoretical consideration as they are not sufficiently important and sufficiently different. Moreover, because they privilege the paradigmatic status of state orders, mainstream legal theorists feel no pressure to revise their theories to accommodate such phenomena.

<sup>&</sup>lt;sup>36</sup> This point was made in the context of international legal theory but it applies to all forms of non-state law. Jeremy Waldron, "Hart and the Principles of Legality," in *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy*, ed. Matthew H. Kramer, Claire Grant, and Ben Colburn (Oxford University Press, 2008), 68–9.

<sup>&</sup>lt;sup>37</sup> Hart, *The Concept of Law*, 4–5, 15–6; Raz, *Practical Reason and Norms*, 150; Raz, *The Authority of Law*, 105.

Advocates of non-state law forcefully reject this explanatory strategy.<sup>38</sup> Indigenous, customary, religious, and community-made laws are not secondary, incomplete, or watered-down state legal phenomena that miss key features from a presumptive central case. Rather, they are law in their own and distinct way. In the same vein some forms of international law, supranational and global law impose duties on nation-states without creating a super-state. One additional supporting example are several forms of autonomous types of transnational law which, according to many theorists, operate without any sort of state intervention.<sup>39</sup> In sum, the second explanatory deficit is that mainstream theories of law have created a general account of all forms of legality by extrapolating from state legal systems.

By contrast, non-state legal scholars have highlighted a different set of putative phenomena that lack some of the features of state law but are sufficiently important, unified in form, and distinctive vis-à-vis other phenomena to also merit theoretical and practical attention. In further support of shifting the state-centric focus, some scholars have noted that the sovereignty and prominent role of the state could be seen as a creation of non-state norms. What a state is, and what it can do, is regulated by non-state legal norms (i.e. the Montevideo Convention on the rights and duties of states, the Vienna Convention of Treaties, the UN Charter, etc.).<sup>40</sup> Others have claimed that, since state law is also a non-state legal order (i.e., a product of non-state norms), we need to first create a general account

<sup>&</sup>lt;sup>38</sup> For some formulations of this critique see Culver and Giudice, *Legality's Borders*, xxiii–xxiv; Mehrdad Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A. Hart," *European Journal of International Law* 21, no. 4 (2010): 967–995.

<sup>&</sup>lt;sup>39</sup> See e.g. Teubner, "Global Bukowina': Legal Pluralism in the World Society."

<sup>&</sup>lt;sup>40</sup> A similar suggestion is advanced by Culver and Giudice, *The Unsteady State*, chap. 1.

of non-state legal phenomena, and only then will we have the resources to understand the domestic case properly.<sup>41</sup> Furthermore, some proponents of global law claim that a "Copernican revolution"<sup>42</sup> has occurred in legal thought: some of the non-state legal phenomena—perhaps, international law, human rights, or some global constitutional norms—now occupy the place that the state once had as the centre of the legal universe.

#### 3. Two Puzzles

In my view, these claims about putative forms of non-state legal phenomena should be taken seriously by philosophers and theoretically interested lawyers. However, since these claims challenge the explanatory adequacy and foundational assumptions of the current theories of law, we do not have a readily available standard to assess their truth or falsity. To engage with the phenomena in a non-question begging manner, we must return to the storied jurisprudential question "what is law?"

We should, however, take care; for such a question is too vague and too general to be useful, and it is unclear what would count as a proper response to it. For some non-state scholars it will suffice to provide a new, more comprehensive definition of law. This strategy assumes that the word "law" has some correct or proper meaning that can be captured by a definition.<sup>43</sup> For some legal philosophers we must develop a new account of

<sup>&</sup>lt;sup>41</sup> Ralf Michaels, "State Law as a Transnational Legal Order," UC Irvine Journal of International, Transnational, and Comparative Law 1 (2016): 141–162.

<sup>&</sup>lt;sup>42</sup> Ziccardi Capaldo, *The Pillars of Global Law*, 8, 154; Mattias Kumm, "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State," in *Ruling the World? Constitutionalism, International Law, and Global Governance*, ed. Jeffrey L. Dunoff and Joel P. Trachtman (Cambridge University Press, 2009), 266; Domingo, *The New Global Law*, xvii.

<sup>&</sup>lt;sup>43</sup> For instance, Ralf Michaels claims that the "definition of law" is one of the "central questions of legal pluralism;" and Peer Zumbansen suggests that the conceptual problem that non-state legal phenomena generates is that the "definition of law has become elusive." Michaels, "Global Legal Pluralism," 251; Peer

the nature of law understood as a set of necessary features that explain law whenever and wherever it exists. In this sense, many legal philosophers presuppose that law has a nature composed of necessary features that can be grasped via conceptual analysis.<sup>44</sup>

For the purposes of framing my project, I will follow one of HLA Hart's methodological recommendations. According to Hart the question "what is law?" is motivated by the desire to address puzzles, confusions, and misunderstandings amongst jurists and other experts who are divided on how to account for legal phenomena.<sup>45</sup> One approach to the question is to identify the puzzles it generates and why these puzzles give rise to contrasting views among different scholars, and to try to resolve those puzzles. In this, Hart's conception resembles Isaiah Berlin's characterization of philosophical inquiries as follows:

[T]hose who ask [such philosophical questions] are faced with a perplexity from the very beginning—they do not know where to look for the answers; there are no dictionaries, encyclopedias, compendia of knowledge, no experts, no orthodoxies, which can be referred to with confidence as possessing unquestionable authority or knowledge in these matters.<sup>46</sup>

Lawyers, philosophers, and empirical scholars are drawn into such philosophical inquiries about law, whether they like it or not. To engage productively in their respective inquiries

Zumbansen, "Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism," *Transnational Law & Contemporary Problems* 21 (2012): 316. For other instances of this search for definitions, see Dupret, "Legal Pluralism, Plurality of Laws, and Legal Practices," 11 (discussing the 'definitional deadlock'); Menski, *Comparative Law in a Global Context*, 19 (discussing the 'global definition of law').

<sup>&</sup>lt;sup>44</sup> See for example, Scott J. Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011), chap. 1; Kenneth E. Himma, "Conceptual Jurisprudence. An Introduction to Conceptual Analysis and Methodology in Legal Theory," *Revus* 26 (2015): 65–92.

<sup>&</sup>lt;sup>45</sup> Hart, *The Concept of Law*, 1–6.

<sup>&</sup>lt;sup>46</sup> Isaiah Berlin, *Concepts and Categories*, ed. Henry Hardy, 2nd ed. (London: Pimlico, 1999), 3–4.

they must have a working answer to the philosophical question "What is law?" Lawyers' doctrinal accounts of the application of norms in the resolution of cases presuppose, perhaps only implicitly, such a working answer. Similarly, moral and political philosophers need a working understanding for their inquiries into authority, justice, legitimacy, and the obedience that subjects owe to these norms. And empirical scholars need some basic understanding of law to address issues concerning identification of the phenomena, explanation of their operation and how they influence their social context or are influenced by it.

The conceptual question arises at the beginning of the inquiry or it returns through the backdoor when justifying our accounts, resolving difficult cases, or providing finegrained details. To be clear, this does not mean that the project of general jurisprudence is explanatorily prior to all other inquiries. For the Hartian the role of general jurisprudence is to provide a preliminary account but this initial impression is refined and often revised in the light of doctrinal, empirical, or normative findings. That is, the purpose of legal theory is to remedy some basic puzzles, confusions, and misunderstandings about law in order to create a stable point of departure for further empirical, doctrinal, and politico-moral studies that in turn lead to yet further refined accounts of legal phenomena. In this sense the goal of legal philosophy for Hart, like the goal of philosophy for Berlin, is "to assist [humanity] to understand [itself] and thus operate in the open, and not wildly, in the dark."<sup>47</sup>

In keeping with Hart's methodological recommendation I will identify in this section two puzzles generated by non-state legal phenomena. These are, first, the problem

<sup>&</sup>lt;sup>47</sup> Ibid., 11.

of the common features or generalities that all instances of law share, and, second, the distinction between legal and non-legal phenomena. As I will now detail, each of these puzzles gives rise to competing solutions.

### 3.1 The Common Features of Form, Structure and Content

I will introduce the first two problems using Hart's description of the project of *general jurisprudence*. In his view:

[A theory of law] is general in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense 'normative') aspect. This institution, in spite of many variations in different cultures and in different times, has taken the same general form and structure, though many misunderstandings and obscuring myths, calling for clarification, have clustered around it.<sup>48</sup>

In a different place, Hart also claimed that law is "a form of social institution with a normative aspect, which in its recurrence in different societies and periods exhibits many *common features of form, structure, and content.*"<sup>49</sup>

There are two concerns of general jurisprudence in the first quotation. According to the first component, *general jurisprudence* provides an account of law that it is not tied to a particular instance of legality, legal system, or legal culture. In this sense, general jurisprudence contrasts with particular jurisprudence, namely, theories of a specific form of law (e.g. the law of a certain state, certain religious legal order, a transnational legal

<sup>&</sup>lt;sup>48</sup> Hart, *The Concept of Law*, 240–1 (italics mine).

<sup>&</sup>lt;sup>49</sup> H. L. A. Hart, "Comment," in *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart*, ed. Ruth Gavison (Oxford: Oxford University Press, 1989), 36 (italics mine).

order, etc.), or a specific type of legality (e.g. state law, religious law, transnational law, etc.).

I would like to call attention to Hart's second concern with common features or generalities of form, structure, and content shared by all types of law in different cultures and different times. I will give the name a *unified account of law* to any theory that attempts to capture these common features.

These common features amongst all forms of law can be used to reformulate the debate generated by the pre-theoretical instances of non-state legal phenomena. A great deal of the discourse about non-state law seems to assume the existence of such generalities, such as any object that has these features is an instance of law. Thus, when a scholar identifies a putative instance of non-state law, she is suggesting that this particular phenomenon exemplifies some of the common features of form, structure, and content that allows us to characterize it as an instance of legality or law. Moreover, the role of a unified theory of law is to elucidate these generalities, and those theories that fail to capture the right properties should be rejected. Thus, when non-state scholars criticize state-centric legal theories, they could be taken as suggesting that standard theories fail to capture instances of non-state law since they are defective accounts of these generalities. Consequently, these theories should be replaced by alternative explanations that capture these common features so that non-state legal phenomena are adequately included.

A substantial part of the debate about non-state legal phenomena could be characterized as a dispute about the best account of the common features that explain the legal character of state and non-state legal phenomena. One group of scholars believes that

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state-centric theories resist modifications which would allow them to be used outside of the domestic context. For example, many scholars have used the conceptual tools of Hart's theory of law—primary and secondary rules, legal officials, and legal systems—to create refined accounts that explain both state law and forms of non-state law.<sup>50</sup>

In contrast, other legal philosophers hold that these accounts of the generalities assume too many features of state law, so new theoretical tools should be developed. Within the tradition of analytical jurisprudence, Keith Culver and Michael Giudice have offered the most sophisticated account of the features that explain the legal character of state and non-state law.<sup>51</sup> In addition to the Hartian tools they add indicators of legality—norms, powers and institutions—and the interactions among them to their jurisprudential toolkit.

Outside the tradition of analytical jurisprudence, non-state legal scholars have also developed alternative accounts of the common features of law. These theories focus on, for example, semi-autonomous social fields;<sup>52</sup> bodies of justiciable procedures and standards;<sup>53</sup> self-generated discourses that use the binary code legal/illegal and include institutionalized processes of secondary rulemaking,<sup>54</sup> and forms of authoritative collective action.<sup>55</sup> It

<sup>&</sup>lt;sup>50</sup> For some selective examples, see Jean d'Aspremont, *Formalism and the Sources of International Law:* A Theory of the Ascertainment of Legal Rules (Oxford: Oxford University Press, 2011); Schultz, *Transnational Legality*; Muniz-Fraticelli, *The Structure of Pluralism*, chap. 6. I will discuss other proposals in the next chapter.

<sup>&</sup>lt;sup>51</sup> Culver and Giudice, *Legality's Borders*; Culver and Giudice, *The Unsteady State*.

<sup>&</sup>lt;sup>52</sup> Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," *Law & Society Review* 7, no. 4 (1973): 722.

<sup>&</sup>lt;sup>53</sup> Santos, *Toward a New Legal Common Sense* (2002), 86; Cf. Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, 1st ed. (London: Taylor & Francis, 1995), 112.

<sup>&</sup>lt;sup>54</sup> Teubner, "Global Bukowina': Legal Pluralism in the World Society," 14.

<sup>&</sup>lt;sup>55</sup> Lindahl, *Fault Lines of Globalization*; Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge University Press, 2018).

would be mistaken for the jurisprudent to dismiss the proposals of anthropologists, sociologists, and jurists as non-philosophical or assume that their philosophical theories have the upper hand. These accounts are candidate unified theories of law, and it is possible to compare them with the standard accounts of jurisprudence advanced by Hart, Raz, and Kelsen on several theoretical standards, including simplicity, coherence, consilience, and generality.

While vastly different in substance, these competing accounts offered by philosophers, lawyers, and empirical scholars share the Hartian hope of providing a unified account of the common features of form, structure, and content that all forms of state and non-state law share.

By contrast, a group of self-styled general jurisprudents, represented by William Twining and Brian Tamanaha, accept the first component of Hart's project but reject the second one. I will refer to instances of this second approach as *fragmentary accounts of law*. For these scholars, jurisprudence is "general" for it refers to all types of legality. For Twining, "general" is a synonym of a "global" or "universal" jurisprudence i.e. a theory of law that studies all legal traditions, cultures, and normative orders.<sup>56</sup> Similarly, Tamanaha defines his project as "general jurisprudence" since it has the "the ability to gather information on all kinds of social arenas, on all state legal systems as well as on other kinds of law."<sup>57</sup>

<sup>&</sup>lt;sup>56</sup> Twining, General Jurisprudence, 16-8.

<sup>&</sup>lt;sup>57</sup> Tamanaha, A General Jurisprudence of Law and Society, 233.

However, fragmentary accounts of law deny the possibility of identifying common features or generalities among the different types of legality. According to Twining, "to assume that law, even state law, has a common nature or core involves reductionist tendencies about which I am deeply sceptical."<sup>58</sup> To be clear, while Twining seems to be open to the possibility of some "sensible generalisations about legal phenomena," <sup>59</sup> he suggests that we are ill-equipped to grasp them. He explains:

... at this stage in history we are not yet very well-equipped to provide an overarching Grand Theory or even many reliable generalisations about the hugely complex phenomena of law in the world as a whole: as yet we lack concepts, data, hypotheses and models adequate for the task. Our Western academic heritage provides some promising starting-points on which to build, but the challenges are enormous. The message is anti-reductionist: it emphasises the complexity of legal phenomena and warns against simplistic, exaggerated, false, meaningless, superficial, and ethnocentric generalisations about law in the world as whole.<sup>60</sup>

The idea is that current Western conceptual toolkits are not reliable to identify and usefully explain patterns amongst the plethora of state and non-state legal phenomena.

Twining's main worry is that the attempts of Western scholars to ascertain generalities among the different kinds of law, particularly in the form of necessary conditions, distorts the phenomena, presenting one parochial perspective about law as if it were universal and representative of all the different legal traditions, cultures and, legal orders. This, for example, is the mistake committed by state-centred accounts of law in

<sup>&</sup>lt;sup>58</sup> Twining, *General Jurisprudence*, 66.

<sup>&</sup>lt;sup>59</sup> Ibid., 18, n. 71. He also claims that these generalizations "are not easily discerned and interpreted."

<sup>&</sup>lt;sup>60</sup> Twining, *Globalisation and Legal Scholarship*, 4:18.

which some scholars have created a theory of the nature of law based on a small selection of state legal systems they are familiar with. As a remedy Twining wishes "to construct a picture" that "emphasises the diversity, the complexity and the fluidity of the phenomena with which we are or should be concerned."<sup>61</sup> In this alternative we will not find a group of phenomena unified by a common nature or core but what he called a "great juristic bazaar;" a "scene of loosely organised diversity."<sup>62</sup> The proper project of general jurisprudence is then simply to create "organizing concepts" and "maps" that arrange the diversity of disjointed phenomena.<sup>63</sup>

Brian Tamanaha provides a more direct rejection of unified theories of law. He advances an account of law in which "law is whatever we attach the label law to."<sup>64</sup> On this view communities attach the label "law" to "quite different phenomena, sometimes involving institutions or systems, sometimes not; sometimes connected to concrete patterns of behaviour, sometimes not; sometimes using force, sometimes not."<sup>65</sup> Thus, the cornucopia of objects identified with the word "law"—state law, international law, transnational law, indigenous law, natural law, law of sub-state organizations (states, provinces, etc.), religious law, soft law, and other putative legal phenomena—are not a "multiplicity of one basic phenomenon" that co-regulate the life of contemporary agents.<sup>66</sup>

<sup>&</sup>lt;sup>61</sup> Twining, General Jurisprudence, 66.

<sup>&</sup>lt;sup>62</sup> Ibid., 10. Cf. William Twining, "The Great Juristic Bazaar (1978)," in *The Great Juristic Bazaar: Jurists' Texts and Lawyers' Stories* (Abingdon: Routledge, 2017), 365–379.

<sup>&</sup>lt;sup>63</sup> Twining, General Jurisprudence, 70; Twining, Globalisation and Legal Theory, 139.

<sup>&</sup>lt;sup>64</sup> Tamanaha, A General Jurisprudence of Law and Society, 128.

<sup>&</sup>lt;sup>65</sup> Ibid., 166 and 194 (original in italics).

<sup>&</sup>lt;sup>66</sup> Ibid., 193.

Instead, they are different kinds of objects that we happen to label with the same word, "each one of these does many different things and/or is used to do many things."<sup>67</sup>

While there are significant differences between their approaches, Tamanaha and Twining concur in their rejection of the unifying features among the different kinds of state and non-state legal phenomena. In a word *they propose a type of general jurisprudence without generalities among the legal phenomena*.

Thus we have identified the first point of controversy among experts generated by the pre-theoretical identification of non-state legal phenomena. We have, on the one hand, the dispute between several unified accounts of the common features of law advanced by philosophers, lawyers, and empirical theorists. These views compete amongst themselves and also conflict with the fragmentary project of general jurisprudence advocated by Twining and Tamanaha.

Each of these proposals faces distinctive challenges. Unified theories must identify explanatory and illuminating accounts of the general features of legality that respond to the claims of the fragmentary project and then they need to demonstrate that their particular account compares favourably to other competing theories. Fragmentary accounts of law must explain how they come to identify some objects as instances of law while excluding others; to justify their stipulation of the plurality of irreducible legal objects in a way that meets Ockham's razor, and to explain which accounts or maps of legality are possible. Without common features that explain legality, the fragmentary project might lead to particularistic understandings of law which merely reproduce the phenomena they are

67 Ibid.

attempting to describe; like the one-to-one map of Jorge Luis Borges' story, which is so accurate that it is not useful.<sup>68</sup>

In sum, we have transformed the abstract question "What is 'law'?" into a more focused and manageable debate between unified and fragmentary accounts about the putative generalities that explain the legality of some phenomena. The dispute could be summarized by the following question: *What, if any, are the key explanatory and illuminating common features of form, structure, and content between the state and non-state phenomena that theorists have pre-theoretically identified as law?* 

### 3.2 The Distinction Between Law and Non-Law

The second question concerns the distinction between legal and non-legal phenomena. Whatever defects they had, state-centric theories provided an operative form of the distinction. Setting borderline cases aside, traditional theories restricted the legal domain to the norms that state-officials create, practice, and recognize. These legal norms contrast with the non-legal norms that lack official imprimatur such as those of etiquette, associations, groups, clubs, academic institutions, dating, the exchange of gifts, religious rites, or aesthetic judgement. However, once we open the Pandora's box of non-state law and call into question the state-centric account of law, the distinction between legal phenomena and objects traditionally considered as non-legal phenomena risks collapse. In

<sup>&</sup>lt;sup>68</sup>Jorge Luis Borges, "On Exactitude in Science," in *Collected Fictions*, trans. Andrew Hurley (London: Penguin, 1998), 325. Other scholars have also used this metaphor to signal problems for fragmentary accounts of law. See Dan Priel, "Two Models of General Jurisprudence," *Transnational Legal Theory* 4, no. 4 (2013): 512–523.

a word, if the state no longer offers the mark of legality, a new distinction between legal and non-legal normative phenomena must be found.<sup>69</sup>

Here, I will focus on two types of responses to the manifest diversity of normative phenomena. The *non-demarcationist* finds no sharp and illuminating distinction between law and non-law within forms of social normativity. For example, Marc Galanter suggested that law can be found in "universities, sports leagues, housing developments, hospitals, etc." while John Griffiths claimed that "all forms of social control are *more or less legal.*"<sup>70</sup> In a similar vein, Boaventura de Sousa Santos shifts the burden of proof:

It might be asked: why should these competing or complementary forms of social ordering be designated as law and not rather as 'rule systems,' 'private governments' and so on? Posed in these terms, the questions can only be answered by another: Why not?<sup>71</sup>

This position has been defended not only by lawyers and empirical scholars but also by legal philosophers. Notably, Keith Culver and Michael Giudice recognize some degree of legality in all kinds of phenomena that create "content-independent reasons for action," namely "reasons for action independently of consideration of their underlying purposes or justificatory reasons." For them, "where [content-independent reasons for action] exist,

<sup>&</sup>lt;sup>69</sup> This issue has held centre stage in the literature about non-state legal phenomena. For some formulations of this question, see Galanter, "Justice in Many Rooms," 18 n. 26; Merry, "Legal Pluralism," 878; Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism," *Cardozo Law Review* 13 (1992): 1451; Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," 206–7; Dupret, "Legal Pluralism, Plurality of Laws, and Legal Practices," 11; Twining, *General Jurisprudence*, 369; Mariano Croce, "Is Law a Special Domain? On the Boundary between the Legal and the Social," in *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives*, ed. Seán Patrick Donlan and Lukas Heckendorn Urscheler (Farnham: Ashgate, 2014), 153–167.

<sup>&</sup>lt;sup>70</sup> Galanter, "Justice in Many Rooms," 17–8; Griffiths, "What Is Legal Pluralism?," 39 (italics in the original); cf. Woodman, "Ideological Combat and Social Observation," 45.

<sup>&</sup>lt;sup>71</sup> Santos, *Toward a New Legal Common Sense* (2002), 115.

legality exists."<sup>72</sup> Since content-independent reasons for action are present in all sorts of normative phenomena—the norms of institutions, associations, sports, religion, tradition, and even the rules that children establish while playing in the park—Culver and Giudice are happy to conclude that all of these phenomena "*exhibit the elements of law*. "<sup>73</sup> Per their unified account, legality is a property that comes in degrees; whilst some normative phenomena (like state law or the European Union) have norm-creating and norm-applying institutions and stronger relationships between them and thereby exhibit more features of legality, others (like children playing in the schoolyard) lack institutions and interconnectedness with other normative phenomena, and thereby exhibit less or weaker legality. In their view, the role of a unified account of legality is "to capture the similarities *and* differences between law and related social phenomena, not to draw clean lines between inherently interconnected social spheres where such lines do not exist."<sup>74</sup>

By contrast, *demarcationist* accounts posit a distinction between legal and non-legal normative phenomena and seek to clarify this distinction. Some scholars believe that elements of the traditional theories—legal systems, legal officials, claims of supremacy, monopoly of force—can be used to illuminate the relevant demarcation. For example, legal phenomena might be only those systematic practices with criteria of validity, or that have relevant norm-creating and norm-applying officials, or that claim priority or supremacy over other normative phenomena, or that monopolize the legitimate use of force in a given community.

<sup>&</sup>lt;sup>72</sup> Culver and Giudice, *Legality's Borders*, 114–5.

<sup>&</sup>lt;sup>73</sup> Culver and Giudice, *The Unsteady State*, 94 (italics in the original).<sup>74</sup> Ibid.

Other scholars have replaced these traditional tools with new alternative accounts better suited to accommodating non-state legal phenomena. It is useful to mention a few examples to illustrate the richness and complexity of this debate. Some scholars have suggested that the *legal proprium* is limited to forms of discourse that define actions as legal or illegal.<sup>75</sup> Some theories identify as legal orders those normative phenomena capable of creating themselves free from external intervention.<sup>76</sup> Others argue that law is a rhetorical device used to highlight a sub-set of politically or morally relevant norms.<sup>77</sup> Some have argued that there are functions or tasks typically performed by legal norms, like the resolution of conflicts,<sup>78</sup> or specific issues, goods or topics which are usually protected by legal norms.<sup>79</sup> One scholar has suggested that the common features of form, structure and content are insufficient to distinguish law from non-law, so we should identify as law a distinctive and specialized form of knowledge that claims to be self-sufficient and separate from ordinary knowledge.<sup>80</sup> Others have even suggested that the legal character

<sup>&</sup>lt;sup>75</sup> Teubner, "The Two Faces of Janus," 1452; Teubner, "Global Bukowina': Legal Pluralism in the World Society," 15.

<sup>&</sup>lt;sup>76</sup> Neil MacCormick, for instance, takes inspiration from systems' theory to suggest that legal systems are those institutional orders that display an "autopoietic" capacity. See MacCormick, *Questioning Sovereignty*, 7–8, 131–2; Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford: Oxford University Press, 2007), 177.

<sup>&</sup>lt;sup>77</sup> See Schultz, *Transnational Legality*, chap. 2; John R. Bolton, "Is There Really Law in International Affairs," *Transnational Law & Contemporary Problems* 10 (2000): 1–48.

<sup>&</sup>lt;sup>78</sup> See Twining's account of "law-jobs" is an example of this position. Twining, *General Jurisprudence*, chap. 5.

<sup>&</sup>lt;sup>79</sup> According to one reading of Hart's project, some basic facts of human nature (vulnerability, approximate equality, limited altruism, limited resources and limited strength of will) makes it "a natural necessity that law has a certain minimum content that embodies the fundamental forms of protection of persons, property and promises." Hart, *The Concept of Law*, 193–200, cf. 91. On this view, legal norms are those that regulate this minimum content of natural law. For this suggestion see Culver and Giudice, *Legality's Borders*, 129–31.

<sup>&</sup>lt;sup>80</sup> Croce, *Self-Sufficiency of Law*.

depends on the recognition as such by other putative normative phenomena.<sup>81</sup> And, finally, as already mentioned, Tamanaha suggests that the only available explanation is a conventionalist one: "law is whatever we happen to call 'law."<sup>82</sup>

While there are many other views in the literature, this selective exposition suffices to show that there are important debates among jurists and philosophers about the distinction between legal and non-legal phenomena. Demarcationist and nondemarcationist accounts of law disagree about the possibility of drawing a meaningful and illuminating distinction between law and non-law. Moreover, there is an intramural dispute amongst demarcationists about the best explanation of the distinction. Each of these two positions has its own challenges. Non-demarcationist approaches have to demonstrate that their view does not trivialize legal phenomena and that it illuminates further inquiries. That is, they need to justify why we should categorize as law the norms of children playing in the park, state law and the law of the European Union, and why this illuminates doctrinal debates about the application of legal rules and moral-political debates about legitimacy and obedience. The demarcationist project, on the other hand, needs to develop a proper account of unified features that correctly captures the relevant phenomena—one that is not over- or under-inclusive. Each approach also needs to demonstrate that their particular formulation of the distinction is more illuminating than the alternatives. The resulting

<sup>&</sup>lt;sup>81</sup> See Ralf Michaels, "Law and Recognition — Towards a Relational Concept of Law," in *In Pursuit of Pluralist Jurisprudence*, ed. Nicole Roughan and Andrew Halpin (Cambridge: Cambridge University Press, 2017), 90–115. For a similar view see Muniz-Fraticelli, *The Structure of Pluralism*, 150–3.

<sup>&</sup>lt;sup>82</sup> See Tamanaha, A General Jurisprudence of Law and Society.

debate could be formulated in the following question: What are, if any, the features that allow us to differentiate between "legal" and "non-legal" phenomena?

# 4. Conclusion

In this chapter I have set the stage for my project of providing the foundations of a theory of state and non-state legal phenomena. I began by offering a characterization of state and non-state legal phenomena and the explanatory deficits that the latter exhibit in familiar state-centric theories of law. I then identified two issues that will be addressed in the rest of the dissertation: the question of the common features shared by all forms of law, disputed by unified and fragmentary accounts of law; and the issue of the distinction between legal and non-legal phenomena, where the contenders are the demarcationist and non-demarcationist projects. I also sketched the most salient features of my methodological approach: I will advocate a theory of law centred on finding explanatory and clarifying features about law which resolve our puzzles, confusions and misunderstandings; and which sets the stage for further theoretical and practical inquiries.

These resources allow me to formulate the position I will advance in the following chapters. Here, I will defend a theory of law that is general, unified and demarcationist. It is general, for it applies to all forms of legal phenomena. Because it identifies some common features of form, structure, and content among different instances of state and non-state law, it is unified. Finally, it is demarcationist for it singles out certain forms of social normativity as legal phenomena—namely, those forms that constitute what I will call political communities.

## Chapter 2: The Hartian Account

This chapter develops the main components of my unified, demarcationist Hart-inspired account of state and non-state law. The argument proceeds as follows. In section 1 I introduce the Hartian theory as an account of different types of normative practices. In section 2, I explain the fundamental distinction between two kinds of normative orders: sets and systems. Section 3 outlines the foundation for the Hartian demarcationist position. Finally, section 4 highlights some distinctive insights of this account.

#### 1. The Hartian Theory of Normative Practices

While Hart's theory of law was intended as an account of "municipal legal systems of the modern state," he also claimed that some "central themes" of his theory apply to "any form of social structure" and any situation where "social rules are observed."<sup>1</sup> Moreover, he also applied some of them to several types of non-state normative phenomena, such as games, rules of etiquette, social conventions, private associations, and military institutions.<sup>2</sup> These remarks justify an alternative reading of the Hartian project as a general theory of normative practices and a contribution to the flourishing field known as social ontology. In this section I explicate the building blocks of this alternative non-state-based reading of Hart's project, namely, the notion of norms, communities, normative orders, and constitutive and constituted rules.

<sup>&</sup>lt;sup>1</sup> Hart, *The Concept of Law*, vi.

<sup>&</sup>lt;sup>2</sup> Ibid., chaps. 3, 5, 7; Hart, "Commands and Authoritative Legal Reasons."

# 1.1 Norms and Normative Practices

For Hart a *norm* or *rule* is any standard that guides or might be taken as the guide of the behaviour of an individual or group.<sup>3</sup> Norms might specify any type of deontic component: they might establish duties (mandatory or duty-imposing norms); confer powers or facilities to realize one's wishes (power-conferring norms); or specify any other Hohfeldian element (rights, liabilities, privileges, etc.). In addition to this, *pace* some influential critics, Hartians do not restrict rules to all-or-nothing standards or norms that specify the consequences of their violation. On the contrary, Hart recognizes that all rules allow a certain degree of *open texture* or indeterminacy about what is covered by them.<sup>4</sup> Hence, the Hartian approach characterizes as rules both strict and specific norms and less precise and determinate standards such as principles, policies, guidelines, recommendations, rules of thumb, etc.<sup>5</sup>

The Hartian distinguishes between those rules which are abstract or propositional entities never practiced by any community (e.g. Plato's proposals for an ideal state) and those norms which are effectively taken up by some group as their actual or potential guides of collective behaviour. I shall refer to the second type as *normative practices*. The

<sup>&</sup>lt;sup>3</sup> I will use "rule" and "norm" interchangeably but I preserve Hart's familiar expressions of "primary" and "secondary rules," and the trio of rules of change, adjudication, and recognition.

<sup>&</sup>lt;sup>4</sup> Hart, The Concept of Law, 123, 149–53; Hart, Essays in Jurisprudence and Philosophy, 359–60.

<sup>&</sup>lt;sup>5</sup> This is a well-established point. See Genaro Carrió, *Principios Jurídicos y Positivismo Jurídico* (Buenos Aires: Abeledo-Perrot, 1970); Joseph Raz, "Legal Principles and the Limits of Law," *The Yale Law Journal* 81, no. 5 (1972): 845; Philip Soper, "Legal Theory and the Obligation of a Judge: The Hart- Dworkin Dispute," *Michigan Law Review*, 75 (1977): 480; Genaro Carrió, "Professor Dworkin's Views on Legal Positivism," *Indiana Law Journal* 55, no. 2 (1979): 231–232; David Lyons, "Principles, Positivism, and Legal Theory," *The Yale Law Journal* 87, no. 2 (1977): 422; Cf. William Twining and David Miers, *How to Do Things with Rules* (Cambridge: Cambridge University Press, 2010), 84. See also Hart's comments in the *Postscript*, Hart, *The Concept of Law*, 263. "But I certainly did not in my use of the word 'rule' claim that legal systems comprise only 'all or nothing' standards or near conclusive rules." Therefore it is surprising that this critique continues to be repeated by non-state legal scholars to deny the applicability of the Hartian project to non-state contexts.

existence of a normative practice ultimately depends on two things: 1) the regular conduct of a certain group, and 2) that members of the community exhibit the attitude of rule acceptance that Hart called the internal point of view.<sup>6</sup> Such an attitude is primarily exhibited when community members conform to a shared pattern of behaviour, demand conformity from others, justify their and others' behaviour by appealing to the shared standards, criticize others who deviate from the shared pattern for their deviation, acknowledge such criticism and demands as justified, and exercise social pressure to force deviators to comply with the standard or to sanction their non-compliance. The norms of social conventions, games, roles, associations, institutions, and state law are examples of normative practices. These practices exist insofar as certain patterns of behaviour and proattitudes are present in a group.

The fact that a group takes certain standards as action-guiding does not entail that they consider them as justificatory reasons to act as these rules instruct. The duties and standards to assess behaviour created by practice-dependent norms are relative to a given practice. For instance, the rules of a game establish that players have certain duties and lay down standards that allow us to assess the player's conduct as correct or incorrect, but such duties and standards exist only from the standpoint of the game, and insofar as they are practiced by the group. The normative character of game norms (the ought of a game) is distinguishable from the moral rightness or correctness of the player's actions (or moral ought) and can be assessed using moral standards.<sup>7</sup>

<sup>&</sup>lt;sup>6</sup> Hart, *The Concept of Law*, 57.

<sup>&</sup>lt;sup>7</sup> Hart originally termed "content-independent" reasons what I had called normative practices, and further contrasted them with a different type of "content-dependent" norms that I have named "justificatory reasons."

# 1.2 Normative Communities

Any discussion of normative practices presupposes specific groups of agents who take the rules as a guide for their conduct, actively seek to conform and modify their behaviour when they detect deviations and exercise social pressure against those who do not abide by the shared standards. For instance, Hart's classic example of the rule which forbids men to wear hats in church refers to the behaviour and attitudes of a specific group of churchgoers. Likewise, the practice of a token instance of a game refers to the conduct and beliefs of one particular group of players. I shall refer to these groups as *normative communities*.

For the Hartian the character of a group as a normative community is primarily a function of being guided by the same shared standards. Hartian communities do not require additional elements such as that group members share a common history, moral-political views, values or sentiments, or common social, economic, and political interests. Such community members need not be in close proximity, for subjects to the same rules might be widespread throughout the world. On this account normative practices and communities are co-constitutive notions: a community is a group guided by the same shared norms, and the behaviour of this group and the acceptance of the rules by community members is what constitutes these members a normative community. In this sense the Hartian account and other theories of analytical jurisprudence provide explanations of the existence conditions of normative practices and their corresponding normative communities.<sup>8</sup>

See Hart, "Commands and Authoritative Legal Reasons." I have avoided his original labels as they can cause conflicting interpretations and bring with them meta-ethical assumptions about the nature of reasons and the non-practice based nature of morality which are not germane for the current project.

<sup>&</sup>lt;sup>8</sup> Cf. Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009), 107. The relationships between normative phenomena and

Among other explanatory roles the notion of community is useful to distinguish between numerically distinct normative phenomena with similar contents. For example, it might happen by coincidence that the people in a small town in Siberia follow the same rules about waiting in line at the market as another group of people in Canada. For the Hartian these are two different rules, each one constituted by the practices of different groups of people, which happen to have the same content. Likewise, there are different rules forbidding homicide in Colombia and Canada, which are created by the behaviour and attitudes of different groups of agents.

The character of an agent as a community member is determined by being subject to certain rules, not by the agent's acceptance of them. As I explain below, while some communities are constituted by the explicit acceptance of the norms by a group of individuals, there are other situations constituted by the concentrated social pressure of an influential minority. In this second case only the minority displays the internal point of view with respect to the community's constitutive rules; moreover this minority enforces the norms they accept from the internal point of view by dint of collective social pressure vis-à-vis community members who might or might not be willing participants in the practice.

Finally, the notion of normative community underscores that the explanation of a normative practice cannot occur without reference to the actions and beliefs of some agents. This does not mean, however, that the Hartian merely attempts to supply a sociological

normative communities have also been noted by other legal theorists. See Kelsen, "The Concept of the Legal Order," 73; Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press, 1987), chaps. 2 and 3; Raz, *Between Authority and Interpretation*, 99–101.

report of certain facts about agents' behaviours and beliefs—namely, that people behave in a certain way or have certain ideas about their norms. Instead, the Hartian seeks to provide a theoretical explanation of normative practices. This explanation demands the identification of specific groups and their patterns of behaviour, and the rational reconstruction of the totality of activities and animating views of participants. We can describe this project as a *quasi-sociological* endeavour to differentiate it from the inquiries of general sociologists.<sup>9</sup> It would be no less fitting to refer to this approach, following Hart, as a *socio-hermeneutical* project; this description highlights the fact that it involves the interpretation of complexes of human practices.<sup>10</sup>

## 1.3 Normative Orders

In the Hartian account the norms that animate normative practices are not to be studied individually or in isolation from others. Rather, they are typically embedded in complexes of norms that regulate and constitute a specific domain of action (an activity, a joint enterprise, process, etc.) such as those that constitute and govern games, clubs, associations, educational institutions, and state legal systems. I refer to these complexes as *normative orders*.

Normative orders are characterized by two central features. First, the norms that constitute a normative order display what Joseph Raz called *normative relationships* among

<sup>&</sup>lt;sup>9</sup> Hart labelled his work an exercise of "descriptive sociology," as it provides a conceptual apparatus to illuminate our purely empirical sociology. Hart, *The Concept of Law*, vi.

<sup>&</sup>lt;sup>10</sup> Hart originally called his approach "hermeneutic." H. L. A. Hart, "Introduction," in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 14. I have added the prefix "socio-" to underscore that the object of understanding are complexes of behaviour and attitudes of social groups, not texts.

them.<sup>11</sup> A rule is normatively related to another in Raz's sense when it impacts the operation of other norms in relevant ways. For example, a rule might be applied as a consequence of another rule (e.g. a sanction that follows the breach of a duty); an action in accordance with a rule might result in the creation of a new norm (e.g. the rules created by the exercise of a norm-creating power are related to the rule establishing the power); or one norm might limit the operation of another (e.g. norms that condition or limit the exercise of a power or right).

And, second, normative orders exhibit a *normative unity* that distinguishes them from other normative practices. The question of what constitutes the unity of a plurality of norms was one of the central issues of legal theory in the twentieth century, but answers were typically directed to explain the kind of unity constitutive of state law. For example, throughout his career Hans Kelsen asked "what accounts for the unity of a plurality of legal norms?," and his answer unequivocally referred to the *Grundnorm* as the "single norm as the source of validity" that unifies a plurality of norms.<sup>12</sup> However, the idea that some complexes of norms operate as discrete, unified groups, i.e. as normative orders, applies to all kinds of normative practices. We distinguish the norms of soccer from the norms of rugby, the rules of condominium associations from the rules of professional associations, and the rules of McMaster University from the rules of the University of Toronto, and so

<sup>&</sup>lt;sup>11</sup> On normative relationships, see Raz, Practical Reason and Norms, 107, 111-3.

<sup>&</sup>lt;sup>12</sup> Hans Kelsen formulated the same question in the first and second editions of *Pure Theory of Law* (from 1934 and 1960, respectively), and in *The General Theory of Law and State* (1945). See Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the "Reine Rechtslehre" or Pure Theory of Law*, trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 1992), 55; *Pure Theory of Law*, trans. Max Knight, Translation from the Second German Edition. (Berkeley & Los Angeles: University of California Press, 1967), 193; Cf. *General Theory of Law and State*, trans. Andrew Wedberg (Cambridge: Harvard University Press, 1945), 100.

on. Each of the examples constitutes a distinct normative unity of norms and agents different from other forms of normative practices and other tokens of the same type. The Hartian identifies seven indicators of normative unity that enable such distinctions:

- (i) A plurality of norms constitutes a unity when all norms need to be used together to regulate a certain domain of action. For example, all the rules of a game typically need to be used as a group.<sup>13</sup>
- (ii) The norms together have or create a shared point, value, or function. To repeat the example, the rules of a game create certain goals and values (e.g. winning or losing) that do not exist without the game's rules.<sup>14</sup>
- (iii) The norms of the normative order were created by, or can be traced to, the same creator.<sup>15</sup>
- (iv) The norms ultimately have the same source of validity (the same Constitution or constitutive convention, contract, or agreement).<sup>16</sup>
- The plurality of norms empowers specific agents or institutions to identify the practice's norms and enforce them to community members.<sup>17</sup>
- (vi) The practice's norms specify jurisdictional boundaries in terms of the topics that the norms regulate, the subjects bound by the norms or the territory in which the norms apply.
- (vii) Participants of the practice represent their order as a normative unity or claim to be acting on behalf of a given normative community. For example, state officials often explicitly identify their normative order as a distinct

<sup>&</sup>lt;sup>13</sup> Cf. Raz, Practical Reason and Norms, 113–5.

<sup>&</sup>lt;sup>14</sup> Cf. Ibid., 117–22.

<sup>&</sup>lt;sup>15</sup> This was the kind of unity that John Austin found characteristic of state law. See *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995) Lectures I and VI.

<sup>&</sup>lt;sup>16</sup> This was the kind of unity that Kelsen found characteristic of state law. See Kelsen, "The Concept of the Legal Order."

<sup>&</sup>lt;sup>17</sup> Hart, *The Concept of Law*, chap. 6; Raz, *Practical Reason and Norms*, 123–140.

unity; and international officials claim to act on behalf of a putative international community.<sup>18</sup>

In sum, a normative order is composed of rules that exhibit normative relationships among them and one or more of these indicators of unity. That is, a Hartian normative order is not a haphazard collection of rules but a *unity of normatively interrelated norms*.

The facts that some norms regulate the same topic or are followed by the same class of people (i.e. the norms of middle-class morality) do not entail that there are normative relationships or a sense of unity among them. As Raz puts it, these norms might be "independent of each other in their force, and the existence of any of them may have no impact on the operation of the others."<sup>19</sup> Thus, these examples do not count as Hartian normative orders, and a different notion should be used to capture them. We can use "*regimes*" to refer to these complexes of norms that do not display the hallmarks of a normative orders. Most of the considerations developed below apply only to orders but are not applicable to regimes.

# 1.4 Constituted and Constitutive Rules

The Hartian account distinguishes between social and non-social rules.<sup>20</sup> A social or customary rule is a norm that is regularly followed by a group where at least some members of the group accept the rule from the internal point of view.<sup>21</sup> Not all the rules that compose

<sup>&</sup>lt;sup>18</sup> For an exploration of the claims of international officials, see Armin von Bogdandy and Ingo Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (Oxford: Oxford University Press, 2014).

<sup>&</sup>lt;sup>19</sup> Raz, Practical Reason and Norms, 107.

<sup>&</sup>lt;sup>20</sup> Cf. Hart, "Answers to Eight Questions (1988)," 282.

<sup>&</sup>lt;sup>21</sup> Hart, *The Concept of Law*, 55–8. As should be clear from the formulation, the social rule is *not* a social practice but a normative standard fixed by a practice.

a normative order are social rules in this sense. For example, enacted norms issued in accordance with power-conferring rules are created by the enactment, not by social practice. However, it is a central Hartian insight that non-social rules typically presuppose that certain social rules are practiced by a given community.<sup>22</sup> For example, the Mayor's by-law forbidding vehicles in the park presupposes that there are some practised social rules that empower the mayor with the capacity of enacting rules, or that create a normative order that contains a norm that empowers the mayor to enact by-laws. In other words, a backdrop of efficacious social rules constitutes the "normal, though unstated, background or proper context"<sup>23</sup>—to use one of Hart's expressions— in which we can talk about the order's non-social rules.

With the distinction between social and non-social rules in hand, I shall recast Hart's distinction between primary and secondary rules as one about two different *levels* of rules applicable to any normative order.<sup>24</sup> To avoid confusion with Hart's explicit formulation I shall refer to these two levels as constitutive and constituted rules.<sup>25</sup> On this characterization *constitutive rules* are the social rules that create and unify a normative practice or any complex of norms. In turn, *constituted rules* are the different level of general

<sup>&</sup>lt;sup>22</sup> Cf. Ibid., 88, 103–4, 108. Cf. Hart, "Definition and Theory in Jurisprudence," 33–35.

<sup>&</sup>lt;sup>23</sup> Hart, *The Concept of Law*, 85.

<sup>&</sup>lt;sup>24</sup> Hart suggested that "secondary rules" were "on a different level from the primary rules, for they are all about such rules." Ibid., 94, cf. 97.

<sup>&</sup>lt;sup>25</sup> The distinction between constitutive and non-constitutive norms was already part of Hart's philosophical context. Cf. John Rawls, "Two Concepts of Rules," *Philosophical Review* 64, no. 1 (1955): 23–6; G. C. J. Midgley, "Linguistic Rules," *Proceedings of the Aristotelian Society* 59 (1958): 279; G. E. M. Anscombe, "On Brute Facts," *Analysis* 18, no. 3 (1958): 71–2; Tony Honoré, "Real Laws," in *Making Law Bind: Essays Legal and Philosophical* (Oxford: Clarendon Press, 1987), 83.

and particular norms and norm-applications which only exist as part of, or which can only be made sense of in the context of, efficacious constitutive social rules.

Three examples illustrate the distinction. First, we can differentiate between the social rules that create the practice of making contracts from the particular contracts that individuals make. Similarly, we can separate the social rules that empower a certain institution (e.g. a parliament) as a communal norm-creator from the general and individual norms that such an institution enacts (e.g. legislation). Third, it is also possible to distinguish between the regularities of behaviour and pro-attitudes of a group that creates a game and empowers the game's umpire from the calls this umpire makes during the game. These calls further specify the game's general norms and usually give rise to new individual norms that did not exist before the application (i.e. "this player committed a serious infraction and must leave the game" is a new particular norm). The first components of the dyads are the order's constitutive norms whereas the second components are the constituted ones. The former are always social rules; the latter need not be social rules themselves.<sup>26</sup> Although these levels differ in their existence conditions and operation, they both comprise rules for they are standards that guide or can guide the behaviour of community members.

Constitutive rules of a normative order might be codified or replicated in constituted norms and the enactment provides the social rule with a canonical formulation which, in turn, might be instrumental to its certainty. Enactment, however, does not transform

<sup>&</sup>lt;sup>26</sup> As I explain in Chapter 3, the Hartian account leaves room for social constituted rules, that is, customary norms that lack the capacity to create and unify normative orders. Customary norms in state normative systems, which are identified according to one of the criteria of validity of the rule of recognition, are a prime example of the constituted social rules, i.e. social rules that do no create new normative orders.

constitutive norms into constituted ones. As a normative practice, an order is operative only when certain social rules are practiced by the community; the social rules that create and unify the normative order are its constitutive rules.

On this approach there are no reasons to restrict constitutive rules to powerconferring rules and constituted to mandatory norms as Hart misleadingly suggested. Instead both levels can incorporate all kinds of deontic components—i.e. they can establish duties, confer powers, rights and immunities, etc. I will further argue below that Hart's theory of secondary rules is a specification of the three constitutive rules of *normative systems*. Such systems differ from simpler arrangements, *normative sets*, that lack this trio of rules. Although Hart describes the constitutive rules of the legal system as powerconferring norms, he adds that these powers are "reinforced" by other normative components (duties, rights, etc.) and non-normative elements (definitions).<sup>27</sup> In consequence, constitutive rules of normative systems are best understood as complexes of deontic and non-deontic elements that regulate central normative activities of a community in which powers play a central but not exclusive role.

### 1.5 Existence and Content

I shall close the section with one clarification of the scope of the refined Hartian project that I pursue here. Namely, the Hartian account is a socio-hermeneutic endeavour that attempts to answer questions about the *existence* and *main features* of normative orders and other normative phenomena, but it does not attempt to resolve *doctrinal questions* about

<sup>&</sup>lt;sup>27</sup> Hart, *The Concept of Law*, 19, 97, 134.
the determination of the constituted norms that are part of a normative order and the application of these norms to resolve individual cases.<sup>28</sup> Thus, the first objective is to answer questions like "is there a social rule or a normative order in place in this situation?"; "Does this community have a normative set or system?"; and "Is this practice a legal one?" However, this theory does not resolve questions such as "Does this order have a rule commanding/forbidding  $\varphi$ ?"; "Did subject S violate the rules prohibiting  $\varphi$ ?"; or "Should consequences  $\psi$  be applied to S for its violation?" Still, while the results of the Hartian explanation do not have direct implications for doctrinal inquiries, proper quasi-sociological accounts of normative phenomena frame and constrain such further inquiries. So, I argue in the next section.

The distinction between existence and content clarifies the theoretical ambitions of the refined Hartian project.<sup>29</sup> For instance, regarding the social rule "Remove your hat in church," the Hartian theory provides an account of systematic behaviour of a community—roughly, this group at this time and place follows a norm-content that can be roughly described as "hats are to be removed in church." However, this should not be confused with the doctrinal task that churchgoers might face about the fine-grained details of the rule that

<sup>&</sup>lt;sup>28</sup> I take the label from Ronald Dworkin, who distinguishes between "sociological" and "doctrinal" questions. Dworkin claims, however, that "sociological" questions about the existence of normative systems and the structures of authority that concern us here are not of "much practical nor much philosophical interest." See Ronald Dworkin, "Hart and the Concepts of Law," *Harvard Law Review Forum* 119 (2005): 95.

<sup>&</sup>lt;sup>29</sup> The distinction between "existence" and "content" is widely accepted in contemporary jurisprudence. See Stefan Sciaraffa, "Explaining Theoretical Disagreement and Massive Decisional Agreement: The Justificatory View," *Problema. Anuario de Filosofía y Teoría del Derecho* 4 (2012): 165–189; Luis Duarte d'Almeida, "The Grounds of Law," in *The Legacy of Ronald Dworkin*, ed. Wil Waluchow and Stefan Sciaraffa (New York: Oxford University Press, 2016), 166–201.

is binding on them or the application of the rule to specific cases. Hartian theory sets the stage for this further inquiry, but it stops short of pursuing such doctrinal questions.

Similarly, the Hartian can explain the constitutive social rules that create and unify a token instance of a game. That is, roughly, this group at this time and place practices a normative complex that constitutes a game of soccer where the content of the constitutive rules can be roughly described e.g. "Such behaviour constitutes an offside foul," "It is a foul to pick up the ball in your hands," "Goals are scored by kicking the ball into the net," and so on. As I explain below, the Hartian can further explicate whether such a practice is a normative set or system, or whether such a practice is a legal one. However, this theory does not and need not illuminate fine-grained doctrinal questions about the order's rules. In other words the theorist's objective of providing an illuminating and fruitful theoretical framework is fully achieved without resolving particular doctrinal issues for the theoretical aim is to set the stage for such doctrinal issues, further politico-moral inquiry, and social scientific study. Note that this distinction between the existence and content of normative orders is a crucial element of the response in Chapter 3 to some objections concerning the applicability of Hartian theory to non-state contexts.

# 2. Sets and Systems

One central insight of the Hartian account is the distinction between two general types of normative orders: sets and systems. In this section I introduce the central elements of this distinction. My argument is a reinterpretation of Hart's fable of the transformation from a primitive community to a legal system.<sup>30</sup>

#### 2.1 Constitutive Rules

The first difference between a normative set and system concerns the different ways in which they regulate the central normative activities of the community—namely, the authoritative identification, creation, monitoring, and application of collective rules. A *normative set* is an order that does not efficaciously regulate these activities and does not specify agents to perform them, so the social upholding of the norms is advanced by the community as a whole. In contrast, *normative systems* are orders created by a trio of efficacious social rules that regulate the community's central normative activities. These are the constitutive rules of recognition, change, and adjudication, and they introduce specific agents in charge of these normative activities. Each of these rules requires some individual discussion.

The *rule of recognition* specifies some marks or criteria of validity that authoritatively identify the norms that belong to the system and guide the behaviour of community members.<sup>31</sup> These criteria remedy the potential uncertainty that might exist in communities ruled by normative sets about which rules are to be obeyed, applied, and enforced as the communal ones. Simple rules of recognition include one single criterion of validity or membership to the system such as an inscription on a document or monument ("All norms in the *Duodecim tabularum*") or the deeds of a certain agent ("All norms issued

<sup>&</sup>lt;sup>30</sup> See Hart, *The Concept of Law*, 91–99.

<sup>&</sup>lt;sup>31</sup> Ibid., 94.

by *Rex*"). A normative system might also have a complex rule of recognition comprising numerous criteria of validity. To use Hart's example, contemporary states typically have complex rules that recognize legislation such as the norms enacted by a parliament, long-standing customary practices, and judge-made law in the form of precedents. The criteria of validity make it possible for the members of a community to distinguish between the rules that will be enforced as communal rules from those which lack communal imprimatur. Thus the community obtains a clearer idea of its duties, rights, powers, etc.

*Rules of change* regulate the creation, modification, and removal of communal rules,<sup>32</sup> and *rules of adjudication* establish how the violation of shared norms should be determined and how communal social pressure should be exerted.<sup>33</sup> These rules remedy two defects of normative sets: the incapacity of the normative order to adapt to new circumstances and the inefficiency of diffuse social pressure—i.e. social pressure exercised by the community as a whole. Hart characterizes the constitutive rules of normative systems as power-conferring rules for they typically endow some agents and institutions with the normative power to create, modify, and apply communal norms.<sup>34</sup> The agents and institutions that perform these normative activities are the officials of their normative communities (henceforth community-officials).

The Hartian account distinguishes between two main types of community-officials: norm-creators and norm-appliers. *Norm-creators* are empowered to issue enactments that alter the system's rules. *Norm-appliers* are agents authorized to issue settlements that

<sup>&</sup>lt;sup>32</sup> Ibid., 95.

<sup>&</sup>lt;sup>33</sup> Ibid., 96.

<sup>&</sup>lt;sup>34</sup> For simplicity of exposition, I set aside the contested power-conferring capacity of the rule of recognition.

identify the system's norms; apply them to particular cases; and monitor the compliance of community members. A key feature of such community-officials is that they issue enactments and settlements that are peremptory in the sense that they cut off "deliberation, argument or debate" among community members about the content of the community's rules.<sup>35</sup> Thus, the presence of a complement of norm-creating and norm-applying officials provides additional clarity to the normative order since these agents identify and create the collective rules, apply them to specific cases, and monitor communal compliance.

In summary, whereas a set lacks standards regulating central normative activities, a system is a normative order that effectively regulates such activities. In consequence a system provides its community with a more concrete idea of *the communal rules, how they are created, applied, and enforced, and by whom.* 

# 2.2 The Structure of Authority

The introduction of norm-creating and norm-applying officials transforms the way the community operates and exercises its practical authority, namely, its capacity to guide the behaviour of community members. A normative order without officials is an egalitarian community in which no agents are empowered to issue normative settlements on behalf of the group. In such a case the normative activities are performed by the community as a whole.

In contrast, those communities ruled by a normative system typically have some agents empowered to settle issues for the community. Efficacious power-conferring rules

<sup>&</sup>lt;sup>35</sup> Hart, "Commands and Authoritative Legal Reasons," 253. Cf. Hart, The Concept of Law, 136.

are accompanied by new norms and obligations for the community members, who have to respect and comply with officials' enactments and settlements. In such a situation communal normative labour has been divided between two subsets of members with different normative roles: officials who are in charge of the normative deliberation and decision-making for the community; and non-official agents or subjects who might simply comply with the norms that officials identify, create, and apply and their settlements about them.<sup>36</sup> In other words, in those complex situations in which social rules empower officials to decide communal normative issues and subjects have a corresponding duty of compliance, the group of officials exercises practical authority on behalf of the group.

Because of these features, normative systems bring with them a different formulation of central politico-moral inquiries. The main questions for normative sets concern the legitimacy of the *de facto* practiced norms; the obedience that subjects owe to them; and circumstances of justified disobedience. In normative sets, however, the identity of the collective norms might be uncertain or disputed amongst participants. In contrast, normative systems typically institutionalize the structure of communal practical authority that oversees the operation of collective rules identified according to some marks or criteria of validity. Thus, it is possible to pose additional politico-moral questions. One such question queries the legitimacy of the community's structure of practical authority and its capacity to guide the behaviour of subjects. Theorists and participants can ask whether the

<sup>&</sup>lt;sup>36</sup> For this view, see Leslie Green, "Introduction," in *The Concept of Law*, by H. L. A. Hart, 3rd ed. (Oxford: Clarendon Press, 2012), xxvii–xxx; Joseph Raz, "The Problem about the Nature of Law," in *Ethics in the Public Domain* (Oxford: Clarendon Press, 1996), 206–7; Joseph Raz, "On the Nature of Law," in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009), 110–1.

officials' capacity to issue enactments and settlements is justified or not in non-practicebased standards. A second question queries the legitimacy of the system of norms that officials identify and their decisions about those norms. That is, we can question whether the framework of collective norms, enactments, and settlements is just. Yet a third question asks about the obedience that subjects owe to the normative framework that officials identify, create, apply, and enforce and circumstances where subjects are morally justified to disobey those norms and even rebel against the structure of authority. This question is called the *problem of political obligation* in circumstances where officials use intense forms of social pressure.

### 2.3 Doctrinal Discourse

Normative sets and systems also differ in the way they structure their doctrinal discourse namely, the discourse about the content of the normative order and the application of its norms. In normative sets there are no structures of authority that authoritatively create and apply norms. In such a situation, the application and enforcement of norms are performed by the community as a whole and the community's members are generally charged with the task of detecting deviations and applying social pressure in response to non-compliance. In consequence, the normative content of the set is those norms *de facto* practiced and enforced by the community at large.

In contrast, normative systems have a structure of authority in charge of creating and applying collective norms. Most importantly, the practices of community officials

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instantiate the community's rule of recognition.<sup>37</sup> Thus, the content of a normative system comprises the norms that satisfy the criteria of validity effectively practiced by the complement of officials. As a result, normative systems give room for valid norms which are not practised by subjects at large, and the possibility that there is widespread subject behaviour which is invalid or illegal per the system's criteria of validity.

This third difference between communities ruled by sets and systems does not concern the absence or presence of public debate and factional pressures about the relevant norms but how these disputes are framed and settled. Sets lack a unified, authoritative perspective from which to frame questions about the content of the order and the application of norms to individual cases. In turn, systems have marks that identify the binding standards and officials in charge of their application. Thus, doctrinal debates in normative systems are fundamentally about the officially accepted perspective about the sources of authoritative public standards. These disputes, in turn, are authoritatively resolved by the system's norm-appliers.

## 2.4 Summarizing the Distinction

In sum normative sets and systems differ in three central aspects: (1) the guidance they provide to their communities; (2) the structure of practical authority; and (3) the articulation of doctrinal discourse. When constitutive social rules regulate a community's fundamental normative activities, they thereby create a distinct kind of normative object, a normative system. This kind of normative object is typically operated through a structure of officials

<sup>&</sup>lt;sup>37</sup> In the next chapter, I further clarify this claim and argue that the norm-appliers are the agents who authoritatively establish the criteria of validity.

and it provides its community with a concrete account of its normative standards and institutionalized forms of normative discourse. Given these features, normative systems are subjects of particular theoretical and practical inquiries, and give rise to doctrinal, and moral-political queries that do not apply to less sophisticated arrangements.

For the Hartian the distinction between sets and systems is a central insight to understand our social normative world. For instance we can now distinguish between two kinds of games. Those token instances of games played with our friends our families without referees or codification of rules are examples of normative sets. Professional sports like those regulated by FIFA or the NHL, which include a bureaucracy of administrative agents and referees that perform the collective norm-applying and norm-creating roles, and which have some marks that identify the norms that regulate their collective enterprise, are examples of a normative system.

Nothing in the Hartian account suggests that normative systems are in all cases better forms of social organization than normative sets. Many communities are well-served by sets, mainly those groups "closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment," or where non-centralized social pressure is sufficient to force dissenters to conform.<sup>38</sup> The informal game mentioned in the previous paragraph offers one example. For the Hartian the transformation from a set to a system is not an unqualified benefit or a goal that every set should pursue but is instead a "luxury" that brings gains and risks: while normative sets might resolve the defects of some sets and bring "adaptability to change, certainty, and efficiency," the structures of officials and

<sup>&</sup>lt;sup>38</sup> Hart, *The Concept of Law*, 91–2.

institutionalized discourse created by normative systems might give rise to forms of oppression and alienation that do not trouble simpler societies.<sup>39</sup>

### 3. The Demarcation of the Legal

Although this conceptual toolkit—norms, normative orders, constitutive and constituted rules, systems, and sets—can be applied to different types of normative practices, the Hartian seeks to preserve a boundary between legal and non-legal norms. In this section I introduce a working demarcationist account that liberally draws from Hart's distinction between legal and moral obligation.<sup>40</sup>

# 3.1 Law as the Regulation of Political Communities

As understood in this dissertation a hallmark of a normative practice is the exertion of *social pressure* or critical reactions against those community members who do not abide by communal standards. For Hart we can properly talk of an obligation or duty when participants of practice orders systematically apply serious forms of pressure to secure conformity to norms. In normative sets critical reactions are exerted by communities as a whole, in normative systems officials are typically in charge of these activities.

The social pressure used by participants to support communal rules ranges from what we can call weak to intense forms. Weak forms of pressure include verbal or nonverbal manifestations of disapproval and appeals to feelings of shame, remorse, and guilt.

<sup>&</sup>lt;sup>39</sup> Ibid., 204.

<sup>&</sup>lt;sup>40</sup> For Hart's distinction, see Ibid., 86–7. Cf. 179-80. See also, H. L. A. Hart, "Legal and Moral Obligation," in *Essays in Moral Philosophy*, ed. A. I. Melden (University of Washington Press, 1958), 82–107; Hart, "Answers to Eight Questions (1988)," 284.

Intense forms include physical compulsion or deprivations of the agent's resources, honour, liberty, and even life.<sup>41</sup> For the Hartian the more intense forms of social pressure are more commonly used in those orders that govern morally, politically or economically salient issues, values, and goods.<sup>42</sup> These stronger forms of social pressure are necessary because practical agents have limited understanding and strength of will: "All are tempted at times to prefer their own immediate interests and, in the absence of a special organization for [the] detection and punishment [of violations], many would succumb to the temptation."<sup>43</sup> The concern is that without coercively enforced compliance, agents are tempted to obtain the advantages of their normative practices without submitting to their obligations. To be clear, the Hartian does not conceive the use of social pressure as providing a psychological account of the motives of obedience. Instead, it is a "*guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not."<sup>44</sup>

Hart suggests these resources provide a starting point for a distinction between legal and non-legal phenomena.<sup>45</sup> Weak social pressure is typically used to support moral obligations created by (non-practice-based) moral rules such as the principles of keeping

<sup>&</sup>lt;sup>41</sup>Cf. Hart, *The Concept of Law*, 81, 91. Here, I prefer Hart's language of intense social pressure over the term "coercion" for two main reasons. On the one hand "coercion" is seldom defined with clarity and it can apply to numerous situations that range from medical interventions to the death penalty. For a brief but effective criticism, see John Gardner, "The Idea of a Pure Theory of Law," *Jurisprudence* 10, no. 1 (2019): 119. On the other hand the efforts to specify "coercion" typically end up characterizing it in similar terms to the Hartian proposal; for Grant Lamond "it is pressure not physical force nor sanctions—which is the key operative factor in coercion," while Ekow N. Yankah claimed that "coercion occurs when sufficiently high pressure is applied to compel the adoption of a certain course of action." Grant Lamond, "Coercion and the Nature of Law," *Legal Theory* 7, no. 1 (2001): 43–4; Ekow N. Yankah, "The Force of Law: The Role of Coercion in Legal Norms," *University of Richmond Law Review* 42 (2008): 1216–7.

<sup>&</sup>lt;sup>42</sup> Hart, *The Concept of Law*, 192–3, cf. 91, 117.

<sup>&</sup>lt;sup>43</sup> Ibid., 197.

<sup>&</sup>lt;sup>44</sup> Ibid., 198.

<sup>&</sup>lt;sup>45</sup> See Ibid., 86–7. Cf. 179-80.

one's promises or not lying. Weak social pressure is also used to support obligations created by normative practices that—according to Hart—educated citizens do not typically recognize as legal such as social conventions, rules of etiquette, and rules of games. In turn, the use of more intense social pressure is central to the practices that, according to Hart, educated citizens would recognize as legal practices: state-law, the norms that regulate primitive communities, and international law. Hence there is support in Hart's work for the view that legal practices are those where participants employ strong social pressure in politico-morally relevant affairs, and legal theory is the systematic study of such practices.

To better capture these insights I introduce the notion of *normative political communities* or *polities*. In my conception a polity is any group that converges in following rules that regulate salient moral, political, or economic issues, where the group's compliance with such rules is effectively enforced by the exercise of intense forms of social pressure. Polities demand the theorist's attention because of the prominent role they play in collective life. Moreover, given the weighty burdens that polities impose on their subjects, moral-political questions about their authority, legitimacy, and justification, along with doctrinal inquiries about their normative content and application of their norms, are especially pressing for participants and theorists.

As construed here law or legal phenomena are sub-types of normative practices namely those that constitute and regulate political communities. Legal systems of domestic states are prominent examples of polities, although they are not the only instances. To use Hart's examples, legal orders can also in principle include what he referred to as "primitive" law and international law. For although these orders (as Hart discusses them) do not have the trio of rules constitutive of normative systems and, as such, are normative sets, they are nonetheless political communities insofar as they comprise rules that regulate salient moral, political, or economic issues, and the community's compliance with such rules is effectively enforced by the exercise of intense forms of social pressure. In contrast, for the Hartian, clubs, universities, and associations are not to be considered as legal orders because they do not constitute political communities even though some of them might display all the hallmarks of a normative system.

In the polity-based conception what is critical for the legal nature of a normative order is that some facts are exhibited by the community, namely the efficacious exercise of intense pressure and the regulation of normatively relevant political, moral, or economic aspects. In consequence the elements suggested by other demarcationist accounts—such as that a given community is organized as a normative system; that it expresses the claim of primacy over other normative phenomena; that ordinary language refers to certain norms as "law" or "legal;" or that participants describe or recognize their own or other's practices with such terms—are not the decisive elements that determine its legal character.

To hold that a given community is governed by a legal practice is an explanatory statement about the place of certain normative phenomena in our network of concepts as objects deserving particular theoretical and practical attention. As such it does not entail an assessment of the moral worth or legitimacy of the practice. That is, to characterize a normative order as "law" does not imply that it is commendable or legitimate. Nor does this assessment inform doctrinal issues, as norm-applying officials might take into account non-legal standards in the resolution of cases.

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#### 3.2 Some Virtues of the Polity-Based Demarcation

This polity-based account of legal phenomena enjoys several explanatory virtues. First, it explains the focus of traditional theories of law; mainstream theories are focused on state law since the state is the predominant political community of our time. In addition it clarifies the claims of those scholars who identify forms of non-state law. From this standpoint the argument made by non-state legal scholars is not that orders like the European Union, the World Trade Organization, or *lex mercatoria* are merely new sources of practices—comparable to new roles, social conventions or the rules that children impose themselves while playing in the park. Rather the key point is that these phenomena are the object of special interest because they attempt to create and regulate novel polities which, while not replacing the state, make insistent and powerful normative demands on their subjects. As a result the refined Hartian account of legal phenomena captures the commonsense distinction between legal and non-legal phenomena, the main motivation of traditional state-centred theories and the claim of non-state legal scholars, while avoiding the possible trivialization of legal phenomena that might follow from the nondemarcationist account of legality.

Moreover, the polity-based conception usefully reframes our debates about the legal character of normative practices. On this conception the distinction between political and non-political communities is not a sharp one and allows for debates among theorists and practitioners. To name one key consideration, theorists might debate whether the form of social pressure typically employed by a community amounts to intense social pressure. To name another, they might disagree about whether the relevant set of rules regulates sufficiently important moral or economic issues.

Relatedly, the legal nature of a normative order is not a fixed or perennial property since the theoretical assessment might change as the practice evolves. In other words debates about the legal character of a normative order have a dynamic dimension: a non-legal normative practice might transform into a legal one if, for instance, it starts to use intense social pressure, and it might cease to be legal if, say, it loses its capacity to regulate moral and political issues. To use a familiar example, canon law might have been a legal order in those times and places where it used intense social pressure, but perhaps it is no longer a legal order. The result is that familiar debates about the legality of non-state normative phenomena that have populated contemporary scholarly literature (e.g. is the international legal order, WTO norm or *lex sportiva* etc. "law"?) could be understood as offering an argument for or against considering certain normative communities as political ones.

In sum, the Hartian concept of law captures a sub-type of normative communities that regulate critical moral issues by imposing pressing practical demands on their subjects. Legal communities might be organized as either sets or systems. Henceforth I shall use the terms "law" and "legal" to refer to those norms, normative orders, and officials that constitute and rule over political communities. Relatedly, I will restrict the "province" of jurisprudence or legal theory to the study of the conceptual, normative, and doctrinal questions of political communities whether they are state-based or not.

## 4. The Central Insights of Hartian Theory

I will conclude this chapter by highlighting two key methodological insights of the Hartian account that distinguishes it from other unified accounts and other interpretations of Hart's project. These are the assumptions of efficacious normativity and the explanatory priority of the normative order vis-à-vis any such order's constituent norms.

#### 4.1 Efficacious Normative Phenomena

As suggested above, Hartian theory provides an account of the existence of normative phenomena. Evidently, non-normative phenomena that do not attempt to guide conduct—such as concepts, theories, or non-rule constituted components of practices—are outside of its purview. Moreover when explaining normative practices, the Hartian assumes that such norms are *de facto* practised by a given community. If norms are no longer practiced by a community, we will not be speaking of extinct normative phenomena (e.g. Roman Law); if the norms have never been practised, the Hartian would be referring to proposals for new phenomena (i.e. the project for a new cosmopolitan system).

As I explain in my conclusions, this seemingly trivial remark becomes relevant for the account of non-state legal phenomena. Other unified accounts of law include within the purview of jurisprudence non-normative dimensions captured by the word "law." That is, some theorists define "transnational law" as a process of empirical transformations, or certain mechanisms of decision-making, or an area of study or education. Other unified theories define as legal orders certain discourses or interactions between normative phenomena independently of whether or not they involve the creation or application of norms.

#### 4.2 The Centrality of the Normative Complexes

For the Hartian the rules and other components of normative phenomena are meaningful in the context of the normative orders of which they are a part. This insight parallels the context principle that is central to the philosophy of language. According to this principle the philosopher should "never ... ask for the meaning of a word in isolation, but only in the context of a proposition."<sup>1</sup> In a similar vein the Hartian holds that individual norms and the duties, rights, powers, etc. they generate should be explained in the context of a normative order.<sup>2</sup> That is, the account of the normative complex is explanatorily prior to the account of its constituent norms. I shall call this view a *contextualist* account of law.<sup>3</sup>

Contextualist accounts of law contrast with another approach in which the explanation of individual legal rules or the components of legality is prior to the account of the complexes of norms. I will refer to this second approach as *compositionalist* as it accords with those accounts of language where the meaning of a proposition is primarily the meanings of its constituent elements. Culver's and Giudice's unified theory of law

<sup>&</sup>lt;sup>1</sup> Gottlob Frege, *The Foundations of Arithmetic: A Logico-Mathematical Enquiry into the Concept of Number*, trans. John L. Austin, 2nd ed. (Evanston, Illinois: Northwestern University Press, 1980), x.

<sup>&</sup>lt;sup>2</sup> Kevin Toh characterises the "context principle" as one of the central prescriptions of Hartian theory. "Four Neglected Prescriptions of Hartian Legal Philosophy," *Law and Philosophy* 34 (2015): 333–368.

<sup>&</sup>lt;sup>3</sup> The priority of normative orders over individual norms is also evident in the work of Hans Kelsen and Joseph Raz. For Kelsen, "it is impossible to grasp the nature of law if we limit our attention to a single isolated rule." Kelsen, *General Theory of Law and State*, 3. Raz, in turn, not only claims that "every law necessarily belongs to a legal system" but also that "it is a major thesis of the present essays that a theory of legal system is a prerequisite of any adequate definition of "a law." Joseph Raz, *The Concept of a Legal System*, 2nd ed. (Oxford: Clarendon Press, 1980), 1, 2. See also, Gardner, *Law as a Leap of Faith*, chap. 7.

provides a prime example of the compositionalist approach. This account attempts to "track" legality in a "radar-like" operation using "indicators of legality—norms, powers, institutions qua agents, and institutions as normative regimes.<sup>4</sup> In their view, each of these components is "individually sufficient" for legality.<sup>5</sup> In turn, a legal order is not a complex of norms, but any "pattern or combination" of the previous elements which might include both normative and non-normative components alike.<sup>6</sup>

This is not the place to compare compositionalist and contextualist accounts of law. For my current purposes I wish to underscore that the main difference between these approaches concerns what Michael Dummett called the "order of recognition"—the order in which we identify the relevant phenomena to be explained—and "the order of explanation"—the order in which the explanation of these phenomena proceeds.<sup>7</sup> For compositionalist scholars the order of recognition of the constituents of legality determines the order of explanation; since individual components of legality are typically identified first, they also have explanatory priority. In contrast, for the contextualist, while individual norms and components of legality might be recognized first, they typically exist as part of complexes of interrelated norms and are meaningfully explained in such contexts.

As a corollary of the compositionalist principle the Hartian account of normative practices operates within a particular order of explanation. On this account we do not begin to explain the distinctive features of legal phenomena solely by reference to individual

<sup>&</sup>lt;sup>4</sup> Culver and Giudice, *Legality's Borders*, 111–129; *The Unsteady State*, 86–100.

<sup>&</sup>lt;sup>5</sup> Culver and Giudice, *The Unsteady State*, 94.

<sup>&</sup>lt;sup>6</sup> Ibid.

<sup>&</sup>lt;sup>7</sup> Michael Dummett, *Frege: Philosophy of Language*, 2nd ed. (Cambridge, MA: Harvard University Press, 1993), 4–5.

norms or components, as Culver and Giudice do when they appeal to certain indicators to determine the existence of legality. Nor does the Hartian identify as legal practices those that bear the hallmarks of a normative system.

By contrast, the first explanatory steps in Hartian theory are to determine whether or not the norms in question are part of a normative order and to identify the communities that generate that order. For the Hartian, legal phenomena are those constituted by normative communities that exercise intense forms of social pressure to secure general compliance with respect to norms that regulate important moral-political issues. Thus the Hartian cannot determine the legal character of a practice without previously identifying the relevant community that constitutes and sustains it. On this account legality is a property possessed by the community and its normative complex not by each of the individual normative components separately. In sum, the identification of the normative order and its constitutive community are key explanatory steps in the Hartian compositionalist account.

#### **5.** Conclusion

In this chapter I have outlined the central elements of my refined Hartian account of state and non-state legal phenomena. First, I reformulated the Hartian account as an explanation of different types of practices including but not limited to state law. One pivotal innovation was the notion of normative orders or unified complexes of interrelated rules. These orders were divided into two kinds—sets and systems—that have different constitutive rules and which allow for different doctrinal and moral-political inquiries. Finally, I articulated a demarcationist account based on the notion of political community, namely groups that exert intense forms of social pressure to effectively secure compliance with sets of rules that regulate important politico-moral domains. The chapter concluded by highlighting some distinctive methodological insights of the Hartian approach.

I proceed in the following chapters to apply the refined Hartian conceptual framework to explain the sense in which certain seemingly non-state legal phenomena share the crucial forms of legality that I have identified here and, hence, can be usefully characterized as instances of legality. But before I can do that it is necessary to respond to two central objections to the applicability of Hartian theory outside state law. The first objection holds that the Hartian account requires hierarchies typical of the rule of recognition of domestic states to identify the system's norms and officials. The second objection suggests the existence of circularity and indeterminacy in Hart's explanation of officials. In the next chapter I will discuss and respond to the powerful argument levied by Culver and Giudice that incorporates both objections.

# Chapter 3: The Applicability of Hartian Theory Beyond the State

This chapter defends the applicability of the Hartian unified theory of state law outside the domestic context. To frame this argument I will focus on two challenges to this theory advanced by Keith Culver and Michael Giudice (henceforth C&G).<sup>1</sup> These challenges are variants of two recurring lines of objection to Hart's theory both in the state and non-state contexts. I focus on C&G's particular articulations of these challenges because they are exemplary in their sophistication and power and have influenced other skeptical positions about Hartian accounts of non-state legal phenomena.<sup>2</sup>

C&G refer to these two challenges, described in Section 1, as the problems of circularity and indeterminacy. According to the first there is a vicious circularity in Hart's theory; the rule of recognition is determined by the practice of officials but, at the same time, officials are identified using the rule of recognition. According to the second objection Hart does not provide a principled way to distinguish between official agents, whose behaviour and attitudes contribute to the rule of recognition, and private agents, whose conduct and beliefs are largely irrelevant to the rule. Without such accounts of officials the Hartian cannot explain the rule of recognition and subsequently—according to C&G—is unable to specify the content of the system and distinguish one system from other legal and non-legal practices.

<sup>&</sup>lt;sup>1</sup> Culver and Giudice, *Legality's Borders*; *The Unsteady State*.

<sup>&</sup>lt;sup>2</sup> See e.g. Richard Collins, "The Problematic Concept of the International Legal Official," *Transnational Legal Theory* 6, no. 3–4 (2015): 608–634; and *The Institutional Problem in Modern International Law* (Oxford: Hart, 2016), chap. 3; Dennis Patterson, "Transnational Lawmaking," in *Research Handbook on the Theory and Practice of International Lawmaking*, ed. Catherine Brölmann and Yannick Radi (Northampton: Edward Elgar Publishing, 2016), 56–66.

C&G argue that Hart does have some resources to remedy these problems within the state legal system. Specifically, domestic rules of recognition contain hierarchies of norms and officials that justify a presumption of some central cases of officials, which in turn remedies uncertainty about disputed cases. However, since similar resources are not readily available outside the state, these two objections debar application of the Hartian model in non-state contexts. As an illustration C&G apply these two objections to international law.

Here I will attempt to respond to this complex, possibly devastating, argument. Instead of dwelling on exegetical disputes about Hart's views I will use C&G's objection as a platform to amplify and defend the renewed Hartian theory of normative practices developed in the previous chapter. Sections 2 to 5 introduce clarifications to the notions of secondary rules, legal officials, and the constitutive rules of adjudication and recognition. One key contribution is what I call the proto-doctrinal interpretation of the trio of constitutive rules of normative systems, i.e. the rules of recognition, change and adjudication. Per this view, as constitutive social rules, these rules do not provide a finegrained account of their content but arise as the result of shared understandings amongst community participants. The Hartian further explicates how the relevant actors whose shared understanding defines the rules might include the officials themselves.

Together these elements allow me to develop in Section 6 a direct response to the problems of circularity and indeterminacy that does not resort to the hierarchy that C&G find in state legal systems. This renewed account is illustrated in section 7 with a discussion of the critics' application of their objections to international legal phenomena.

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# 1. The Challenge

# 1.1 The Problems of Circularity and Indeterminacy

C&G's challenge attacks the notions of *legal system* and *legal officials*, the central conceptual tools of Hart's project. As commonly understood a legal system is constituted by three secondary rules that are followed by legal officials. These are the rules of change that establish procedures to introduce, modify, and eliminate the norms of the system; the rules of adjudication that specify a set of officials authorized to apply the system's norms, and the rules of recognition that specify the criteria of validity, i.e. the marks that identify the norms that belong to the legal system. In turn, primary rules are those regulated by the rules of recognition, adjudication, and change. The "union of primary and secondary rules" is, in Hart's view, the "key" to understanding the nature of legal phenomena.<sup>3</sup>

C&G advance two objections to Hart's account—the problems of circularity and indeterminacy of officials.<sup>4</sup> The *problem of circularity* concerns the "burden of identifying officials without presupposing the notion of legal validity, which is simply the set of criteria of membership to a legal system practiced by its officials."<sup>5</sup> That is, the rule of recognition

<sup>&</sup>lt;sup>3</sup> Hart, *The Concept of Law*, 71.

<sup>&</sup>lt;sup>4</sup> Culver and Giudice, *Legality's Borders*, 1–15, 32–37.

<sup>&</sup>lt;sup>5</sup> Ibid., 2, 6, 10. This is a widespread and recurrent objection. See for example Rolf Sartorius, "Hart's Concept of Law," in *More Essays in Legal Philosophy: General Assessments of Legal Philosophies*, ed. Robert S. Summers (Berkeley & Los Angeles: University of California Press, 1971), 169; Ian W. Duncanson, "The Strange World of English Jurisprudence," *Northern Ireland Legal Quarterly*, no. 3 (1979): 218–20; Neil MacCormick, *H.L.A. Hart*, 1st ed. (Stanford: Stanford University Press, 1981), 113–120; N. E. Simmonds, "Legal Validity and Decided Cases," *Legal Studies* 1, no. 1 (1981): 31; Juan Ramón Páramo, *H.L.A. Hart y la teoría analítica del derecho* (Madrid: Centro de Estudios Constitucionales, 1984), 187; Kent Greenawalt, "The Rule of Recognition and the US Constitution (1987)," in *The Rule of Recognition and the US. Constitution*, ed. Matthew Adler and Kenneth Einar Himma (New York: Oxford University Press, 2009), n. 6; Matthew Kramer, "The Rule of Misrecognition in the Hart of Jurisprudence," *Oxford Journal of Legal Studies* 8, no. 3 (1988): 408–9; José Antonio Ramos Pascua, *La regla de reconocimiento en la teoría jurídica de H.L.A. Hart* (Madrid: Tecnos, 1989), 17; C. J. G. Sampford, *The Disorder of Law: A Critique of Legal* 

used to identify the norms of a legal system comprises those criteria of validity that officials accept in common. However, at the same time, officials exercise powers created by legal norms, and these power-conferring norms are identified using the standards of the rule of recognition.

Consider an example of an official of domestic law. In a national legal system a judge is an agent whose public powers are conferred on her by one of the system's norms. Like all the other norms of the legal system this power-conferring norm is identified by one of the criteria of validity of the rule of recognition. However, Hart also holds that the rule of recognition is constituted by the convergent practice of judges and other state officials of recognizing certain norms as belonging to the legal system. As a result, according to the criteria, there is a vicious circularity between the norms that empower the system's officials and the rule of recognition that establishes the criteria of validity.

The problem of the *indeterminacy of officials* in turn concerns the "burden of identifying which sorts of activities or exercises of power in a legal system distinguish officials from non-officials, and so determine the borders of legal systems."<sup>6</sup> According to C&G's construal of Hart's project the rule of recognition not only identifies the valid norms

Theory (Oxford, UK; New York, NY, USA: Blackwell Pub, 1989), 35–6; Michael D. Bayles, *Hart's Legal Philosophy: An Examination* (Dordrecht: Springer, 1992), 54–55; Ricardo Caracciolo, *La Noción de Sistema En La Teoría Del Derecho* (México: Fontamara, 1994), 74–5; Manuel Atienza and Juan Ruiz Manero, *A Theory of Legal Sentences* (Dordrecht: Springer, 1998), 150–1; Tamanaha, *A General Jurisprudence of Law and Society*, 141–2; Riccardo Guastini, "Bobbio Sobre La Norma Fundamental y La Regla de Reconocimiento," *Analisi e diritto* 2005 (2005): 203–207; Stephen R. Perry, "Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View," *Fordham Law Review* 75 (2006): 1186–7; Leslie Green, "Notes to the Third Edition," in *The Concept of Law*, by H. L. A. Hart, 3rd ed. (Oxford: Clarendon Press, 2012), 316; Carlos Bernal, "Austin, Hart, and Shapiro: Three Variations on Law as an Entity Grounded in a Social Practice," *Rechtstheorie* 44, no. 2 (2013): 173; Christoph Kletzer, *The Idea of a Pure Theory of Law: An Interpretation and Defence* (Bloomsbury Publishing, 2018), 123–4.

<sup>&</sup>lt;sup>6</sup> Culver and Giudice, *Legality's Borders*, 2, 6–7.

that belong to the normative system but, in doing so, also determines what they call a system's "borders," i.e. the limits between the legal system and other legal and non-legal normative phenomena.<sup>7</sup>

Since the rule of recognition is comprised by the criteria that officials recognize in common, it is crucial that the Hartian scholar is able to identify this set of agents. For if a system's legal officials cannot be identified then the content of that system's rule of recognition—i.e. the rule that is accepted in common and followed by the system's officials—cannot be determined. As a consequence if a system's rule of recognition cannot be identified, then the Hartian has no resources for identifying the system's set of valid norms and the precise contours of its borders. Hence, this challenge undercuts the motivating rationale of Hart's theory—namely, the aspiration to provide a theoretically useful and illuminating account of legal systems and the set of norms that any such system harbours.

The crucial premise that informs the indeterminacy challenge is that Hartian theory lacks a principled criterion for distinguishing between officials and non-official agents. Despite the pivotal explanatory role that he attributes to officials, Hart is surprisingly cavalier about its analysis. He provides only a few remarks distinguishing between two types of power-conferring rules, that is, norms that provide agents with the ability to change some deontic components (duties, rights, status, etc.) within a given practice.<sup>8</sup> Private

<sup>&</sup>lt;sup>7</sup> Ibid., 2, 7, 14, 21, 47–54. The explanation of "borders" is so central to their project that is in the title of their book.

<sup>&</sup>lt;sup>8</sup> Hart, *The Concept of Law*, 27–31; H. L. A. Hart, "Legal Powers," in *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982), 196.

powers confer subjects with "facilities for realizing their wishes"<sup>9</sup> such as the institutions of contracts, wills, and marriage. Public powers are those held by officials. However, Hart only provided examples of domestic officials without specifying their distinctive features. Legislators, members of parliament, judges, courts, ministers, county councillors, police officers, and tax inspectors are his examples of officials that wield public powers under state law.

C&G are not satisfied with this explanation by example. They highlight other agents such as accountants, lawyers and presidents of universities that exercise normative powers within domestic legal systems similar to those of state agents but which are not readily classified as Hartian officials. For C&G the Hartian account of officials *alone* does not provide enough resources for asserting or denying the "public" character of these powers and the official character of these agents. On this basis, C&G conclude that Hartian theory is ill-equipped to differentiate between official agents whose attitudes and behaviour are relevant to the constitution and determination of a legal system's rule of recognition and non-official subjects whose attitudes and behaviour are nor relevant to the rule. Hence, Hartian theory rests on an indeterminate foundation and, as explained above, this indeterminacy threatens to undercut the Hartian project of providing a theoretically illuminating and useful account of legal systems and legal norms.

<sup>&</sup>lt;sup>9</sup> Hart, *The Concept of Law*, 27.

# 1.2 The Presumption of Hierarchy

C&G hold that the Hartian can remedy the problem of indeterminacy by relying on a *presumption of hierarchy* that identifies certain paradigmatic officials such as Supreme Court justices, and attributes to them the authoritative standing to resolve unclearness about the identity of the system's officials.<sup>10</sup> They provide a complex argument for this presumption.

According to C&G, Hart's account of legal systems of nation-states incorporates a hierarchy of norms as a central component of the system's rule of recognition, and such a hierarchy is instrumental for identifying the system's valid norms. Hart claims that one way to determine the membership of a given rule in a normative system is to trace a chain of authorizations until we reach the ultimate rule of recognition.<sup>11</sup> To borrow from Hart's illustrative example, to determine whether a by-law issued by a municipal council belongs to the UK's legal system, the Hartian theorist looks for the superior norm that validates it— in this case the parliamentary act regulating the council's power. In turn the validity of this superior norm, e.g. the parliamentary act, can be traced to a yet more fundamental validating norm and so on, until an ultimate rule of recognition is found—the social norm constituting the Parliament as the UK's supreme legislative authority.

As C&G understand this example, Hart relies on a "hierarchy of norms"—a ranking of rules where superior rules validate inferior ones—to remedy a problem that they call the "indeterminacy of legal norms," namely, the uncertainty about the membership of a given

<sup>&</sup>lt;sup>10</sup> Culver and Giudice, *Legality's Borders*, 15–8.

<sup>&</sup>lt;sup>11</sup> Hart, *The Concept of Law*, 107.

norm to the legal system.<sup>12</sup> They assume that hierarchical arrangements are the "particular kind[s] of use of secondary rules" that can overcome the normative indeterminacy typical of the normative sets that govern pre-legal communities.<sup>13</sup> In their construal the presence of normative hierarchies is more than a typical feature of the rule of recognition of municipal law; it is key for the performance of the "functional" aspect of the rule,<sup>14</sup> namely, to bring certainty about the membership of particular norms to the system, and thereby specify the borders of the system with other normative phenomena.

By C&G's lights, Hartian scholars rely on similar resources to resolve what they call the problem of indeterminacy of officials, i.e. uncertainties about the official character of specific agents.<sup>15</sup> In their view the hierarchy of validating norms typical of contemporary states "likely entail" a hierarchy or ranking of the state officials, designating the directives of some agents as being "superior" to or "weightier" than the directives of others.<sup>16</sup> This feature is evident, for example, in the titles assigned to norm-appliers, like "lower," "superior" and "supreme" courts, which reflect the fact that some courts are more powerful than others. These hierarchies of officials and norms allow Hartian scholars to presume the existence of clear cases of officials at the apex of the official hierarchy. These paradigmatic official agents, in turn, can determine the official nature of borderline cases and resolve the

<sup>&</sup>lt;sup>12</sup> Culver and Giudice, *Legality's Borders*, 16.

<sup>&</sup>lt;sup>13</sup> Ibid., 29. "One critical indication of the presence of a rule of recognition uniting a set of primary and secondary rules", they add, "is the means to rank the various sources of rules which emerge, or determine if they are legal rules at all." Ibid.

<sup>&</sup>lt;sup>14</sup> Culver and Giudice, *Legality's Borders*, 3–4.

<sup>&</sup>lt;sup>15</sup> Ibid., 15–6.

<sup>&</sup>lt;sup>16</sup> Ibid., 17.

indeterminacy of officials, thereby bringing certainty about the agents whose behaviour and attitudes determine the rule of recognition.

This putative solution to official indeterminacy can be illustrated with another of C&G's examples. When a citizen helps to apprehend lawbreakers by employing the power of citizen's arrest, she exercises law-enforcing powers comparable to those of police officers; however, it is not clear whether this exercise of a normative power makes the citizen an official whose behaviour and attitudes are relevant to the system's rules of recognition. For C&G the hierarchies of norms and officials allow Hart to presume, without providing any additional explanation, that high-ranked state judges are clear instances of officials of most state legal systems. "If anyone can be presumed to be a legal official," they claim, "surely a supreme court judge is one."<sup>17</sup>

This presumption provides a resource to solve the indeterminacy of disputed cases. To determine the official character of the individual who exercises powers of citizen arrest, the Hartian will look at the practices and decisions of the courts empowered to apply the norms regarding such cases. That is, according to C&G's construal, "if [the Hartian] can presume a core of officials such as judges, who sit at the top or center in a hierarchical structure of a legal system, worries about borders become less worrisome, since there is in practice a means of resolving such indeterminacy."<sup>18</sup> In conclusion the rules of recognition contain hierarchies that can be used to presume some central cases of officials, which in turn remedies the uncertainty about disputed cases.

<sup>&</sup>lt;sup>17</sup> Ibid., 16.

<sup>&</sup>lt;sup>18</sup> Ibid.

Furthermore, the presumption of hierarchy also provides resources to respond to the problem of circularity. C&G suggest that Hartian scholars can break the vicious circularity by offering *speculative social anthropological accounts*, thought-experiments or just-so stories about the social practice that explains the emergence of clear cases of officials.<sup>19</sup> Speculation not backed by evidence suffices in the context of state law, according to C&G, because the hierarchies of the rule of recognition allow the Hartian theorist to presume some clear instances of officials, and thought experiments complete the account.

### 1.3 The Unreliability of the Presumption of Hierarchy in International Law

Although C&G are ultimately unsatisfied with the presumption of hierarchy and speculative social anthropological accounts, they nonetheless hold that they provide "likely acceptable"<sup>20</sup> solutions to the problems of indeterminacy and circularity within the context of state law. However, as putative forms of non-state legal phenomena such as international or transnational law lack the hierarchical structures of norms and officials present in state law, the resources used to resolve the objections are not "reliable"<sup>21</sup> outside the domestic context. Without hierarchies, C&G claim, it is not possible to presume clear cases of officials to remedy indeterminacy about disputed cases and that allow thought experiments for breaking the circularity. And without an account of officials, the Hartian cannot identify the rule of recognition of non-state legal practices that specify their valid norms and borders

<sup>&</sup>lt;sup>19</sup> C&G cite the accounts provided by Jules Coleman, Kent Greenawalt and Brian Tamanaha. See Jules L. Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (New York: Oxford University Press, 2001), 100–1; Greenawalt, "The Rule of Recognition and the US Constitution (1987)," 4 n.6; Tamanaha, *A General Jurisprudence of Law and Society*, 142.

<sup>&</sup>lt;sup>20</sup> Culver and Giudice, *Legality's Borders*, 21.

<sup>&</sup>lt;sup>21</sup> Ibid.

with other normative phenomena. That is, without the hierarchies typical of state law, Hart cannot provide an account of legal officials which would allow him to develop a theory of non-state law.

C&G illustrate the Hartian incapacity to respond to their two objections without the resources offered by state law with a discussion of international law, the normative system that regulates the relationships between nation-states. Hart controversially diagnosed the international law of his time as resembling the law of primitive communities as it was bereft of a central legislature, courts with compulsory jurisdiction, and enforcement agents.<sup>22</sup> Thus, C&G's application of their two objections focuses on the putative official character of nation-states, for they are agents whose practices and behaviour are supposed to give rise to the international legal system. According to C&G, international law is "fraught with difficulties of circularity and indeterminacy" because states are at "one and the same time both the creators and the subjects of international law.<sup>23</sup>" They explain:

Circularity is most evident: statehood or state sovereignty in international relations requires recognition from other states. To escape from circularity of course requires a positive account of the practices or legal-normative powers which make states into legal officials, if they are to be viewed as creators of international law. Yet here indeterminacy looms large. It may be easier to distinguish the legal- normative powers that mark officials from citizens in state law, but the very exercise of powers by states that, e.g., create treaties, are the same powers that render them subject to treaty obligations.<sup>24</sup>

<sup>&</sup>lt;sup>22</sup> Hart, *The Concept of Law*, chap. X.

<sup>&</sup>lt;sup>23</sup> Culver and Giudice, *Legality's Borders*, 33.

<sup>&</sup>lt;sup>24</sup> Ibid.

In their view current attempts to apply the Hartian theory to international law do not solve the problem because they presuppose, and do not explain, the difference between the official and non-official capacities of states. C&G cite as an illustration David Lefkowitz's discussion of customary international law.<sup>25</sup> While Lefkowitz recognizes the need for an account of international legal officials to provide a successful theory of customary international law, he "set[s] this question aside" with the hope that speculative social anthropological accounts will suffice to provide a response.<sup>26</sup> However, the assumptions that make this strategy a valid solution in the context of state law—namely, hierarchies of norms and officials that allow the Hartian to presume undisputed cases of officials—are not present in international legal practice. That is, international law does not afford the possibility to presume states or any other agents as the hierarchically superior officials that can resolve the indeterminacy about disputed cases and break the circularity. Consequently, the Hartian cannot determine the official or non-official character of the exercises of normcreating powers by domestic states.

These considerations show "precisely" why the resources used in state law "offers little help to accounts of international law." <sup>27</sup> C&G conclude:

If states are at one and the same time both the creators and subjects of international customary law (and other types of international law), there is no hierarchy to climb onto which might bring determinacy to their membership in a class of international legal officials.<sup>28</sup>

<sup>&</sup>lt;sup>25</sup> David Lefkowitz, "(Dis)Solving the Chronological Paradox in Customary International Law: A Hartian Approach," *Canadian Journal of Law and Jurisprudence* 21 (2008): 129–148.

<sup>&</sup>lt;sup>26</sup> Ibid., 134.

<sup>&</sup>lt;sup>27</sup> Culver and Giudice, *Legality's Borders*, 37.

<sup>&</sup>lt;sup>28</sup> Ibid.

"And without knowledge of whether any international legal officials exist," they add, "it is impossible to conclude one way or the other whether an international rule of recognition exists."<sup>29</sup> These accounts of legal officials and the rule of recognition are required "to capture and distinguish international law and an international legal system from other forms of social order, social norm, and so on."<sup>30</sup> In sum, without the hierarchies typical of state law, the Hartian cannot provide a non-circular, determinate account of international legal officials. And without this account it cannot specify the international rule of recognition, so it cannot explain the systematic and legal character of the international legal order.

#### 2. The Trio of Constitutive Rules of Normative Systems

To respond to this powerful challenge, in this and the following three sections I will refine some central elements of Hart's theory of law. This refined Hartian account will allow me to provide a solution to the problems of circularity and indeterminacy that does not incorporate the resources that C&G introduce as putative solutions to the objections in the context of state law. The first of these elements is a clarification of the constitutive and social natures of what Hart calls the secondary rules of normative systems.

#### 2.1 *The Rule of Recognition as a Constitutive Rule*

As discussed in the previous chapter constitutive rules of all forms of normative practices have two distinctive features, namely, (1) their capacity to give rise to normative phenomena and (2) their character as social rules generated by the behaviour and attitudes

<sup>&</sup>lt;sup>29</sup> Ibid., 33.

<sup>&</sup>lt;sup>30</sup> Ibid.

of a group of agents. In normative systems the two defining features of constitutive rules are most evident in the Hartian description of the rule of recognition. This rule specifies "some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts."<sup>31</sup> Hart explains:

We only need the word 'validity,' and commonly only use it, to answer questions which arise within a system of rules where the status of a rule as a member of the system depends on its satisfying certain criteria provided by the rule of recognition. No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way.<sup>32</sup>

As shown in the passage the constitutive rule of recognition establishes the criteria that any rule must meet to be a valid rule of the system. In this sense the rule of recognition is constitutive of the system's valid or constituted rules.<sup>33</sup>

The passage also shows that the rule of recognition differs from valid or constituted rules in its model of existence. Constituted rules are valid or invalid by dint of the system's rule of recognition. For the Hartian, constituted rules need not be mandatory rules as Hart suggests. That is, there might be duties, powers, rights, etc. and other Hohfeldian elements created by enacted and non-practice constitutive norms that exist because they meet the criteria of validity.<sup>34</sup> By contrast, the rule of recognition has force and is operative by dint

<sup>&</sup>lt;sup>31</sup> Hart, *The Concept of Law*, 94.

<sup>&</sup>lt;sup>32</sup> Ibid., 109.

<sup>&</sup>lt;sup>33</sup> Ibid., 94.

<sup>&</sup>lt;sup>34</sup> This conception allows for the possibility of norms regulating the creation and application of norms that exists as constituted norms i.e. rules validated by the standards of the rule of recognition. Accordingly, the

of being followed and accepted by members of the relevant community. That is, a system's constitutive rule of recognition is operative or in force by dint of practice, whereas the system's constituted rules exist qua norms by dint of being validated by the system's rule of recognition.<sup>35</sup>

By describing the rule of recognition as a constitutive social rule the Hartian rejects the Kelsenian account of the foundational rule of a legal system.<sup>36</sup> Crudely put, the Kelsenian holds that all norms can be genetically traced to the constitution of the legal system, the master rule that validates each one of the system's rules. But when we inquire about the norm that validates the constitution we need to return to previous constitutions that authorize it. When we go back to the very first constitution we will reach a moment where the fundamental authorizing norm—the *Grundnorm*—has to be "assumed," or "postulated" or considered a "hypothesis."<sup>37</sup> Unlike the Kelsenian, the Hartian does not query the validity of the ultimate, validating norm. That is, the Hartian does not inquire whether the rule of recognition is valid or invalid. Instead, the rule of recognition is an efficacious or practiced social rule that exists when the community accepts certain criteria as establishing the public standards that guide communal life. As Hart puts it, the existence of the rule of recognition is "a matter of fact."<sup>38</sup>

expressions "rules of change" and "adjudication" will be reserved for the social, constitutive rules that create and unify normative systems.

<sup>&</sup>lt;sup>35</sup> Hart, *The Concept of Law*, 103.

<sup>&</sup>lt;sup>36</sup> Cf. Kelsen, Pure Theory of Law, 197, 203; General Theory of Law and State, 115–7.

<sup>&</sup>lt;sup>37</sup> Cf. Hart, *The Concept of Law*, 108, 293.

<sup>&</sup>lt;sup>38</sup> Ibid., 110.

It is possible that the norm-creators of a system codify the rule of recognition to provide it with a canonical formulation that brings certainty for the community.<sup>39</sup> However, such codification does not transform the rule of recognition into a constituted norm. As a customary norm, the rule of recognition consists of the criteria of validity practised in the community, and codification would be a dead letter if the criteria of validity were not efficacious. Hart recognized this point: "Even if [the rule of recognition] were enacted by statute, this would not reduce it to the level of a statute; for the legal statutes of such enactment necessarily would depend on the fact that the rule existed antecedent to and independent to the enactment."<sup>40</sup> In this sense the rule of recognition remains a social rule even when it has a codified formulation.

# 2.2 Rules of Change and Adjudication as Constitutive Rules

These two distinctive features—constitutive and social characters—also apply to the other two rules of Hart's trio of secondary rules, namely, the rules of change and adjudication. Per the Hartian genetic story of the legal system, these three rules remedy defects that exist in communities governed by simpler arrangements called normative sets.<sup>41</sup> A normative set lacks standards regulating the central normative activities of a community, i.e. the identification, creation, and application of communal rules. As a result they suffer from three defects: uncertainty about the identity of communal rules; static character derived

<sup>&</sup>lt;sup>39</sup> On this point, see Matthew H Kramer, *Where Law and Morality Meet* (Oxford: Oxford University Press, 2004), 110–14; Stefan Sciaraffa, "The Ineliminability of Hartian Social Rules," *Oxford Journal of Legal Studies* 31, no. 3 (2011): 620; Cf. Gardner, *Law as a Leap of Faith*, 68, 102; Matthew H. Kramer, *H.L.A. Hart* (Cambridge: Polity, 2018), chaps. 3, section 12.

<sup>&</sup>lt;sup>40</sup> Hart, *The Concept of Law*, 111.

<sup>&</sup>lt;sup>41</sup> Ibid., 91–8.
from its inability to alter its norms; and uncertainty about the application of the norms to particular cases.

The three rules at the foundation of normative systems solve these defects by regulating the key normative activities and by, crucially, empowering some agents to perform them i.e. community officials. The rule of recognition establishes criteria for the identification of the norms that govern communal life; the rules of change regulates the creation, modification, and removal of rules and empower some agents to perform such activities (i.e. norm-creators); and the rules of adjudication regulate how the violation of rules should be determined and by which agents (i.e. norm-appliers). In this sense the rules of change and adjudication are constitutive of the system's norm-creators and norm-appliers, the agents who perform the community's central normative activities.

The presence of a complement of norm-creating and norm-applying officials gives additional clarity to the normative order since these agents authoritatively identify and create the collective rules, apply them to specific cases, and monitor communal compliance. As a result, although the rule of recognition is constitutive of a "system of primary rules," and introduces the "embryonic form" of what Hart calls a "legal system,"<sup>42</sup> it does not solve all the defects of the normative set. The shortcomings are remedied only when the complete trio of rules is present. That is, the three rules *together* create a *normative system*, namely, a sophisticated arrangement that includes standards regulating the identification, creation, and application of communal rules. In this sense the rules of change and adjudication are constitutive of the complex arrangement that the Hartian calls a normative system.

<sup>&</sup>lt;sup>42</sup> Ibid., 94.

As a result the system's rule of recognition is not the only constitutive rule of the system. To illustrate this point consider the familiar interpretation that holds the rule of recognition as a master rule that validates all the system's norms, including other secondary rules.<sup>43</sup> For the refined Hartian account, this construal not only brings Hart's theory closer to the Kelsenian understanding that queries the validity of foundational norms but it also fails to capture the distinction between sets and system. Unlike a set, a normative system regulates its central normative activities; i.e. it has sophisticated arrangements that provide its community with a clearer idea of their rules, how they are created and applied, and by whom. A normative order exists only when the trio of constitutive rules is present.

Moreover, the norms of change and adjudication are not in a subordinate relationship to the system's rule of recognition, rather they are part of the backdrop of constitutive practice that gives rise to the practice and makes it what it is. Thus, the rules of change and adjudication are independent constitutive rules of the system that operate in tandem with the rule of recognition. As a result, as constitutive social rules, it is inapposite to query whether the rules of change and adjudication are valid or invalid. Like the rule of recognition itself, constitutive rules of change and adjudication exist and operate by dint of social practices rather than validation by other standards. In sum, their existence is also a matter of fact.

<sup>&</sup>lt;sup>43</sup> Ronald Dworkin and Scott Shapiro hold that the rule of recognition is the "master" rule of the legal system. Dworkin, *Taking Rights Seriously*, chap. 1; Shapiro, *Legality*, 80. In the same vein C&G have described the rule of recognition as a "tertiary" rule that validates all rules including secondary rules. *The Unsteady State*, 63.

## The Hartian Account of Officials

Per Hartian theory the constitutive rules of change and adjudication bring with them officials in charge of the creation and application of the norms of a normative system. However, as critics have rightly noted, although Hart suggested that officials exercise public powers he did not provide the elements to distinguish between the public powers of officials and the private capacity of subjects to create and apply norms. The refined Hartian account has the resources to remedy this critical gap.

### 2.3 Public Powers

For the Hartian the public or private character of an instance of norm-creation and normapplication depends on whether it is performed by individual members for their own part or for the community. To use familiar Kantian terms, community-members express in private acts their individual or unilateral will, while public acts express the collective or omnilateral will of the community on a normative issue. We can illustrate the Hartian understanding of the public-private distinction with Hart's domestic examples. The private powers of citizens to form contracts and make wills regulate how individuals can create norms governing their own affairs. By contrast, the public power to "legislate" refers to the enactment of general or individual norms for the community, not to any act of normcreation. Likewise, the public power to "adjudicate" is not any act of application of norms, but the utterance of settlements that decisively apply norms on behalf of the community.

Public or collective normative activities are performed differently in sets and systems. Normative sets are egalitarian communities that have not entrusted specific agents with powers to identify, create, and apply norms, so these normative activities are performed by the community as a whole. Hence the defects that Hart notes in normative sets. Since any public normative decision involves the participation of several community members, it might be difficult to identify the communal norms that regulate certain issues and their content, to create new ones or to apply them to specific cases. In contrast, a group governed by a normative system typically empowers specific agents to perform the central normative activities. The agents who perform the public normative activities are the officials of the community. It is distinctive of officials that they enact authoritative decisions about normative issues.<sup>44</sup> That is, officials establish the rules of the community, how are they applied and their content, so they cut off "deliberation, argument or debate"<sup>45</sup> among community members on normative issues. Hence, officials bring clarity to the system thereby resolving the problems evident in normative sets.

As a result Hartian officials are individual or collective agents that authoritatively exercise normative powers to settle normative situations on behalf of a given group. On this conception, as should be evident, Hartian officials are not only state representatives but any agent in charge of the authoritative identification, creation, and application of norms within a normative order.<sup>46</sup> To illustrate, consider the distinction between games ruled by sets and systems. In an informal game played without referees the violation of norms is determined by the community as a whole. There might be disputes among the private views

<sup>&</sup>lt;sup>44</sup> Hart, *The Concept of Law*, 136.

<sup>&</sup>lt;sup>45</sup> Hart, "Commands and Authoritative Legal Reasons," 253. Cf. Hart, *The Concept of Law*, 136.

<sup>&</sup>lt;sup>46</sup> As Roger Cotterrell notes, "Nothing in Hart's book seems to indicate that 'officials' for this purpose must be state officials: certainly the judges of an international tribunal and perhaps the priests of a religious group, the elders of a cultural or ethnic group, the committee of an association, or the directors of a corporation could qualify." *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Dartmouth: Ashgate, 2013), 37.

of different communal participants about the specific application of a given norm, and it might be difficult to reach official public decisions on these issues. In contrast, institutionalized games typically empower referees as norm-appliers and federations as norm-creators: the federation establishes the norms that regulate collective activities and alters them if necessary, while referees issue settlements that decisively determine the violation of rules and remedy communal tensions. Again, while the informal game might be well served by a set, other more complex situations (e.g. a national league) might need community officials. Yet the introduction of officials is not an unqualified benefit, for it brings with it gains and risk; officials might improve efficiency and certainty but might also create forms of oppression and alienation unobtainable in egalitarian societies.<sup>47</sup>

Power-conferring norms are central to the Hartian account of officials and allow us to distinguish officials from other notions with which they are commonly confused. We should distinguish between officials who exercise normative powers to issue enactments and settlements on behalf of normative communities and agents who exercise influence not backed by normative powers such as critics, charismatic members, lobbyists, and economic, intellectual, or social elites. The second kind of agents might exercise influence in the community but they do not qualify as community officials in the Hartian sense as their influence is not backed by power-conferring norms. That is, influential agents who do not exercise powers created by norms do not settle normative situations in the community via their utterances and deeds. By contrast, officials hold efficacious powers created by

<sup>&</sup>lt;sup>47</sup> Hart, *The Concept of Law*, 204.

customary or enacted norms to issue enactments and settlements on behalf of the community.

In addition to this, officials should also be distinguished from other agents and institutions that I will call community agents—agents that work for the community or represent it but who do not exercise normative powers to create or apply norms. For instance, a municipal trash collector is a community agent but not an official for he or she does not exercise a normative power. However, the same agent would be an official if he or she had powers to fine those who violate the rules about proper garbage disposal.

### 2.4 Two Types of Community-Officials

The Hartian further distinguishes between two kinds of officials: constituted and constitutive. *Constituted officials* are those created by the system's constituted rules, namely, those norms recognized by the system's rule of recognition. *Constitutive officials* are created by the constitutive social norms that give rise to the normative system, where rules of change and adjudication empower some officials to create and apply norms on behalf of the political community. To illustrate this distinction consider a polity where *Rex*, the holder of powers of norm-creation and norm-application, confers legislative capacities on a Minister of Economy who in turn creates a Tax Agency. Here, *Rex* is the constitutive norms that give rise to and unify the practice. *Rex's* power exists insofar as they are followed and accepted by the community. The Minister and the Agency, in turn, are constituted officials whose public powers are created and limited by the orders' constitutive norms, i.e., norms created under the rule of recognition "*Rex*'s enactments are law."

These two types of powers demand different inquiries. Constituted officials are identified through a doctrinal analysis of the public powers created by valid constituted rules per the system's rule of recognition. This first inquiry often involves technical and sometimes difficult questions about norms of competence and regulating jurisdictions. Treatises of administrative law in domestic legal systems are clear illustrations of the difficulty of the doctrinal identification of constituted officials as these treatises commonly provide intricate reconstructions of the numerous agents and bodies that exercise public powers on behalf of state political communities. In contrast, the identification of constitutive officials demands the explanation of the social, constitutive rules that empower some critical mass of agents to perform the central normative activities of change and adjudication and which thereby give rise to normative systems.

Hartian theory provides a socio-hermeneutical account of constitutive officials but does not engage in the doctrinal identification of constituted ones. The fine-grained account of constituted officials is an activity that is advanced by participants in the operation of the normative system. On this conception, what is critical for the specification of the systematic character of a given order is to identify the critical mass of constitutive officials who exercise normative powers to create and apply norms on behalf of the community, and whose actions resolve the defects of normative sets. The social rules that empower these officials constitute and unify the normative system.

Like all constitutive rules it is possible for the constitutive rules of change and adjudication to be codified or replicated in constituted norms. In our previous example we could issue a constitution codifying all the system's powers, including *Rex's* constitutive

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ones, which might bring further clarity to the normative system. However, such codification of constitutive rules does not transform the constitutive powers into constituted rules. As social rules, constitutive powers of adjudication and recognition are operative because they are practiced by a community and their codification would be a dead letter if the rules were not efficacious. In this sense normative systems that efficaciously regulate the central normative activities of certain communities are constituted—to use Stefan's Sciaraffa's apt expression—by a complex of "ineliminable social rules."<sup>48</sup>

#### 3. The Constitutive Rule of Recognition

#### 3.1 The Constitutive Function of the Rule of Adjudication

Although both rules of change and adjudication are constitutive rules of the normative system, the rules of adjudication play a more prominent role. I will refer to this feature as *the centrality of norm-appliers*.

For the Hartian the peremptory settlements of norm-appliers not only solve the inefficiency of diffuse social pressure but also help to remedy uncertainty about the system's norms. To use the hackneyed example, if the community does not have a mechanism for authoritatively establishing whether a disputed object (i.e. a *zucchetto* or a crown) counts as a "hat" for the purposes of the rule "remove your hat in church," the content of the rule remains indeterminate. Hart suggests that this might make communal obedience and enforcement of the norm more difficult. It might also generate disputes between different factions about the interpretation of the rule, and tensions between those

<sup>&</sup>lt;sup>48</sup> Sciaraffa, "The Ineliminability of Hartian Social Rules," 620.

who comply and those who do not comply or wish to take advantage of the indeterminacy.<sup>49</sup> Settlements issued by norm-appliers in specific cases not only solve individual disputes but also *authoritatively establishes the content of the norm*, thereby resolving communal tensions and facilitating obedience and enforcement.

Furthermore, the content-establishing function of norm-appliers also extends to the rule of recognition that specifies the community's criteria of validity. Since the community's norm-appliers must identify the rules that belong to the community's framework of public standards prior to their settlements, their pronouncements also authoritatively determine the criteria of validity. "If courts are empowered to make authoritative determinations of the fact that a rule has been broken," Hart wrote in the context of state law, "these cannot avoid being taken as authoritative determinations of what the rules are."<sup>50</sup>

Joseph Raz illustrates the pivotal role of norm-appliers by considering a community without officials in which a social rule empowers an agent with the power to decide whether group members have violated the public rules. In such a case the norm-applier remedies the defects of inefficiency and uncertainty by conclusively identifying the applicable norms and their content. The fact that a new social rule empowers a legislator does not alter the prominent role of the norm-applier. Since the norm-applier will decide cases based on the system's rules, his views about shared norms—including the norms enacted by the legislator—establish their content. Whereas other officials and community members might

<sup>&</sup>lt;sup>49</sup> Hart, *The Concept of Law*, 91–2.

<sup>&</sup>lt;sup>50</sup> Ibid., 97, 102–3, 137.

have "opinions" about what the communal norms should be, as Raz puts it, norm-appliers authoritatively establish the shared public standards that guide the community and also determine the content of these rules.<sup>51</sup> Hence, norm-appliers are the community's authoritative rule-identifiers, and their views are the ones that determine the system's rule of recognition.

The centrality of adjudicators transforms our understanding of the rule of recognition. For the Hartian the rule of recognition is not the product of the behaviour and attitudes of all the system's officials but the criteria of validity authoritatively ascertained by norm-applying officials.<sup>52</sup> In turn, the constituted norms are those identified by the criteria of validity effectively accepted by the system's norm-appliers. Thus, for the Hartian, in addition to creating the norm-applying officials and being one of the necessary conditions of a normative system, the rule of adjudication has one further constitutive role: the status of a constituted rule as a member of the normative system depends on its satisfaction with the standards that norm-appliers accept in common. In this sense the content of a normative system is equivalent to the norms authoritatively identified and applied by the community's norm-applying officials.

<sup>&</sup>lt;sup>51</sup> Raz, *Practical Reason and Norms*, 135; *The Authority of Law*, 108–9. Hart concurs: "There is, of course, a difference in the use made by courts of the criteria provided by the rule and the use of them by others: for when courts reach a particular conclusion on the footing that a particular rule has been correctly identified as law, what they say has a special authoritative status conferred on it by other rules." *The Concept of Law*, 101–2.

<sup>&</sup>lt;sup>52</sup> Hart, *The Concept of Law*, 116, 110.

# 3.2 Rules of Recognition Without Hierarchy

Attention to the centrality of norm-appliers and the constitutive role of the rule of adjudication clarify the role that hierarchy plays in normative systems. For the Hartian the mere presence of a hierarchy of norms is insufficient to determine whether specific constituted rules belong to the normative system. On the contrary, settlements of norm-applying officials are the key factor that authoritatively establishes the membership of a given norm to the normative system and determines the rule's content. If a community has a sophisticated hierarchy of sources and norms but lacks norm-applying officials who resolve disputes and other societal tensions about its rules, there would still be uncertainty about what the norms are and their content. Without norm-applying officials, moreover, such uncertainty would extend to the hierarchy itself and how it operates. In fact, for the Hartian, we can only argue that a community has a hierarchy of norms insofar as the ranking of norms is accepted by norm-applying officials.

As a result we should distinguish Hart's hierarchical conception of the rule of recognition from the general conception of the rule. As C&G rightly note, Hart introduces some hierarchies of criteria of validity in his discussion of "complex" rules of recognition i.e. rules of recognition comprising several criteria of validity such as certain authoritative texts, the enactment by specific bodies, enduring customary practices.<sup>53</sup> Hart further suggests that such a hierarchy establishing superior and inferior criteria is crucial to unifying them under the same rule. "The reason for still speaking of 'a rule' at this point is

<sup>&</sup>lt;sup>53</sup> Ibid., 95, 101.

that, notwithstanding their multiplicity, these distinct criteria are unified by their hierarchical arrangement."<sup>54</sup>

However, there is nothing in the doctrine of the rule of recognition that entails that the plurality of criteria of validity must be hierarchically organized. "What is crucial [for the existence of the rule]," Hart claims, "is that there should be a *unified or shared official acceptance* of the rule of recognition containing the system's criteria of validity."<sup>55</sup> Per the centrality of adjudicators, it is the norm-appliers whose official acceptance matters. That is, the animating feature of the rule is the mutual acceptance by a critical mass of normapplying officials of some criteria which identify the rules that guide communal life.

Shared acceptance of norm-applying officials is possible both in simple rules of recognition with one criterion of validity and complex rules that comprise several criteria. A rule of recognition with one criterion of validity like a list written in a public document or a monument (e.g. the Code of Hammurabi or *Duodecim Tabulae*) is operative when officials converge in the writing or inscription of a certain text as the "proper way to resolve disputes about the existence [i.e. validity] of a [constituted] rule."<sup>56</sup> In complex rules of recognition comprising several criteria of validity, norm-applying officials converge in a plurality of standards to identify the norms of the system. If all there is to a rule of recognition is that the authoritative criteria of validity are mutually and publicly recognized by the system's norm-applying officials, it seems a lack of imagination to hold that a

<sup>&</sup>lt;sup>54</sup> Hart, *Essays in Jurisprudence and Philosophy*, 360. As Matthew Kramer presents the Hartian view, the hierarchical arrangement of the criteria of validity "ties" them "together as a coherently interrelated set of standards. The integratedness which it bestows upon them is what justifies our designating those criteria and their rankings as an overarching rule of recognition." Kramer, *Where Law and Morality Meet*, 107.

<sup>&</sup>lt;sup>55</sup> Hart, *The Concept of Law*, 115 (emphasis added).

<sup>&</sup>lt;sup>56</sup> Ibid., 92.

hierarchical arrangement is the only way to unify a plurality of criteria. Nor it is clear why Hart holds that the shared perspective of norm applying officials is insufficient for unification. On the contrary, it seems very plausible that officials might converge in a multiplicity of criteria of validity to the norms that guide a given community.

To illustrate the possibility of unified, non-hierarchical complex rules of recognition, consider Werner Menski's claim that a lack of hierarchies is one of the defining features of African customary law. Relying on Kojo Yelapala's description, Menski suggests that four different "sources" of law that "may be consulted simultaneously" can be recognized in most African customary normative orders—namely, the authority of the living (kings or lineage heads); the authority of ancestors; the authority of supernatural forces and the authority of the supreme, omnipotent being.<sup>57</sup> Menski then explains:

The African model thus emphasizes the all-pervading authority of socio-religious authorities, but does not give them a hierarchically superior position. This confirms the hypothesis that in traditional African processes of law-finding, several potentially conflicting sources of authority were always ideally harmonized into one system of interacting equals rather than allowing any one element superiority over the others.<sup>58</sup>

For the Hartian, Menski signals that participants of numerous African normative orders converge in a plurality of non-hierarchically arranged criteria of validity. Such convergence might give rise to an operative rule of recognition, and thereby to a normative system, in

<sup>&</sup>lt;sup>57</sup> See Kojo Yelpaala, "Circular Arguments and Self-Fulfilling Definitions: 'Statelessness' and the Dagaaba," *History in Africa* 10 (1983): 365.

<sup>&</sup>lt;sup>58</sup> Menski, Comparative Law in a Global Context, 430.

which the communal norm-applying officials determine the order's content in their decisions of individual cases.

In sum, the presence of a hierarchy of criteria of validity is not necessary for what C&G call the functional role of the rule of recognition, nor is it necessary for the existence of simple or complex rules of recognition. In complex situations the different criteria of validity might be hierarchically organized and this might increase the certainty of the rule of recognition, but the hierarchy is not necessary for the rule's existence. That is, there is a rule of recognition when norm-applying officials converge on one or many criteria of validity to identify which norms belong to a normative system and, when there are several criteria, they might or might not be hierarchically arranged.

#### 3.3 The Proto-Doctrinal Conception of the Rule of Recognition

Based on the preceding elements the refined Hartian account provides an alternative conception of the rule of recognition. This alternative rests on the distinction between quasi-sociological questions about the existence of a normative system and doctrinal questions about the content of such a system. For the Hartian the rule of recognition is best understood as a *proto-doctrine about the criteria of validity*, an officially shared framework in which doctrinal questions about the normative system can be formulated.

On this conception, for a rule of recognition to exist, norm-appliers must largely converge on the criteria or sources of norms that guide the community. Officials might converge on a single criterion ("all norms enacted by Rex") or several formal and substantive criteria of validity (e.g. legislation and precedents that respect the equality of citizens). However, sophisticated proto-doctrines might also stipulate impermissible sources, accepted methods of legal reasoning and interpretation, and hierarchies of several kinds (hierarchies of norms, criteria of validity, and the values promoted by the system).

It is a central feature of the proto-doctrinal conception that the unified officials' acceptance of the criteria of validity does not imply a shared perspective about all the norms entailed by the authoritative marks. Not only might participants have difficulties in capturing and expressing propositions about the content of social rules like the rule of recognition, but also (like any other norm) the rule of recognition might have an "open texture"—namely, it might be indeterminate what is covered by the rule. Thus, the system's participants might disagree about the details of the rule and the standards it identifies.<sup>59</sup> However, these disputes about the content of the rule are resolved by the settlements of norm-applying officials. That is, norm-applying officials are in charge of providing the authoritative, fine-grained account of the system's content—i.e. the norms entailed by the criteria of validity.

This formulation brings further clarity to the distinction between normative sets and systems. In both types of normative orders there might exist doctrinal disputes about the content and application of communal norms but these orders differ in how these disputes are framed and settled. A community governed by a normative set lacks a unified authoritative perspective from which to frame questions about the content of their normative orders. By contrast, a normative system is a complex with sufficient maturation and concreteness about the sources of communal standards and that includes officials in charge of the creation and application of norms. Given these features, in systems, doctrinal

<sup>&</sup>lt;sup>59</sup> Hart, *The Concept of Law*, 149–53, Cf. 123.

disputes largely concern the officially accepted perspective on the sources of authoritative public standards and they can be authoritatively resolved by the system's norm-appliers.

In consequence, far from providing evidence of the non-existence of unified acceptance, disputes about the application of the different criteria of validity are a typical feature of normative systems. Community members, including norm-appliers, might have diverging views about the membership of constituted norms to the system, their applicability to particular cases, competing methods or interpretation, and even about the goals or moral values that inform the practice. However, these doctrinal disputes presuppose substantial agreement about the sources of public standards collectively recognized and enforced by a compound of norm-appliers. In other words, the Hartian account of the rule of recognition explains the normal background or proper context of efficacious constitutive rules in which doctrinal debates about collectively recognized sources can be framed and settled.

In sum, the Hartian offers a quasi-sociological account of the marks that identify valid norms but does not attempt to offer a fine-grained doctrinal account of the system's content. This quasi-sociological exercise is theoretically illuminating in a number of ways. For present purposes the most germane is that this account facilitates what I refer to as a doctrinal conception of the rules that constitute any legal system. That is, the protodoctrinal conception of a system's rules locates the base material that informs fine-grained doctrinal judgments about the identity of the relevant system's rules. The officially accepted proto-doctrine is, in short, the arena where doctrinal disputes take place within normative systems.

## 4. The Constitutive Rule of Adjudication

The elements developed in the previous section allow us to reframe C&G's indeterminacybased critiques. Such a critique rests on a widely shared interpretation of Hart's project which holds that the system's rule of recognition is the criteria of validity practised by all agents who exercise public normative powers. Hence it is necessary to identify the totality of legal officials to identify that system's rule of recognition. Irrespective of whether this interpretation is exegetically accurate, the refined Hartian theory allows for an alternative reconstruction.<sup>60</sup> Given the central role that norm-applying officials play, the Hartian requires only the identification of a critical mass of agents whose behaviour and attitude embody the system's constitutive rule of adjudication. Hence, for the Hartian, the critical activity is the identification of the constitutive norm-applying agents empowered by the rule of adjudication whose behaviour and attitudes determine the constitutive rule of recognition. In this section I develop such an account.

Because a constitutive rule of adjudication is a social power-conferring rule, I must devote a few words to an account of rules of this kind. Following this I provide an account of the rule of adjudication that incorporates a distinction between two kinds of normappliers that I call adjudicators and enforcers. Finally, I will clarify the distinctive protodoctrinal account of the constitutive rule of adjudication. Per this view, like the rule of recognition, the social rule that empowers constitutive norm-appliers is comprised by the

<sup>&</sup>lt;sup>60</sup> In support of the Hartian interpretation it is useful to note that most iterations of the problems of circularity recognize the argument of the centrality of adjudications. Most of the writers cited in footnote 5 hold that the circularity occurs between the rule of recognition and the rule of adjudication: the rule of recognition is identified by judges and other norm-applying officials empowered by the rule of adjudication while judges and other norm-applying officials are empowered by norms identified by the rule of recognition.

shared understanding of the compound of adjudicators and enforcers, but it does not provide a fine-grained account of the identity of constituted norm-appliers.

4.1 Social Power-Conferring Rules

As several theorists have highlighted, heretofore no account of social power-conferring rules has been provided.<sup>61</sup> Here, I attempt to remedy this critical deficit by developing such an account, drawing on some resources from Hart's account of social mandatory norms.<sup>62</sup>

For the Hartian there are two requirements for the existence of a social powerconferring norm. First, social rules of this kind entail *habitual recognition* of the capacity of an agent or group of agents to specify peremptory settlements of standards of behaviour for the relevant community, while excluding the community at large and other specific agents from issuing such settlements.<sup>63</sup> This recognition is primarily evidenced by the group's regular compliance with the settlements that empowered agent or agents specify. And, second, a customary power-conferring norm further requires *collective acceptance from the internal point of view* of the agent's norm-applying capacity by at least some of the group's members. Such an attitude entails acceptance of the settlements that the empowered agent or agents identify as standards of conduct to which group members are required to conform; a disposition to criticize members who fail to recognize such agents; authority to specify such settlements or fail to comply with the specified settlements; and a

<sup>&</sup>lt;sup>61</sup> See Stephen R. Perry, "Where Have All the Powers Gone? Hartian Rules of Recognition, Noncognitivism, and the Constitutional and Jurisprudential Foundations of Law," in *The Rule of Recognition and the U.S. Constitution*, ed. Matthew Adler and Kenneth Einar Himma (New York: Oxford University Press, 2009), 307–8; Kramer, *H.L.A. Hart*, 47.

<sup>&</sup>lt;sup>62</sup> Hart, *The Concept of Law*, 55–8.

<sup>&</sup>lt;sup>63</sup> Cf. Hart, "Commands and Authoritative Legal Reasons," 258–9.

disposition to apply social pressure against those who fail in these ways. To be sure, the existence of a power-conferring rule is compatible with some degree of non-compliance with the mandatory norms that officials identify and apply, so long as compliance is monitored, violations are declared, and there are critical reactions against deviators, and some threshold level of resulting compliance within the relevant group.

In most of Hart's examples of social rules a preponderance of the group members exhibits the internal point of view and exercises critical pressure against deviators. We can call this situation *articulation by broad support*. However, Hart also describes a second model that we can call *articulation by concentrated pressure*. Social rules of this second kind are established by dint of acceptance from the internal point of view by "a minority of influential and well-organized agents" <sup>64</sup> who compels obedience in the community by exercising social pressure against non-compliers.

Further, it is a central insight of Hart's theory that the relevant minority whose behaviour and attitudes give rise to the social rules might be constituted only by the system's officials. In such a situation officials mutually accept their respective powers from the internal point of view and exercise social pressure sufficient to secure the larger group's general compliance with the norms that they create, identify, and apply. The second form of articulation of social rules informs Hart's account of the existence of a normative system. Hart writes:

There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are

<sup>&</sup>lt;sup>64</sup> Ibid., 257.

valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. The first condition is the only one which private citizens need satisfy: they may obey each 'for his part only' and from any motive whatever; though in a healthy society they will in fact often accept these rules as common standards of behaviour and acknowledge an obligation to obey them... The second condition must also be satisfied by the officials of the system. They must regard these as common standards of official behaviour and appraise critically their own and each other's deviations as lapses.<sup>65</sup>

Per the distinction formulated above Hart suggests in this passage that the constitutive rules of normative systems can be articulated by concentrated social pressure. That is, a legal system exists *at least* if its officials accept the trio of constitutive rules from the internal point of view, and the system's subjects comply with the settlements the system's officials specify in accordance with the trio of system-constituting rules. Note that on this account officials must exhibit the hallmarks of the internal point of view, whereas subjects, in general, need not so long as they generally comply with the settlements that the system's officials issue. It may be further noted that subjects might comply with communal norms and official settlements for any reason, including a sense of moral duty, habitual conformity, and even fear of sanction.

This account aptly characterizes complex and large-scale normative orders with thousands or millions of participants such as those constituted by the citizens of a nationstate, the professional soccer players ruled by FIFA or traders whose transactions are

<sup>&</sup>lt;sup>65</sup> Hart, *The Concept of Law*, 116–7.

regulated by non-state norms. In such cases not all community members know, let alone critically accept, the constitutive social rules that give rise to the normative practices that govern them and empower their norm-making and norm-applying institutions.

As evident in the cited paragraph, Hart provides an account of the minimum conditions for the existence of a legal system. He describes as "healthy" those communities in which subjects have reasons to accept the system's constitutive norms from the internal point of view; and as "deplorably sheep-like" where the constitutive rules are critically accepted by officials only.<sup>66</sup> Thus, the Hartian allows that deplorable legal systems might exist and the recognition of this systematic character serves to highlight part of the danger they represent. For instance, a kleptocratic arrangement where subjects are alienated by the powers of an influential minority who empower themselves by monopolizing intense forms of social pressure meets Hart's minimal conditions despite being corrupt and deplorable.

### 4.2 The Existence Conditions of the Rule of Adjudication

The refined Hartian theory clarifies yet one more distinction between two types of normappliers that we can call adjudicators and enforcers. *Adjudicators* are norm-appliers who decisively decide on alleged violations of the system's rules.<sup>67</sup> Hart's primary examples of adjudicators are referees in games or courts in state law. In turn, *enforcers* are officials who

<sup>&</sup>lt;sup>66</sup> Ibid., 116. Ibid. Cf. Jeremy Waldron, "All We Like Sheep," *Canadian Journal of Law & Jurisprudence* 12 (1999): 169–188; Leslie Green, "*Positivism* and the Inseparability of Law and Morals," *New York University Law Review* 83 (2008): 1035–1058.

<sup>&</sup>lt;sup>67</sup> Hart, *The Concept of Law*, 141–2. Hart considers the introduction of adjudicators as a transformation as important as the evolution from "regime of custom to a mature system of law." Ibid., 142. Raz offers a similar argument assigning a central role to "primary institutions," a special form of "norm-applying institutions" whose authoritative decisions are "binding even when [they are] mistaken." *Practical Reason and Norms*, 135; *The Authority of Law*, 108–9.

monitor subject compliance with communal rules and settlements and apply social pressure to violators, oftentimes at the behest of adjudicators. Examples of the second kind include domestic executive bureaucrats, police officers, and tax agents. The Hartian analysis focuses on adjudicators because they have a more prominent role in exercising the constitutive function of ascertaining the system's norms. The enforcement of communal standards, in turn, might be performed by the community at large, by non-specialized officials, or even by officials of other normative orders.<sup>68</sup>

We have now sufficient resources to provide the Hartian account of a social rule of adjudication. To introduce this account I will employ again Hart's example of the rule about wearing a hat in church. Imagine a community in which priests police compliance with the rule "no hats in the church," where priests' judgments motivate criticisms and the exercise of effective social pressure against rule violators. In general, such a community harbours a social power-conferring rule investing its priests with a norm-applying power if the following two conditions are met: (1) community members habitually comply with the priests' judgments with respect to certain rules that the priest identifies as mandatory. And (2) all community members or some crucial subset of them accept the priests' powers from the internal point of view and, consequently, criticize and exert social pressure against those who do not recognize the priest's power or abide by his settlements. Under the broad support model, the priest's norm-applying power exists by dint of general community acceptance of the priest's power from the internal point of view and its effective

<sup>&</sup>lt;sup>68</sup> For example, state enforcers give efficacy to rules and settlements of private associations, norms from other states as regulated by international private law, and transnational arbitration regimes.

enforcement of general compliance with the priest's exercise of this power. In the concentrated pressure model, the priest's power exists by dint of a minority's acceptance of the priest's norm-applying capacity, where the minority is capable of applying social pressure on the group sufficient to motivate general compliance.<sup>69</sup>

Let us further imagine that in this community the priest issues settlements that decisively establish the violation of mandatory rules whilst a group of acolytes exercises the social pressure that gives efficacy to the priest's settlements (e.g. they verbally censor deviators). In such a situation we can characterize the priest as an adjudicator and the acolytes as communal enforcers. The existence conditions of the acolytes' norm-enforcing powers have a similar explanation: such power exists if the community habitually recognizes the acolytes' capacity to enforce the priest's settlements, and some members of the community accept such capacity from the internal point of view. These enforcing powers could also be structured by broad support or concentrated pressure. Of particular interest for the present purposes is that under the concentrated pressure model, the priest and acolytes could mutually recognize each other's respective capacities to adjudicate and enforce communal norms, while the community at large might even be alienated and only yield to the enforcers' social pressure.

This is the germ of a rule of adjudication of complex normative systems that Hart attempted to describe: a complex social situation in which a complement of normappliers—adjudicators and enforcers—mutually and publicly recognize one another's powers to identify and apply communal norms and secure the compliance of those subject

<sup>&</sup>lt;sup>69</sup> Hart, The Concept of Law, 60–1, 114 Cf. 20–1.

to the norms they identify in accordance with their judgments about the correct application of those norms. It is important to note that, even in the second form of articulation, the official character of an agent is not only a function of its capacity to exercise brute social pressure or influence in the community. For someone to be considered as an official the agent's capacity to change or apply norms is constituted by a power-conferring constitutive social rule. Such a rule is manifested by the relevant officials' practical attitudes and applications of social pressure, and the community's compliance. The key point is that officials normatively empowered in this way are not merely folks who *de facto* exercise social pressure and secure conformity; they are agents who can create and uphold mutually accepted normative powers through their efficacious exercise of social pressure over a certain community.

## 4.3 The Proto-Doctrinal Conception of the Rule of Adjudication

At this point we have reached a provisional account of the constitutive rule of adjudication of the normative system. Such a rule exists by dint of a pattern of treating a critical mass of agents and institutions as empowered to police and apply the system's rules. This practice might be realized by way of acceptance from the internal point of view by either the community as a whole (i.e. broad support) or a cohesive set of agents who can secure communal conformity (i.e. concentrated social pressure model). In complex, multi-official communities established by concentrated pressure like contemporary states, the existence of a constitutive rule of adjudication can be verified by locating a critical complement of adjudicators and enforcers who mutually and publicly recognize one another's powers to identify and apply communal norms, and who can secure compliance among subjects for the standards they identify and the ruling they make. For example, most contemporary states have a cohesive set of adjudicators (e.g. courts) and enforcers (e.g. executive officials and police agencies) who identify and apply the laws of the system. These norm-applying officials effectively monitor compliance with the rules they identify and their settlements, exercising social pressure against non-compliers, while the bulk of subjects might or not accept such power-conferring standards from the internal point of view.

Subsequent to this the rule of recognition of a normative system comprises the authoritative criteria of validity mutually and publicly recognized by the efficacious complex of adjudicators and enforcers. Hence, the constituted norms are those identified as such by the criteria of validity effectively accepted by the system's norm-appliers. Or, to put it differently, the status of a constituted rule as a member of the normative system depends on whether it satisfied the standards that the compound of adjudicators and enforcers accept in common.

The Hartian socio-hermeneutical account seeks to identify the critical group of norm-applying officials that constitutes and unifies the practice but it does not attempt to provide a fine-grained account of all the agents who exercise norm-applying powers in the community. We can refer to this understanding as the proto-doctrinal conception of the rule of adjudication. Per this account, what is crucial for the existence of constitutive social power-conferring rules is *sufficient convergence* regarding the critical group of agents obeyed by-and-large by the community, *not* the absence of disagreement. The Hartian allows for disputes about the precise contours of the community's set of constitutive officials. If a critical mass of agents is absent or there are competing factions of officials, we might be in front of a normative set or competing normative systems.

As should be evident, nothing in the Hartian account entails that constitutive normapplying officials are a necessary feature of every normative order, that they should be presumed, or that the presence of officials is the point of departure to study legality. Instead, the Hartian begins with the study of normative orders, some of which regulate political communities. If the normative order lacks norm-appliers; the existence of norm-appliers is doubted; or the existing officials do not act in tandem; the community is still ruled by a normative set that likely suffers from the three normative defects. If, however, we can identify a critical mass of agents empowered by a social rule to identify and apply collective rules whose decisions are largely observed by the community at large and supported by sufficient social pressure, we have identified a social rule of adjudication. By identifying such a rule, we have taken a crucial step in the identification of a society ruled by a normative system.

## 5. Meeting the Problems

# 5.1 The Problem of Indeterminacy Resolved

As I shall now explain, the refined Hartian theory developed above has sufficient resources to meet the challenges advanced by C&G. I will begin my exposition with a discussion of the more fundamental problem of the indeterminacy of officials. As discussed above the problem of indeterminacy rests on the presupposition that any adequate theory of law must be able to specify the identity of the legal norms, and officials and that Hartian legal theory is unable to satisfy this desideratum. As construed here this criticism has bite only insofar as it implicates the fundamental aspiration of Hartian theory—namely, to provide a theoretically illuminating account of legal norms and legal systems. The refined Hartian theory that I have developed here is able to meet this indeterminacy-based challenge for it brings into view a crucial distinction between proto-doctrinal and doctrinal conceptions of the officials and norms that has heretofore been overlooked not only by those who level the charge of indeterminacy, such as C&G, but also by legal theorists in general. More pointedly, once this crucial distinction is brought to the fore, the theoretical utility of the refined Hartian account begins to come into full view.

The refined Hartian account does not attempt to provide an account of how to generate the fine-grained enumeration of constituted officials and norms of any given legal system that the problem of indeterminacy requires. Rather, the refined account locates what I refer to as a proto-doctrine of criteria of legal validity, a quasi-sociological account of a system's rule of recognition, together with parallel proto-doctrinal rules of change and adjudication. In this reading, as long as the theorist can identify a sufficiently unified practice of official acceptance of the criteria of validity (e.g. legislation, precedent, custom) as well as sufficiently unified parallel practices of official acceptance of the constitutive rules of change and adjudication, the Hartian can individuate particular normative systems and differentiate any such systems from other normative orders. For example, Canada's proto-doctrine of criteria of validity and its officials is sufficient to identify its legal system and separate it from others such as the American one and international law. However, this proto-doctrinal conception of the system's constitutive rules does not aspire to directly

enable or imply a fine-grained account of the norms that compose the Canadian legal system, nor a detailed account of all agents who exercise normative power on behalf of the Canadian polity. Rather, the Hartian seeks to provide a quasi-sociological account of the habitually followed and accepted practices that constitute any legal system. To do that the Hartian requires no more than a reconstruction of the behaviour and shared understandings that animate the constitutive powers in the community.

These resources show why C&G's borderline cases of officials do not pose a challenge to the Hartian account. The examples of lawyers, accountants and citizen's arrest do not involve constitutive officials recognized or obeyed by the community at large, let alone members of the critical mass of constitutive norm-applying officials that identify the rule of recognition. Rather, C&G highlight doctrinal disputes about the official character of constituted officials created by valid rules of the system. These doctrinal disputes are similar to other disputes about the official nature of a given agent or a particular exercise of normative power, which are typical of state legal systems. Familiar examples are inquiries such as "Is the President allowed to regulate transportation?," "Is education a provincial or federal issue?," and "Were the police entitled to search this particular house?" Normative systems typically have standards to determine when officials act "beyond their powers" (ultra vires), in their "personal" capacity, or even as "criminals in uniform," and often have standards to determine the responsibility of the agents and the community, if any, in such cases. It is crucial to note that such doctrinal disputes arise within normative systems with efficacious criteria of validity practiced by the critical compound of courts and executive bureaucrats that secure compliance among subjects. Further, norm-applying officials are called to resolve indeterminacy about the official character of specific agents and their actions. In other words, far from a decisive objection to the Hartian account of legal officials, doctrinal disputes about the official nature of constituted officials is a central feature of normative systems.

C&G's example of Canadian university presidents deserves special mention. Per C&G's description these agents enjoy substantial statutorily conferred powers and their decisions are recognized and supported by state officials.<sup>70</sup> For the Hartian these agents cannot be deemed constitutive officials of the Canadian polity for they do not seem to be part of the compound of agents that identify the standards that guide the community and whose directives are followed by the bulk of citizens. However, it is a matter of doctrinal inquiry to determine whether university presidents exercise powers created by legislated norms to settle normative situations on behalf of the state. If the doctrinal inquiry determines that they do exercise such powers, the Hartian could recognize university presidents as constituted officials of the Canadian polity.

In addition, the Hartian can provide an alternative analysis: the theorist can also approach universities as normative orders of their own i.e. each university is a unified complex of norms related to but independent from the legal system of the Canadian polity. In this second analysis university presidents are candidate examples of officials who wield powers to enact settlements on behalf of this community. Further, these agents might be deemed constitutive officials if the quasi-sociological analysis determines that they are part

<sup>&</sup>lt;sup>70</sup> Culver and Giudice, *Legality's Borders*, 47–8.

of the critical mass of agents empowered by the efficacious social rules of change and adjudication that constitute and unify the university's normative order.

The second perspective further illustrates new subtleties in the Hartian account. We can see that any application of the Hartian theory departs from the individuation of normative orders and these normative orders might be organized as normative systems that include their own group of officials. Moreover, nothing precludes the same agent from acting as an official of different communities. For instance, university's constitutive officials might also be constituted officials empowered by valid norms of state law. Finally, like universities, there might exist other non-state normative orders within domestic jurisdictions such as unions, associations, corporations, etc. which are constituted, recognized, accepted or tolerated by state law or that operate parallel to the domestic normative system. The Hartian account provides resources that help to uncover and give an account of such normative orders.

## 5.2 The Problem of Circularity Resolved

Now recall the charge that Hart's legal theory is circular because it holds (1) the rule of recognition of any legal system, and hence the system's complement of valid norms, is constituted by the criteria of validity accepted in common by the system's legal officials, and (2) the officials of any system are those specified by the system's valid norms, i.e. those recognized by the system's rule of recognition.

The refined Hartian account can readily meet this objection for it holds that, just like rules of recognition, the rules of change and adjudication that constitute the officials of any legal system are effectively practiced rules. As such the rules of change and adjudication are not creatures of the constituted rules recognized by the system's rule of recognition. Rather, such norms exist by virtue of being practiced and accepted from the internal point of view by the community as a whole (broad support) or by the mass of officials (concentrated pressure). Thus, the refined account suffers no vicious circularity for it does not rely on the rule of recognition to identify the system's constitutive officials; rather, the existence of such officials is a matter of social practice.

This interpretation compares favourably to the more familiar interpretation of Hart's project in two respects. First, the refined Hartian conception avoids some explanatory distortions of the Kelsenian query about the foundations of the system's constitutive rules assumed by the problem of circularity. For instance, in the aforementioned polity in which *Rex* holds the powers of law-creation and law-application, it could be proposed that *Rex's* constitutive powers are validated by the simple rule of recognition establishing "*Rex'* enactments are law." Such an interpretation unwarrantedly transforms the rule of recognition into a sort of meta-rule of the legal system. However, such an account is not only cumbersome but also distorts the constitutive nature of the rules of change and adjudication as well as the relationships among the constitutive bedrock as composed by a trio of secondary rules which establishes the criteria of validity and empowers *Rex* to create and apply his directives. The presence of the trio of constitutive rules is the critical element that transforms such an order into a Hartian normative system.

Second, the refined Hartian theory provides a unified account of normative orders that is continuous between legal and non-legal practices. To see this point, contrast the

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Hartian account with familiar accounts of games provided by social ontologists and legal theorists.<sup>71</sup> For purposes of the illustration, I shall consider games as paradigmatic examples of non-legal practices.<sup>72</sup> When a social philosopher examines the existence of non-legal practices, they do not typically look for the master rule that validates all the norms of the system including the power of its core officials. For example, to explain an institutionalized sports federation such as FIFA or NHL, familiar accounts do not look for the master standards that validates all the system's norms including the powers of referees or federations, let alone presume a hypothetical *Grundnorm* of soccer or hockey. Very differently, the theorist simply explains the constitutive norms that give rise to the practice which, in some cases, bring with them norm-creating and norm-applying officials. Although paradigmatic legal practices such as state law are often more complex, the Hartian holds that they are also the product of constitutive social practices and they are to be explained using similar considerations. In other words, in the same way that we do not typically look for the ultimate master rule that validates all of the norms of non-political communities, there is no theoretical or practical reason to look for such a rule in legal practices.

<sup>&</sup>lt;sup>71</sup> For some discussion on institutionalized and non-institutionalized games, see John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969), 33–12; Raz, *Practical Reason and Norms*, 111–123; John R. Searle, *Construction of Social Reality* (New York: Simon & Schuster, 1995), chap. 3; Andrei Marmor, *Social Conventions: From Language to Law* (Princeton, N.J.: Princeton University Press, 2009), chap. 3.

<sup>&</sup>lt;sup>72</sup> In chapter 5, I explore the possibility that some institutionalized games might give rise to legal practices.

# 5.3 Avoiding the Presumption of Hierarchy

To further clarify the refined Hartian account it is useful to consider again the presumptions of hierarchy discussed above and posited by C&G as a remedy to the problem that Hart calls normative "uncertainty" and C&G "indeterminacy" about the norms of the system. The refined Hartian reading needs not to rely on a presumption of hierarchy to meets these challenges. Rather, it is the presence of a compound of norm appliers what brings determinacy to the system. As discussed in previous sections, normative hierarchies are usual features of the domestic legal systems that Hart studied, but they are neither necessary elements of every union of primary and secondary rules, nor should they be presumed for a normative system to be intelligible or operational. A functional normative system might have a rule of recognition including one or several criteria of validity without a hierarchical ordering (e.g. African customary law), and all constitutive officials can be at the same level (e.g. a game with several umpires or a polity with several Reges). In such cases, normappliers are called upon to resolve doctrinal disputes about the membership of the valid norms and the public character of constituted officials. Hart provides an argument, not a presumption, to support the privileged role of norm-appliers. Thus, if a community has a rule of recognition including a sophisticated non-official based hierarchy of sources and norms but lacks a group of norm-applying officials, it has not yet remedied the problems of indeterminacy of norms and officials. In sum, the systematic character of a normative system does not depend on the presence of a hierarchy of norms but on the presence of norm-appliers and norm-creators and the existence of a shared perspective about the criteria of validity among the system's norm-appliers.

In closing my response to C&G's challenge, it is important to note that some parts of their critique are also based on the idea that the very notion of community-official is "hierarchical." Michael Giudice has written in a comment on a previous version of this paper:

Whenever there are officials (legal or otherwise), hierarchy exists, since some (the officials) have power or authority to settle disputes which others (regular subjects) lack. Trying to argue that there could be officials without hierarchy is like trying to square the circle.<sup>73</sup>

It seems, then, that two different phenomena are called "hierarchy" in C&G's formulation. One sense of hierarchy refers to a ranking of officials implied in the rankings of norms. My argument has responded to this first sense. A different sense, noted in the passage, relates to the effective ability of an agent to guide the community. In the Hartian account officials capture this second sense of hierarchy as they are the agents endowed by the system's norms with the capacity to settle situations on behalf of the community.

In my view this second sense of hierarchy is telling of what C&G find most problematic of Hart's account: the centrality that the theory assigns to officials distorts the explanation of law qua social phenomena. Like other critics C&G worry that Hart's theory makes the existence of law dependent on the recognition of a special class of powerful agents only without considering the behaviour and attitudes of the people who live under the law's norms.<sup>74</sup> As a remedy, they suggest to "turn pyramid back on its social base" i.e.,

<sup>&</sup>lt;sup>73</sup> Michael Giudice, comments from December 1, 2018 (in file with the author).

<sup>&</sup>lt;sup>74</sup> See Culver and Giudice, *Legality's Borders*, 19–20, 123. For a similar claims see Massimo La Torre, "The Hierarchical Model and H. L. A. Hart's Concept of Law," *Revus. Journal for Constitutional Theory and Philosophy of Law*, no. 21 (2013): 160.

to minimize the role of legal officials in legal theory and assign the central explanatory role to subjects.<sup>75</sup>

While such a worry might be justified in familiar understandings of Hart's theory it does not affect the renewed conception developed here. Per the refined Hartian account advanced here officials are not a necessary feature of legality nor their presence should be presumed. Instead, they are agents who perform central normative roles, and whose presence alters the nature of the normative order. This feature plays a central explanatory role in other accounts of social normative phenomena. For example, social ontologists have discussed what they call "operative" members that transform "egalitarian" collectives where all members accept the constitutive rules into "structured" or "institutionalized" communities.<sup>76</sup> However, the Hartian account goes further than typical socio-ontological accounts: this account also clarifies that customary power-conferring rules in large institutional frameworks are commonly, but not necessarily, constituted by dint of being accepted by an influential minority only and the effective social pressure that this influential minority can exert on other members of the community. One additional Hartian contribution is the clarification of different moral-political questions. On this account, normative systems allow inquiries not possible in simpler arrangements such as the problems of the *authority* of those agents who identify, create, and apply the communal

<sup>&</sup>lt;sup>75</sup> Culver and Giudice, *Legality's Borders*, 109. They take this expression from Gerald Postema, "Law's Melody: Time and the Normativity of Law," *Associations. Journal for Legal and Social Theory* 7, no. 1 (2003): 238. Similar concerns motivate other objections against to the notion of legal officials in non-state legal phenomena, see, see Cf. Sanne Taekema, "Does the Concept of Law Need Officials?," *Problema. Anuario de Filosofía y Teoría del Derecho* 2 (2011): 179; d'Aspremont, *Formalism and the Sources of International Law*, 203–4.

<sup>&</sup>lt;sup>76</sup> Cf. Raimo Tuomela, *The Philosophy of Sociality: The Shared Point of View* (New York: Oxford, 2007), 127–128.

norms and the *obedience* of subjects to the norms that officials peremptorily identify and their decisions about them. These questions become particularly pressing in those practices created by the concentrated pressure of officials.

In sum, the refined Hartian theory need not rely in all instances on the ideas of hierarchy or officials to explain the existence of legal phenomena. Instead, it provides an account of normative phenomena that elegantly captures pivotal socio-ontological insights and distinctions. Furthermore, the Hartian compares favourably to familiar socio-ontological theories as it also introduces two types of normative orders and the minimum level of acceptance of subjects and operative members while highlighting the critical moral and political questions that arise. Therefore, *pace* C&G, it is not necessary to dispense with officials or minimize their role to understand the social foundations of law; on the contrary, their presence or absence helps to clarify them.

# 6. Illustrating the Rejoinder: The Possibility of International Legal Officials

We can now respond to C&G's application of the objections to international law. The core of their argument is that international law suffers from circularity and indeterminacy because states are simultaneously international legal officials and subjects: they are officials for they exercise powers of norm-creation, such as the capacity to create treaties or give rise to international customary law, while simultaneously these powers also render them subjects bound by international legal norms. Without hierarchies to clarify their official status, the Hartian cannot develop a successful account of the international legal practice as a legal system.
Per the conception of officials developed by the refined Hartian reading, there is no reason to regard states as international legal officials. While treaty-making entails clear exercises of powers of norm-creation, no individual state expresses the collective will of the putative community that gives rise to international legal practice—presumably, the normative community C&G's account has in mind is composed of nation-states. Rather, the creation of ordinary treaties (such as those that establish borders between two states) is a situation in which states employ international private or unilateral powers to regulate their own affairs. Similarly, the processes through which state behaviour and attitudes create international customary law and, I will add, the making of multi-lateral treaties, are cases in which the egalitarian community of nation-states collectively expresses its public views. Since no specific state is empowered to manifest the collective will of the community of states, there are no normative officials in such a normative community.

While C&G's objection successfully shows that the community of states has no division of normative labour between officials and subjects, their objections do not achieve their larger goal of showing the impossibility of a Hartian account of international legal officials. Here, I will show how the refined Hartian perspective provides an alternative account which is not based on the premises of C&G's interpretation of Hart's project. For C&G, Hart needs to identify international legal officials in order to determine if there is an international rule of recognition and, consequently, conclude that international law is a legal system. By contrast, as suggested in Chapter 2, the first explanatory step of the Hartian account is to identify the relevant normative order and its corresponding community, not to search for officials. That is, the theorist needs to determine first if there is a unified

complex of interrelated norms, and the group of agents whose behaviour and pro-attitudes give rise to that order. If there is no normative order, the question about the systematicity character of the practice is irrelevant.<sup>77</sup>

The identification of normative orders and communities is a demanding process that cannot fully be pursed here but for purposes of the present discussion, we can assume that there is a normative order in the area of practice called international law (henceforth *international normative order*). Further, the relevant community of agents that gives rise to this order (the *international community*) is not limited to the nation-states, but they also include other internationally relevant actors such as international organizations, NGO's, and citizens for some limited purposes.

Having identified the international normative order and its constitutive community, we can now determine whether there are international legal officials. For the Hartian, international legal officials are those agents who exercise normative powers to authoritatively settle normative issues on behalf of the community. To determine their existence, we need to look and see whether the constitutive and constituted rules of the international order have empowered some agents to identify, create and apply norms on behalf of the international community. If such agents exist, there might be an international

<sup>&</sup>lt;sup>77</sup> As I explain in the next two chapters, important literature on the Hartian accounts of international law has missed these important explanatory steps. Theorists have come to formulate the question as "is international law a legal system or a set?" without identifying the normative order and the relevant community. International law in these accounts is a doctrinal area, the subject taught in law schools, or the content of international law treatises. Still, there is no guarantee that there is one and only one normative order in each area of practice.

legal system; if they do not we should recognize the international legal order as a nonsystemic practice.

Furthermore, as suggested above, Hartian quasi-sociological analysis attempts only to provide an account of the existence condition of constitutive officials empowered by constitutive power-conferring rules. Such an analysis is a pre-requisite of the doctrinal study of the international legal order, including the analysis of the constituted norms that empower constituted officials. This quasi-sociological analysis, to be clear, demands a reconstruction of the totality of activities and animating views of participants of the international community that to pursue this complex study here. However, even from a summary description of international legal practice, we are able to identify numerous candidate agents and institutions that peremptorily create and apply international legal norms on behalf of this putative international community whose decisions are recognized, by-and-large, by states and international actors. To take only the most prominent examples, the General Assembly of the United Nations and the UN Security Council are candidate norm-creators that issue enactments on behalf of the international community. The Universal Declaration of Human Rights, for instance, is an enactment of the General Assembly that authoritatively declares, on behalf of the international community, basic rights for all individuals of the world.<sup>78</sup> More importantly for Hartian purposes, international law also has a sizeable number of norm-appliers that identify and apply international norms to specific cases.<sup>79</sup> A central example of an adjudicator that apply

<sup>&</sup>lt;sup>78</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

<sup>&</sup>lt;sup>79</sup> See e.g. Alter, *The New Terrain of International Law*; Bogdandy and Venzke, *In Whose Name?* 

international legal norms is the International Court of Justice (ICJ), the main judicial organ of the United Nations that settles disputes among nation-states.

It is important to note that C&G correctly criticize Hart's characterization of the role of ICJ and other putative norm-appliers in the international legal order. Hart suggests that the international legal order lacks a rule of adjudication because the ICJ and other international courts are bereft of "compulsory jurisdiction."<sup>80</sup> In response C&G hold that "courts with compulsory jurisdiction are only one particular forms of... law-applying institutions, and so do not exhaust the possibilities of institutions capable of practicing secondary rules of... adjudication."81 Even so, C&G still do not consider the ICJ and other norm-appliers as candidate international legal officials.<sup>82</sup> Their refusal seems to be founded on the assumption that hierarchies are central to the rule of recognition, so we cannot decisively establish the official nature of a certain institution in the absence of hierarchy.<sup>83</sup> As argued here, the Hartian interpretation frees us from the presumptions of C&G's conception. Since an official is an agent who exercises normative powers by providing peremptory settlements on behalf of a given community, the ICJ and other norm-appliers could be considered an authoritative norm-applier of international norms even in the absence of a hierarchy of norms.

<sup>&</sup>lt;sup>80</sup> Hart, The Concept of Law, 218, 232.

<sup>&</sup>lt;sup>81</sup> Culver and Giudice, *Legality's Borders*, 28. Similar arguments have been advanced by Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A. Hart," 981 and; Jeremy Waldron, "International Law: 'A Relatively Small and Unimportant' Part of Jurisprudence?," in *Reading HLA Hart's "The Concept of Law*," ed. Luis Duarte d'Almeida, Andrea Dolcetti, and James Edwards (Oxford: Hart Publishing, 2013), 213–16.

<sup>&</sup>lt;sup>82</sup> Culver and Giudice, *Legality's Borders*, 27–31.

<sup>&</sup>lt;sup>83</sup> Ibid., 32–3, 37.

To conclude, while C&G's objection shows that the community of states lacks division of labour, they do not demonstrate the impossibility of identifying international legal officials. *Pace* C&G, the Hartian does not need to rely on or assume a normative hierarchy to provide a non-circular, determinate account of international norm-applying officials; it must seek those agents who efficaciously create and apply international legal rules and settlements on behalf of the international legal community.

#### 7. Conclusion

This chapter has defended the applicability of the Hartian account to non-state contexts against the powerful objections advanced by C&G. Contra the problem of circularity I have argued that the complex of customary secondary rules not only constitutes the criteria of validity but also empowers some agents to perform the crucial normative activities of the system. Contra the problem of the indeterminacy of officials I developed the Hartian account of officials as agents who create and apply the norms on behalf of a specific community. Moreover, I distinguished between two kinds of officials depending on whether they are created by valid rules or constitutive social practice, and I developed Hart's theory of the existence conditions of social power-conferring rules. I also took issue with the claim that Hart resorts to hierarchies of norms and officials to remedy the indeterminacy about these components of the normative system. Instead, per the argument of the centrality of adjudicators, the critical function of identifying the valid norms and constituted officials is in the hands of the norm-appliers. This renewed account was tested on international law. Since we have addressed the most important objections to the applicability of Hartian theory in non-state contexts, we can confidently use it to explain both state and non-state normative phenomena. In the next chapter I apply this account to one prominent non-state practice: international trade law.

# Chapter 4: An Illustration – A Hartian Account of International Trade Law

In the previous two chapters I introduced and defended a Hartian unified account of state and non-state law. Central to this project is the notion of normative order i.e. unified complexes of interrelated norms that regulate a domain of action. Normative orders can be divided into two kinds, sets and systems, that provide different guidance to their communities and allow for different types of moral and political inquiries. Moreover, the Hartian regards as legal practices those sets and systems that regulate issues of moralpolitical importance through the imposition of intense forms of social pressure.

This chapter illustrates the refined Hartian theory of law by applying it to two complexes of norms that have regulated multilateral international trade: the World Trade Organization (WTO) and its predecessor the General Agreement on Tariffs and Trade of 1947 (GATT). Both treaties promote the elimination and reduction of tariffs (i.e. taxes on imports or exports) and other types of non-tariff barriers to trade (e.g. quotas, subsidies, lengthy delays in customs procedures, regulations, etc.) that make trade more difficult or impossible. The most remarkable feature of these treaties is the creation of a sophisticated mechanism of dispute resolution to guarantee the effectiveness of their norms.

My main goal in this chapter is to show that the Hartian theory can create a useful and illuminating account of these practices. At the same time GATT and the WTO provide an ideal illustration of some distinctive insights of the Hartian unified proposal, notably, the explanatory centrality of normative orders; the distinction between sets and systems; its demarcationist account based on the notion of political community; and the proto-doctrinal conception of constitutive social rules. The argument proceeds as follows. Section 1 develops the first explanatory steps of the Hartian account. I then use the Hartian typology of normative orders to explain these practices. Section 2 argues that GATT could be characterized as a legal set, while section 3 holds that the WTO exhibits all the hallmarks of a Hartian legal system. In Section 4 I articulate some explanatory virtues of the resulting account.

#### **1. Framing the Hartian Account**

The Hartian account provides resources to clarify, frame, and answer conceptual puzzles about international trade law. This approach differs from the standard use of Hart's theory to explain international trade law. Per this more familiar view Hart distinguishes between pre-legal communities governed by sets that lack standards that guide the identification, modification, and application of their rules and systems that do include those standards. To determine whether GATT and the WTO are law, then, the theorist must verify whether they constitute legal systems i.e. whether they contain standards that regulate the identification, creation and application of their norms.

International trade lawyers typically claim that the WTO exhibits all the hallmarks of a Hartian legal system: since the treaty identifies a number of mandatory norms it operates as a rule of recognition; the norms about modifying the treaty count as a rule of change; and the WTO's sophisticated mechanism of dispute settlement constitutes its rule of adjudication.<sup>1</sup> It is disputed, however, whether such rules were evident in GATT; some

<sup>&</sup>lt;sup>1</sup> See David Palmeter, "The WTO as a Legal System," Fordham International Law Journal 24 (2000): 479.

scholars hold that the trio of secondary rules can be identified<sup>2</sup> whilst others are doubtful of this possibility.<sup>3</sup> In the second interpretation the legal character of GATT would remain an open question. In any case the central idea remains that the notion of a legal system can explain the legality of international trade practices.<sup>4</sup>

In contrast the Hartian does not start by attempting to determine the legal character of a practice through its systematic nature. According to the order of explanation suggested in Chapter 2 questions about the systematic or non-systematic character of a given practice are posterior to the identification of the relevant normative orders and community of agents whose action and attitudes create and sustain the practice. In other words we cannot properly explain a normative practice without identifying the specific groups of agents whose attitudes and behaviour constitute it; nor is it possible to characterize a practice as a set or system without previously identifying it is a normative order. In addition, the systematic character of a practice is not the distinctive mark of legality, as commonly understood by international trade lawyers. Rather, in the Hartian account, legal phenomena are constituted by normative communities that exercise intense forms of social pressure in

<sup>&</sup>lt;sup>2</sup> Without reference to Hart's theory, some scholars confidently characterise GATT as a "system" or "order" that regulate its central normative activities. See e.g. John H. Jackson, *World Trade and the Law of GATT* (Charlottesville: Bobbs-Merrill Company, 1969); Robert E. Hudec, "The GATT Legal System: A Diplomat's Jurisprudence," *Journal of World Trade Law* 4 (1970): 615–665; Wolfgang Benedek, *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht (Berlin Heidelberg: Springer-Verlag, 1990).

<sup>&</sup>lt;sup>3</sup> For example Palmeter has claimed "GATT resembled Hart's prototypical international legal system more than it resembled a modern municipal legal system." Palmeter, "The WTO as a Legal System," 464.

<sup>&</sup>lt;sup>4</sup> Similar diagnoses have been advanced without resorting to Hart's particular conception of legal system. For example, see Chios Carmody, "A Theory of WTO Law," *Journal of International Economic Law* 11, no. 3 (2008): 527–557; "Theory and Theoretical Approaches to WTO Law," *Manchester Journal of International Economic Law* 13, no. 2 (2016): 152–185.

relevant moral-political areas. This view is compatible with the possibility of nonsystematic, yet legal, practices.

With these considerations in hand this section begins to articulate a theory of international trade law in the light of Hartian theory. Here, I argue first that GATT and the WTO are normative orders and explicate some of the consequences of such a diagnosis. Then, I argue that these normative orders can be regarded as legal practices insofar as they constitute political communities.

### 1.1 GATT and the WTO as Normative Orders

For the Hartian a given practice constitutes a normative order when it meets the three requirements laid out in Chapter 2, i.e. to constitute a unified complex of interrelated norms that regulate a domain of action. The character of a given practice as a normative order is not affected by its origin. Hence, a normative order can be the result of norms that are part of a different normative order if it displays the constitutive requirements.

Thus, while GATT and the WTO are creatures of international law they can *also* be considered as independent normative orders because they exhibit the three constitutive hallmarks: they regulate a specific domain of action (multilateral trade); their norms display significant normative relationships among them (as will be detailed in the next sections); and their norms exhibit several indicators of unity. Among other things these treaties specify agents in charge of identifying and applying collective norms as well as some boundaries in terms of the topics and subjects they regulate. In addition there are statements from theorists and participants that represent the practices as a distinctive unity. For example, a former Director-General of the WTO has stated, "WTO comprises a true legal

order... We see that there exists, within the international legal order, a specific WTO legal order."<sup>5</sup>

To characterize GATT and the WTO as treaty-based normative orders allow us to distinguish them from the domain of general international law. For the Hartian international law is a different normative order that regulates the relationships among states. The distinction between multilateral trade treaties and general international law is evident in the different issues they regulate, and the different communities of actors whose behaviour and attitudes constitute and sustain them. The international legal order is the by-product of a community of around two hundred states and other internationally relevant actors, including thousands of international organizations, NGO's, and even citizens for certain purposes. In turn, GATT and the WTO are normative orders which are constituted and sustained by the behaviour of a more limited set of actors. As established by the constitutive treaties, members of this community are nation-states and some non-state entities such as the European Union, Hong Kong, Macau, and Taiwan. Thus, the specific orders of international trade and general international law are different practices constituted and sustained by different communities.

In contrast the hallmarks of a normative order are not evident in the area of practice traditionally called international trade law or international economic law—the totality of norms that regulate economic relationships among states.<sup>6</sup> Instead of a single normative

<sup>&</sup>lt;sup>5</sup> Pascal Lamy, "The Place of the WTO and Its Law in the International Legal Order," *European Journal of International Law* 17, no. 5 (2006): 969–70.

<sup>&</sup>lt;sup>6</sup> Joel Trachtman, "The International Economic Law Revolution," *University of Pennsylvania Journal of International Law* 17, no. 1 (1996): 49–50; Steve Charnovitz, "What Is International Economic Law?," *Journal of International Economic Law* 14, no. 1 (2011): 5.

order, international trade law is best understood as a network of normative orders. For example, multilateral treaties are accompanied by a constellation of bilateral, national, regional and mega-regional trade agreements such as NAFTA/CUSMA,<sup>7</sup> CETA,<sup>8</sup> or TPP11.<sup>9</sup> These agreements regulate similar issues to those falling under the umbrella of GATT and the WTO and in many cases contain the same norms and principles about the liberalization of trade. For the Hartian each of these agreements constitutes its own normative order generated and sustained by independent communities. For instance, the WTO is constituted and supported by the multilateral trade community which is different from the community that gives rise to and maintains specific trading agreements (for example Canada and the EU in the case of CETA; the USA, Mexico and Canada in the case of UMSCA, etc.). Thus, while these orders have relevant relationships among them, there is no evidence that they are nested in a macro-normative order that comprises all norms of trade. In consequence, since international trade law is not a normative order, it cannot be explained in terms of the sets and systems which are so central to Hartian theory.

To see the theoretical relevance of these considerations we can contrast the Hartian account of the individuation of normative orders with the alternative accounts that individuate normative orders through the function, purpose or point performed by a group of norms or norm-related elements. Consider the influential functionalist theory developed

<sup>&</sup>lt;sup>7</sup> Canada-United States-Mexico Agreement (CUSMA), https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng

<sup>&</sup>lt;sup>8</sup> Canada-European Union Comprehensive Economic and Trade Agreement, https://www.international.gc.ca/gac-amc/campaign-campagne/ceta-aecg/index.aspx?lang=eng

<sup>&</sup>lt;sup>9</sup> Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng

by Luhmann and Teubner.<sup>10</sup> Per this approach global society (i.e. the network of economic, social, and political interactions outside the state) is divided into functionally identified sectors—the internet, trade, sports, human rights, etc.—each of which is regulated by its own legal order. A legal order is thus the discursive complex that governs any one of the sectors of global society. These orders are legal insofar as they use the binary code legal/illegal to describe human behaviour. On this account international trade law is the normative order that regulates the sector of global society concerned with inter-state trade through the use of the code legal/illegal.<sup>11</sup>

There are two points of contrast between the Hartian and the functionalist individuation of normative orders. On the one hand since functionalists focus on discourse, they do not make a sharp division between normative and non-normative components of practices. For Luhmann-inspired theories, "*any act or utterance* that codes social acts according to this binary code of lawful/unlawful might be regarded as part of the legal [order] no matter *where it was made and who made it.*"<sup>12</sup> When it comes to the Hartian theory of normative practices the functionalist puts normative discourses that guide conduct (like those uttered by officials) on an equal footing with theoretical discourses that guide beliefs (like observers who use deontic language to describe a practice).

For the Hartian, on the other hand, functional differentiation alone is insufficient to individuate a legal order as a complex of normative phenomena: one Hartian normative

<sup>&</sup>lt;sup>10</sup> Systems theory has a canonical formulation in Niklas Luhmann, *Law as a Social System*, Oxford Socio-Legal Studies (Oxford: Oxford University Press, 2008).

<sup>&</sup>lt;sup>11</sup> See Teubner, "Global Bukowina': Legal Pluralism in the World Society"; Gunther Teubner, "Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors?," in *Public Governance in the Age of Globalization*, ed. Karl-Heinz Ladeur (Aldershot: Routledge, 2004), 71–87.

<sup>&</sup>lt;sup>12</sup> Michael King, "The 'Truth' about Autopoiesis," Journal of Law and Society 20, no. 2 (1993): 223.

order might perform more than one function, or there might be more than one normative order regulating the same function or sector of global society. Trade is a perfect example as it is regulated by state norms, trade agreements, supra-national organizations such as the European Union, and the multilateral trading system. I believe that most functionalist accounts recognize this distinction as they identify normative orders as discrete normative unities. For example, Teubner talks of the WTO as an order different from regional trade agreements and other regimes of international law. However, it is not intuitively clear which theoretical feature of their functionalist account justifies this distinction. For the Hartian the functional individuation of normative orders is parasitic upon, or posterior to, individuation based on normative relationships and a sense of unity. As a result Hartian theory clarifies some critical assumptions overlooked by most formulations of the debate about international trade law.

### 1.2 GATT and the WTO as Legal Orders

The community that constitutes and sustains GATT and the WTO is a political one in the Hartian sense developed in previous chapters. There is no doubt that the topic regulated by these normative orders—international trade—is an issue of the utmost economic, moral, and political importance. In fact, some have even argued that the main goal of these practices—the promotion of free trade—is itself a moral and political imperative.<sup>13</sup>

Moreover, GATT and the WTO deploy several mechanisms of criticism, censorship and social pressure against states that fail to comply with their rules and the judgments of

<sup>&</sup>lt;sup>13</sup> See for example, Fernando R. Tesón, "Why Free Trade Is Required by Justice," *Social Philosophy and Policy* 29, no. 1 (2012): 126–153.

their officials. The most important mechanism is the possibility of the "suspension of concession or obligations,"<sup>14</sup> colloquially known as sanctions or retaliations. If norm-applying officials of this practice rule that a state has not respected their commitments, they might authorize the country affected by the violation to take economic countermeasures, typically tariffs, that would otherwise be inconsistent with the agreements.

To illustrate this consider the most famous example of the legitimate use of retaliatory countermeasures—*EC Bananas* case.<sup>15</sup> Here, the WTO ruled that the European Union's scheme of special access to banana producers from former colonies broke free trade rules. Given the EU's failure to comply with the ruling, complainant states were granted permission to retaliate. For example, the United States was allowed to impose around \$500,000,000 per year in tariffs that corresponded to the economic loss of US exporters derived from the EU's failure to comply. For this purpose the US established tariffs of up to 100% on an extensive list of EU products ranging from handbags to tea makers. As can be seen, the imposition of retaliations can be particularly taxing and could affect significant sectors of another's country economy.

As a result we can confidently characterize GATT and the WTO as normative orders that constitute and regulate political communities—i.e. communities whose participants apply intense forms of social pressure to secure conformity to norms that regulate relevant politico-moral issues. That is, the legal character of international trade is

<sup>&</sup>lt;sup>14</sup> WTO, Art. 22.2, DSU.

<sup>&</sup>lt;sup>15</sup> EC — Bananas III. WT/DS27/R/ECU

not a function of their systematic nature or of features such as a claim of supremacy, the presence of officials or a hierarchy of norms.

#### 2. GATT as a Legal Set

In this and the following section, I will argue that while GATT constituted a Hartian legal set, the WTO provides an example of a Hartian legal system. Three preliminary clarifications on this statement are necessary. First, such an assessment does not mean that the Hartian account entails a historical narrative where sets precede systems. As shown in the brief historical description provided below, GATT 1947 was originally part of a failed plan to create a more sophisticated normative order that included norm-applying and norm-creating officials. If such an effort had been successful, it is possible that multilateral trade law would have been governed by a normative system from the outset.

Second, the Hartian analysis differs from familiar applications of Hart's project to international trade law. To determine whether a certain normative order is a set or system is not merely a verification of whether it contains standards about the sources of primary rules and regulations about how to change and apply them. Instead, it is a quasi-sociological analysis of the capacity of its constitutive rules to efficaciously regulate central normative activities—i.e. the creation, identification, and application of its rules—so the normative community can overcome the defects that Hart found characteristic of normative sets— i.e. a static character, uncertainty about the collective rules and their application to specific cases. Thus, a legal practice might contain officials, criteria of validity or regulations on how to introduce and change norms, but if those components do not remedy the defects of a normative sets, we cannot talk of a normative system.

Third and finally, the Hartian account is open to the possibility that the constitutive standards of a normative order are codified, and the fact of codification might bring some certainty and clarity to the practice. Such is the case in practices like GATT and the WTO that have their origins in constitutive treaties. However, it would be mistaken to consider that codification transforms constitutive rules into constituted ones, and, therefore, the theorist only needs to advance a doctrinal analysis of the order's norms. Rather, since every extant normative practice is constituted by the behaviour and attitudes of a community of agents, any application of Hartian theory proceeds with reference to the backdrop of constitutive social practice.

This section advances a detailed examination of GATT. After a brief historical reconstruction, I argue that GATT suffered from several of the problems that Hart found characteristic of normative sets. These problems persisted despite the sustained efforts of contracting parties to remedy them, which included the creation of a sophisticated mechanism of dispute resolution. Hence, I conclude that GATT is an example of a legal set with some traces of a systematic character.

### 2.1 GATT's Accidental Origin

GATT was agreed during the 1944 UN Conference in Bretton Woods and adopted as part of the larger project to create a post-Second World War international economic system.<sup>16</sup> Along with creating the International Monetary Fund and the World Bank, states that

<sup>&</sup>lt;sup>16</sup> For these historical remarks, see 'History of the Multilateral Trading System' 'https://www.wto.org/english/thewto\_e/history\_e/history\_e.htm and John H. Jackson, "The Evolution of the World Trading System – The Legal and Institutional Context," in *The Oxford Handbook of International Trade Law*, ed. Daniel Bethlehem et al. (Oxford: Oxford University Press, 2009), 30–53.

participated in the conference also agreed to establish an international trading system that would make the advantages of free trade available to all states. The negotiation of this system was divided into two components: first, the establishment of the principles and mandatory rules of the system and a schedule or list of tariff reductions and other commitments; and second, the establishment of an International Trade Organization (ITO), a specialized agency of the United Nations that would comprehensively regulate trade and other economic matters. ITO was projected to have an institutionalized structure of officials, including a mechanism of dispute settlement headed by an International Court of Trade.

The first component was successfully negotiated and agreed in Geneva in 1947 resulting in the General Agreement on Tariffs and Trade, GATT.<sup>17</sup> The 23 contracting parties of this international treaty committed to substantially reduce tariffs on goods and other trade barriers through a schedule of mutual concessions.<sup>18</sup> It was also established that the meetings organized under GATT could serve as a negotiation forum to achieve new "reciprocal and mutually advantageous arrangements."<sup>19</sup> The treaty established the two fundamental principles of the international trading system that still apply today. These are, first, the *most favoured nation principle* which holds that all tariff concessions and benefits that one contracting party gives to another must be equally extended to all other contracting parties.<sup>20</sup> And, second, the *national treatment principle* that commits contracting parties to

<sup>&</sup>lt;sup>17</sup> General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 194.

<sup>&</sup>lt;sup>18</sup> GATT, Art. 2

<sup>&</sup>lt;sup>19</sup> GATT, Preamble.

<sup>&</sup>lt;sup>20</sup> GATT, Art. 1

eliminate discrimination against foreign products, particularly by giving imports the same treatment that national products receive concerning taxes and regulation.<sup>21</sup>

The second component was delayed for a new round of negotiations to be held in La Habana in 1948. To quickly implement the tariff cuts, the 23 contracting parties agreed to adopt GATT starting January 1, 1948, through a "Protocol of Provisional Application."<sup>22</sup> It was expected that negotiation and implementation of the second component would take place soon. However, while negotiators concluded a Charter for ITO,<sup>23</sup> it never entered into force. Thus GATT's provisionally adopted text became the primary regulation of international trade between 1947 and 1995.

These accidental beginnings resulted in what the specialized literature has called GATT's "constitutional" or "birth" defects<sup>24</sup> that marked its operation. Because the ITO Charter was supposed to regulate the structural, functional, and procedural aspects of the international trading system, these topics were not included in GATT. Consequently, GATT's contracting parties had to improvise the regulations of key issues. For example, GATT did not have its own budget and lacked administrative support to organize regular meetings among states. As a remedy, contracting parties borrowed the Commission created to prepare the ground for the ITO (Interim Commission for the International Trade Organization, ICITO) to function as a Secretariat and established its headquarters in Geneva. With this modification GATT started to operate as a *de facto* international

<sup>&</sup>lt;sup>21</sup> GATT, Article 3.

<sup>&</sup>lt;sup>22</sup> This agreement is the "Protocol of Provisional Application" 30 October 1947, 55 UNTS 308.

<sup>&</sup>lt;sup>23</sup> Havana Charter for an International Trade Organization, 24 March 1948, UN Doc E/CONF.2/78

<sup>&</sup>lt;sup>24</sup> John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd ed. (Cambridge, MA: MIT Press, 1997); John H. Jackson, *Restructuring the GATT* (New York: Bloomsbury Academic, 1998).

organization. The mechanism for dispute resolution, GATT's outstanding feature, was another improvisation. The treaty did not extensively regulate the resolution of disputes among states, for they were expected to be the jurisdiction of ITO's World Trade Court. In response, GATT's contracting parties created the influential, yet structurally defective, dispute settlement mechanism based on panels discussed below.

Despite the profound effect that it had on the liberalization of world trade, GATT could never overcome its birth defects. This resulted in persistent disagreements about GATT's nature; the binding character and application of its norms; and the authority and legitimacy of the *ad hoc* agencies and procedures that parties created. From a theoretical perspective many of these problems closely resemble the defects that Hart found typical of normative sets. I will explain these defects in turn.

### 2.2 The Static Character

GATT's first defect concerns what Hart called the *static character* of a normative order namely the inability to adapt to new circumstances by means of mechanisms which provide for immediate, deliberate change.<sup>25</sup> In the case of international trade law, norms need to be tailored to the changing economic and political conditions of international commerce such as the emergence of influential economic actors, new products that alter supply chains, economic cycles, recessions, etc. However, the provisions of the treaty and the practice made it difficult to alter its norms.

<sup>&</sup>lt;sup>25</sup> On this problem, John H. Jackson, "The Puzzle of GATT," *Journal of World Trade* 1, no. 2 (1967): 140–3; Palmeter, "The WTO as a Legal System," 462–3.

First off, modification of the constitutive treaties and the schedule of concessions was considered a taxing process, and the provision that regulated modification was filled with several technical difficulties.<sup>26</sup> For our socio-hermeneutical endeavour, it suffices to provide a basic account. Save for the modification of some foundational principles, the modification of portions of the treaty required acceptance by two-thirds of the contracting parties. This level of agreement was difficult to reach and it became more difficult as the number of contracting parties increased. However, following the common practice of international law, changes to the treaty applied only to the parties that accepted them.<sup>27</sup> Thus, there was little incentive to engage in the long and challenging process of treaty modification as the resulting change would not apply to dissenting states.<sup>28</sup> These difficulties, as I explain in the next section, also became a source of normative uncertainty.

More central to the Hartian defect, GATT also had difficulties in modifying its constituted norm. To use David Palmeter's analogy, GATT's static character not only related to its "constitutional" treaty but also to "legislative" (I would add, "administrative") norms that guided the behaviour of participants and its day-to-day operations.<sup>29</sup> Examples of these constituted norms included decisions about the accession of new members, waivers of GATT obligations to individual states for a special justification, or withdrawal of members. These issues were especially controversial when they involved influential political and economic actors. Other items regulated by constituted rules were authoritative

<sup>&</sup>lt;sup>26</sup> GATT, art. XXX. For Jackson, this provision "has proven one of the most troublesome and restricting in GATT." Jackson, "The Puzzle of GATT," 140.

<sup>&</sup>lt;sup>27</sup> Article 40.4 of the Vienna Convention, which states that "the amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement,"

<sup>&</sup>lt;sup>28</sup> Jackson, *Restructuring the GATT*, 45–6.

<sup>&</sup>lt;sup>29</sup> Palmeter, "The WTO as a Legal System," 462.

interpretations of the treaty to clarify the meaning of contested provisions or new norms necessary to clarify the treaty or expand its purview of regulation.

Since GATT lacked specific agents in charge of the creation of communal rules, all normative decisions were taken by all the "contracting parties acting jointly" (later called the GATT Council). In terms of the refined Hartian theory, all normative decisions were taken directly by the normative community as a whole. To make things more difficult, while the treaty permitted decision-making by majority vote<sup>30</sup> such a mechanism was never used. The actual practice under GATT was that norm-creating decisions were always taken by a *consensus* of all contracting parties.<sup>31</sup> This decision-making process was described by one former GATT Director-General (the chief of GATT's secretariat) as follows:

The normal procedure in GATT is to avoid voting on controversial matters. First, a compromise solution acceptable to all interested parties is looked for. The general view is that, if this fails, it is best to wait until the positions of the parties develop sufficiently to enable them to support a decision or at least not to oppose it. Decisions are therefore generally taken by consensus. It means that the Chairman finds that a decision or recommendation is adopted when no delegation objects to its adoption.<sup>32</sup>

Decision-making by consensus is common in international law and is crucial to GATT because of its character as a forum where parties reached decisions by negotiation and mediation, not by forming political or economic blocks.<sup>33</sup> However, the consensus rule

<sup>&</sup>lt;sup>30</sup> GATT, art. XXV.

<sup>&</sup>lt;sup>31</sup> Palmeter, "The WTO as a Legal System," 463.

<sup>&</sup>lt;sup>32</sup> Olivier Long, Law and Its Limitations in the GATT Multilateral Trade System (Leiden: Brill, 1987), 55.

<sup>&</sup>lt;sup>33</sup> For an illuminating discussion of the origins of the consensus rule in GATT, see Mary E Footer, "The Role of Consensus in GATT/WTO Decision-Making," *Northwestern Journal of International Law & Business* 17 (1997): 663–669.

made it difficult to reach decisions about the modification of norms, particularly in an organization that had more than one hundred members at its peak. In practice, each one of the contracting parties had veto power—i.e. one dissenting party was enough to block the adoption of a decision.

The outcome of this inability to modify GATT's constitutive and constituted rules was that the normative order remained stagnant at critical moments. As international trade lawyers described this feature, the multilateral trade order suffered from a "rigidity and inability to develop rules so as to accommodate the many new developments in international trade and other economic interdependent subjects."<sup>34</sup> In Hartian terms, GATT was a static legal order that had difficulties in adapting to the changing circumstances of the international economy.<sup>35</sup>

## 2.3 Normative Uncertainty

The second defect of GATT is what Hart called *normative uncertainty*—namely, a lack of clarity about the norms that guide a community. This defect has two faces: one is the lack of clarity about the rules that govern the community, and the second concerns the content of such rules. GATT suffered from uncertainty on both counts.

The lack of efficient procedures to change GATT's constitutive and constituted rules was not only a cause of static character, but it further became a major source of the first type of normative indeterminacy. One reason for uncertainty was the procedure of treaty modification. Since treaty amendments only applied to consenting states, there were

<sup>&</sup>lt;sup>34</sup> Jackson, *Restructuring the GATT*, 46.

<sup>&</sup>lt;sup>35</sup> Cf. Hart, *The Concept of Law*, 92–3.

in practice different versions of the treaty that applied to different countries. While this might be acceptable in other sectors of international law, it is at odds with the most favoured nation principle.

Moreover because modification of any other aspect required consensus, contracting parties started to advance the necessary adaptations to new economic circumstances through different mechanisms. One strategy was the use of non-multilateral side agreements that did not amend GATT's constitutive treaty. International lawyers typically refer to these agreements as "codes." Some of these codes regulated the trade of specific products (e.g. codes on Bovine Meat, Dairy, Civil Aircraft), others governed institutional aspects (e.g. codes on the dispute settlement mechanism), others expanded GATT's provisions (i.e. codes on government procurement, non-tariff barriers to trade, anti-dumping measures) and some even offered authoritative interpretations of the agreement (i.e. interpretations on the provisions on customs valuation and subsidies).<sup>36</sup>

While the codes introduced necessary transformations to the multilateral trading system they brought new problems with them. To be operative, each code needed to be accepted by states and applied only to those parties that adhere to them. In consequence they led not only to another partial rupture of the most favoured nation principle, but they also furthered the fragmentation of the international trade normative order.<sup>37</sup> For instance, the code on the Implementation of GATT Article VII (Customs Valuation) attempted to be an official interpretation of the treaty. Yet, since the code applied only to those who

<sup>&</sup>lt;sup>36</sup> For a list of these codes, see "WTO | Pre-WTO Legal Texts," accessed August 11, 2019, https://www.wto.org/english/docs\_e/legal\_e/prewto\_legal\_e.htm.

<sup>&</sup>lt;sup>37</sup> Jackson, *Restructuring the GATT*, 45–6.

explicitly accepted it, dissenting states could claim not to be bound by the official interpretation.

Furthermore, some of these agreements introduced independent dispute settlement mechanisms, which created at least eight different forums in which GATT disputes could be resolved. This led to opportunities for forum-shopping (i.e. the possibility for a contracting party to select the dispute settlement mechanism most beneficial for it) and forum duplication (i.e. the possibility for contracting parties to launch the same issues under different dispute settlement mechanisms).<sup>38</sup> The resulting situation was termed "*GATT à la carte*" by the specialized literature: the proliferation of treaty modifications and codes that allowed states to select which norms applied to them and the jurisdictions in which to settle their disputes.

The second type of uncertainty—i.e. uncertainty about the content of the communal norms—was also evident in GATT. Because the text of the treaty was "ambiguous" and "terse,"<sup>39</sup> it could be strategically used by states to make the rules fit their needs. Among the most recurrent causes of "acrimony among nations"<sup>40</sup> were the grandfather rights, the escape clause, and provisions about subsidies.<sup>41</sup> Grandfather rights were a clause of the

<sup>&</sup>lt;sup>38</sup> World Trade Organization, A Handbook on the WTO Dispute Settlement System: A WTO Secretariat Publication (Cambridge University Press, 2004), 15.

<sup>&</sup>lt;sup>39</sup> Jackson, *The World Trading System - 2nd Edition*, 47.

<sup>&</sup>lt;sup>40</sup> John H. Jackson, "The Birth of the GATT-MTN System: A Constitutional Appraisal Symposium on the Multilateral Trade Agreements II," *Law and Policy in International Business* 12 (1980): 36. Cf. Jackson, *World Trade and the Law of GATT*, 425, 264–70.

<sup>&</sup>lt;sup>41</sup> Here, I follow the list of disputed issues in GATT provided by Patricia Kalla and United States International Trade Commission. See Patricia Kalla, "The GATT Dispute Settlement Procedure in the 1980s: Where Do We Go From Here?," *Dickinson Journal of International Law* 5, no. 1 (1986): 94; United States International Trade Commission, *Review of the Effectiveness of the Trade Dispute Settlement Under the GATT and the Tokyo Round Agreements*, Report to the Committee on Finance, US Senate, 332-212, 1985, 69–70.

Protocol Regulating the Provisional Application that exempted contracting parties from certain GATT obligations that conflicted with "existing legislation" in those states.<sup>42</sup> States were allowed to define which obligations conflicted with their pre-existing legislation. The escape clause allowed states to take temporary measures inconsistent with their GATT duties when trade concessions would "cause or threaten serious injury" to domestic producers.<sup>43</sup> Since the key terms of the provision—"threat," "serious," and "injury"—were not clearly defined, the clause was commonly used to introduce protectionist measures against GATT's purpose. Similarly, there was uncertainty about which actions constituted impermissible "subsidies" and which constituted a legitimate exercise of government powers to protect the domestic economy. Without a clear definition of subsidy, and since countries strategically chose not to accept the Code that attempted to clarify it, GATT's prohibition of the use of subsidies was far from effective.

Many international trade lawyers have noted that these and other examples of normative uncertainty affected GATT's operation. John H. Jackson described the situations as follows:

[Due to this unclarity, norms could not] serve as a basis on which government officials or private business leaders can predict trade patterns and opportunities. Investment decisions, for example, in developing as well as in industrialized countries, may be based on long-term projections of trade opportunities.

When decision-makers cannot depend on government refraining from interfering with trade, one basic purpose of the trade rules—to add certainty to an uncertain world in order to promote economic progress—has been lost. Moreover, as rule

<sup>&</sup>lt;sup>42</sup> "Protocol of Provisional Application" 30 October 1947, 55 UNTS 308.

<sup>&</sup>lt;sup>43</sup> GATT, art. XIX.

departures become easier, the fulfillment of another goal of the rules—the reduction of tensions that can lead to political conflict among nations—becomes more difficult. Furthermore, tolerated noncompliance with rules can be misleading to a nation or enterprise that mistakenly accepts a rule at face value. Without expertise on what degree of noncompliance is tolerated, such a nation or enterprise may find itself at a disadvantage relative to those who can manipulate the system to their advantage. Thus, when rules break down, the relative bargaining advantage of those parties that are already rich and powerful may be enhanced significantly.<sup>44</sup>

This discussion is remarkably close to what Hart described as the defect of normative uncertainty and its effects on agents. For Hart, since there is uncertainty about the norms that guide communal life and the content of those norms, it is unclear which rights, duties, etc. participants have. Because agents like humans or states have limited strength of will, it is likely that they attempt to take advantage of normative uncertainty and this will generate disputes and tensions between different community members. Hart suggested that the presence of norm-applying officials is instrumental in resolving such a defect. However, as I develop in the next section, GATT's sophisticated mechanism of dispute resolution was ultimately incapable of providing the necessary remedy.

### 2.4 Inefficacious Social Pressure

Finally, GATT also lacked an efficacious mechanism to resolve disputes among community members about the application of its norms, despite several important efforts to solve this issue. For Hart, the absence of norm-applying procedures and officials generates a defect that he called the inefficiency of diffuse social pressure—namely, that

<sup>&</sup>lt;sup>44</sup> Jackson, "The Birth of the GATT-MTN System," 36.

the social pressure exerted by the community as a whole is incapable of supporting communal norms.

As mentioned above, GATT did not establish a mechanism to resolve trade disputes, for they were expected to be the jurisdiction of ITO's World Trade Court. Thus, the treaty contained only one provision for this effect (GATT Art. XIII). This provision stated that the "contracting parties acting jointly" (i.e. the GATT Council) had to "promptly investigate" and "give a ruling" about all disputes that arose among states concerning the "nullification" and "impairment" of the benefits of the treaty (i.e. when one party deemed that another had not fulfilled its obligations).<sup>45</sup> That is, when one state deemed that another state had violated the treaty (e.g. by discriminating between foreign and domestic products), it could submit the issue to the GATT Council who would make a decision on the violation of GATT's norms. In cases of serious violations, the Council could authorize a contracting party or parties "to suspend GATT obligations to other contracting parties." <sup>46</sup> That is, the infringed party might take legitimate countermeasures or retaliations against the non-complier party, otherwise forbidden by the multilateral trade system.

Practice quickly revealed that the provisions of Article XIII were insufficient. It was also clear that a meeting of all contracting parties was not a suitable mechanism to resolve technical disputes about the application of the treaty, i.e. whether a certain domestic measure was discriminatory or protectionist. In response to these defects, and after trying

<sup>&</sup>lt;sup>45</sup> GAT 1947, Article XXII:2

<sup>&</sup>lt;sup>46</sup> GAT 1947, Article XXII:2

other models, a mechanism of panels was established in 1952.<sup>47</sup> These panels were composed of three or five experts independent of the parties of the dispute, typically diplomats of other countries, who were appointed to issue a *report* giving a ruling on the dispute. These reports became legally binding on the parties of the dispute when they were adopted by the GATT Council. The practices and procedures of this mechanism were codified on several occasions.<sup>48</sup>

The panel mechanism resulted in the most advanced device of international dispute resolution of its time. Empirical analyses reported that the compliance rate for successful complaints was over 80%.<sup>49</sup> Moreover, panels were able to create a body of jurisprudence about GATT's norms. Adopted and unadopted reports brought certainty about the applicable rules and their content, thereby providing a clearer picture of the duties, rights, powers, etc. of parties under GATT's normative order. According to international trade lawyers, this mechanism of dispute settlement generated a radical transformation in the normative order. Through the panel mechanism international trade law transformed the so-called "diplomatic" or "power-oriented" mechanism of dispute resolution codified in the treaty into a "legalistic," "rule-oriented" or "juridical" decision-making procedure.<sup>50</sup>

<sup>&</sup>lt;sup>47</sup> For these historical remarks, see Jackson, "The Evolution of the World Trading System – The Legal and Institutional Context"; Christina Schröder and Roberto Azevedo, "Early Dispute Settlement in the GATT," in *A History of Law and Lawyers in the GATT/WTO*, ed. Gabrielle Marceau, by Roberto Azevedo (Cambridge: Cambridge University Press, 2015), 141–150.

<sup>&</sup>lt;sup>48</sup> The most important of these "codes" were Decision of 5 April 1966 on procedures under Article XXIII, BISD 14S/18; "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" (BISD 26S/210) and The Decision on Dispute Settlement, contained in the Ministerial Declaration of 29 November 1982 (BISD 31S/9).

<sup>&</sup>lt;sup>49</sup> Cf. Robert E. Hudec, Daniel L. M. Kennedy, and Mark Sgarbossa, "A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989," *Minnesota Journal of Global Trade* 2 (1993): 1–114. However, Hudec reminds us that compliance with panel reports was likely since parties had to consent to the adoption of the report in the first place.

<sup>&</sup>lt;sup>50</sup> Hudec, "GATT Legal System"; Jackson, *The World Trading System - 2nd Edition*, chap. 2.

However, this dispute settlement mechanism was unable to guarantee the efficacy of GATT's norms. Complaints about the systems were recurrent and ranged from: the length of the procedures due to the lack of procedural timeframes; uncertainty about the jurisdiction and procedures applicable (Article XXIII alone, the special codes that regulated it for those countries that accepted them, or special dispute settlement mechanisms created by other codes); limited resources and availability of panellists; the absence of legal rigour and clarity in the rulings; and the delays of governments in implementing the decisions.<sup>51</sup> Yet the most problematic issue was the capacity of states to block the operation of the system. Critical procedural decisions concerning the establishment of the panel, the adoption of the panel report, and authorization of countermeasures were taken by the GATT Council, i.e. they were taken by all contracting parties. These decisions were also taken by consensus, which included the parties of the dispute. As a result, the respondent that violated its GATT obligations could block the establishment of the panel, and the losing party to a dispute could block the adoption of the panel or the Council's authorization of countermeasures.

Such an arrangement in which subjects have the capacity to prevent the application of settlements against them can function because states that make use of such prerogative suffer political and reputational costs. In addition, contracting parties might decide not to block the decisions affecting them because they are invested in the long-term sustainability of a normative order that creates advantages for all. However, the incentives for compliance

<sup>&</sup>lt;sup>51</sup> For a detailed list of issues, see Jackson, *Restructuring the GATT*, 65; United States International Trade Commission, *Review of the Effectiveness of the Trade Dispute Settlement Under the GATT and the Tokyo Round Agreements*, 69 and 79.

are weak and might be outweighed by other considerations particularly in economically and politically sensitive areas. For example, as a result of a cost-benefit analysis, states might estimate that the political cost of blocking the system is smaller than the economic cost of complying with one of GATT's concessions. Or they might obstruct the operation of the dispute resolution system for domestic political reasons, like sustaining protectionist measures that please specific domestic constituencies (e.g. farmers who benefit from agricultural subsidies). In consequence, GATT's dispute resolution mechanism was effective where the stakes were low but it was ineffective in economically important or politically sensitive areas—the ones that more urgently needed third-partly settlement.

The capacity of contracting parties to veto decisions resulted in additional structural weaknesses of GATT's dispute resolution mechanism.<sup>52</sup> First, potential plaintiffs refrained from bringing disputes in those cases when the defendant was likely to block its complaint or veto the decision if it was not favourable to the defendant's interest. Second, the mechanism created incentives for non-compliance since obligations could not be properly enforced. Third, the ineffectiveness of the mechanism justified the exercise of unilateral action by individual parties outside the official channels, particularly by powerful actors who could impose economic sanctions against other countries. And, finally, the veto power that states had over the operation of the mechanism influenced the drafting of the panel reports. These were not only technical interpretations of the treaty but also considered the likelihood of a decision being adopted. These weaknesses resulted in "a decreased

<sup>&</sup>lt;sup>52</sup> Here, I am following, World Trade Organization, *A Handbook on the WTO Dispute Settlement System*, 14; Jackson, *Restructuring the GATT*, 64–5.

confidence in the ability of GATT dispute settlement," particularly in the most contentious trade issues.<sup>53</sup>

The preceding considerations can be reformulated using resources from the refined Hartian theory. From this perspective, the introduction of the panels was an effort to resolve the problems of the inefficiency of diffuse social pressure and normative uncertainty through the introduction of norm-applying officials who could issue settlements that authoritatively identified the system's norms and applied them to specific cases. For the Hartian, to be sure, panels were norm-applying officials that took decisions on behalf of the community and their reports are settlements, as they had the capacity to identify communal norms and their content even if not adopted by the GATT Council. Unadopted reports were taken as having persuasive authority, and, as a matter of practice, they were followed by future panels on similar issues.<sup>54</sup> International trade lawyers have highlighted several reasons for the practice of deferring to unadopted panels, including considerations of continuity, efficiency and consistency and the principle of treating equal cases alike.<sup>55</sup>

However, for the veto powers and other features of the dispute resolution mechanism, these norm-appliers were unable to remedy the defect of uncertainty and inefficiency of social pressure. Panels did not decide on the application of their own

<sup>&</sup>lt;sup>53</sup> World Trade Organization, A Handbook on the WTO Dispute Settlement System, 14.

<sup>&</sup>lt;sup>54</sup> This view was clearly manifested by WTO's norm-applying officials commenting on the previous practice: "Although unadopted panel reports have no formal legal status in the GATT or WTO system, the reasoning contained in an unadopted panel report *can nevertheless provide useful guidance to a panel or the Appellate Body in a subsequent case involving the same legal question.*" Panel Report, Japan — Alcoholic Beverages II, para. 6.10; Appellate Body Report, Japan — Alcoholic Beverages II DSR 1996:I, 97 at 108 back to text

<sup>&</sup>lt;sup>55</sup> See David Palmeter and Petros C. Mavroidis, "The WTO Legal System: Sources of Law," *American Journal of International Law* 92, no. 3 (1998): 402.

decisions and in this sense they did not operate as *adjudicators*—namely norm-appliers that issue settlements that were binding even if mistaken.<sup>56</sup> Instead, adjudicative powers remained formally and, in practice, in the hands of the community as a whole. In sum, for the Hartian, while GATT did have norm-applying officials, it suffered from several structural defects including a lack of adjudicators that could bring certainty to the system and enforce collective norms. As a consequence, GATT remained affected by the problems of uncertainty and inefficiency of social pressure typical of normative sets.

#### 2.5 Assessment

Most central normative activities in GATT were performed directly by the community and, in consequence, it suffered from the trio of defects typical of normative sets —uncertainty about its norms, a static character and inefficiency of social pressure. There were several efforts to remedy such deficiencies. In particular, GATT introduced norm-applying officials who could apply the standards on behalf of the community and thereby alleviate normative uncertainty and inefficiency, particularly in the less contentious issues. In turn, as international trade lawyers recognized, these officials created an institutionalized normative discourse—i.e. the discourse about the content of the normative system was based on the perspective of these norm-applying officials. Still, these features were insufficient to remedy the trio of defects due to some features of GATT's treaty such as the consensus rules, veto power in the dispute resolution mechanism, and the difficulty of

<sup>&</sup>lt;sup>56</sup> Hart, *The Concept of Law*, 141–2. Hart considers the introduction of adjudicators as a transformation as important as the evolution from "regime of custom to a mature system of law." Ibid., 142.

modifying treaties. Therefore, the Hartian should characterize GATT as a legal set that evidenced some traces of systematic character.

#### 3. The WTO as a Legal System

Now we will turn our attention to the WTO, the more sophisticated normative order created to replace GATT. Here, I will argue that such an order exhibits all the hallmarks of a Hartian legal system: it has a rule of adjudication in the procedures for settling disputes amongst its members and mechanisms to monitor their compliance with its norms; procedures to modify its laws more efficient than those of GATT; and a complex rule of recognition established by the convergent practice of its adjudicators. This analysis begins with a description of some of its general features.

# 3.1 WTO's General Features

The idea of a radical reform of the multilateral trade system began to emerge at the Uruguay Round, the 8th round of GATT negotiations (1986-1993). Negotiators and academics noticed that the substantive goals of the negotiation (i.e. the reduction of agricultural subsidies and the liberalization of trade in services, intellectual property, and investments) would be impossible to achieve without certainty about the institutional structure of the system and the mechanisms of dispute resolution. Thus, part of the negotiation focused on creating a UN specialized agency on multilateral trade that would remedy all the structural defects of the GATT. The result of this negotiation was the World Trade Organization, established by the Final Act concluding the Uruguay Round of Negotiation and officially signed on April 15, 1994, during a meeting in Marrakesh, Morocco.<sup>57</sup>

To bring certainty about the norms of the practice, negotiations proceeded under the so-called "single-undertaking" mechanism: all members needed to accept as one body of law all the agreements of the Uruguay Round which were included as annexes to the Marrakesh Agreement. The main components of this normative package are the following. Annex 1 is composed of three agreements on substantive rules of trade liberalization based on the same core principles as its predecessor. This Annex has several sub-components. Annex 1A is composed of a new agreement on the Trade of Goods (GATT 1994, an amended version of GATT 1947) and some agreements on specific issues such as Agriculture, Textiles, Non-Tariff Barriers to Trade, Anti-Dumping, Safeguards, Subsidies, among others. The other two components of Annex 1 extend the scope of the multilateral system beyond the trade of goods. Annex 1B contains a General Agreement on the Trade in Services (GATS) that liberalized the trade on services such as banking, construction, telecommunications, etc., and Annex 1C regulates the Trade-Related Aspects of Intellectual Property (TRIPS). In turn, Annexes 2 and 3 govern procedural issues. Annex 2 or Dispute Settlement Understanding (DSU) establishes the Dispute Settlement Mechanism (DSM), an improved procedure for the resolution of disputes. Annex 3 creates the Trade Policy Review Mechanism (TPRM), a system of surveillance and periodic review of

<sup>&</sup>lt;sup>57</sup> Marrakesh Agreement Establishing the World Trade Organization of 15 April 1994, 1867 UNTS 154 (hereafter WTO Agreement.).

members' compliance with WTO obligations. There is also a fourth annex comprised of some optional agreements on disputed issues.

In addition, the WTO was created as a proper international organization with members, not contracting parties, endowed with an institutionalized bureaucracy and administrative support. The main goals of this organization are to "facilitate the implementation, administration and operation as well as to further the objectives" of the WTO agreements; to be a forum of negotiation; and to administer the mechanisms of dispute settlement and trade policy review.<sup>58</sup> The complex organizational structure of the WTO comprises three central bodies. First is the Ministerial Conference, the highest decision-making body of the WTO. This Conference is the biennial meeting of trade ministers and other senior officials from the organization's 164 members. Second, the General Council composed of representatives of all member governments (usually ambassadors) who meet regularly to conduct the functions of the WTO on behalf of the Ministerial Council. The General Council also exercises the function of Dispute Settlement Body and Trade Policy Review Body—that is, the same body acts under different names and the special regulations of the DSU and TPRM, respectively. And third, the Secretariat headed by a *Director-General* which is responsible for supporting WTO delegate bodies on all the activities that are conducted by the Organization, particularly the negotiation and implementation of WTO agreements and providing technical support to developing countries. In addition to these three major institutions, there are a plethora of subordinate councils responsible for different areas of the agreement that report to the General Council

<sup>&</sup>lt;sup>58</sup> WTO Agreement, Art. III:1.
(one for GATT 1994, one for GATS and one for TRIPS), as well numerous working groups and sub-committees.

### 3.2 The Constitutive Rule of Adjudication

As many commentators have noted, the most remarkable feature of WTO's constitutive practice is the presence of a sophisticated rule of adjudication. For the Hartian, such a rule is not limited to the mechanism of dispute resolution, highlighted by all other accounts, but also includes the trade policy review mechanism. Here, I will explain these two components.

The first one is the *Dispute Settlement Mechanism* codified by Annex 2, a judicial mechanism with compulsory jurisdiction established to resolve disputes among member states about the application of WTO agreements. This instrument seeks to provide "security and predictability" to the normative order, "to preserve the rights and obligations of Members under the covered agreements," and "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."<sup>59</sup> In a nutshell, the system operates as follows.

WTO member states are forbidden from unilaterally determining violations of the agreements and imposing sanctions on violators. When a member state alleges that another is in violation of one of the communal norms (say, because it established discriminatory measures against foreign products), it must bring the issue to the General Council operating as the Dispute Settlement Body.<sup>60</sup> If consultations for a direct solution fail, the Dispute

<sup>&</sup>lt;sup>59</sup> DSU, art. 23.1

<sup>&</sup>lt;sup>60</sup> WTO Agreement, Art. IV:3.

Settlement Body must establish an *ad hoc* panel composed of three or five experts to issue a report that decides the dispute. One important innovation of the WTO system was the introduction of an appeal review of panel decisions by the Appellate Body, a standing body of seven independent experts that work as the highest adjudicative organ of the system.<sup>61</sup> The Appellate Body can hear appeals about panel reports from both parties on points of law and can decide whether to uphold, modify or reverse the report. The reports issued by panels and the Appellate Body need to be accepted by the Dispute Settlement Body to become binding decisions on parties of the dispute. When approved, they should be implemented by the losing member (e.g. by removing the discriminatory measure) "within a reasonable period."<sup>62</sup> If they are implemented, the losing party can be subject to the unilateral and proportional suspension of concessions, previously authorized and supervised by the Dispute Settlement Body.

This Dispute Settlement Mechanism attempts to remedy all the defects of its predecessor. Unlike GATT, WTO rules establish a clear timeframe for consultations, panels procedures, and appeals. More importantly, to prevent individual states from blocking the operation of the mechanism—the major problem confronted by GATT—critical procedural decisions concerning the establishment of the panel, the adoption of the report, and measures of retaliation are taken using a *reverse* or *negative* consensus.<sup>63</sup> Per this device the Dispute Settlement Body must approve the action unless there is a consensus not to do so among all members (including the parties of the dispute). While it is

<sup>&</sup>lt;sup>61</sup> DSU, Art. 16.

<sup>62</sup> DSU, Art. 23.3

<sup>&</sup>lt;sup>63</sup> DSU, Articles 6.1, 16.4, 17.14 and 22.6.

theoretically possible to achieve this reverse consensus, it is necessary that the interested party (the one requesting the panel or favoured by the judgement) joins the consensus against the decision.

Reverse consensus on procedural decisions radically transforms the dispute resolution mechanism. WTO members have a right to the establishment of a panel. Moreover, reports of panels and the Appellate Body are in practice automatically adopted by the Dispute Settlement Body. As a result, while the norm-application power formally remains in the hands of the General Council, the automatic application of their decisions transforms panels and the Appellate Body into adjudicators who decisively establish violations of the rules. These adjudicators help to remedy the defects of the inefficiency of diffuse social pressure and the uncertainty of the communal rules that characterized GATT. As international trade lawyers have recognized, the Dispute Settlement Mechanism is "a stabilizing factor that promotes peaceful relations between countries by identifying breaches in an impartial manner, and putting a cap on retaliation, by offering legal clarification and predictability to private traders, and by [providing] (...) protection against government abuse."<sup>64</sup>

The second component of the rule of adjudication is the Trade Policy Review Mechanism. As established in Annex 3 the main goal of this device is "to contribute to the enhanced adherence by all Members to rules, disciplines and commitments" of the WTO constitutive agreements, and "to smoother the functioning of the multilateral trading

<sup>&</sup>lt;sup>64</sup> Manfred Elsig, Joost Pauwelyn, and Robert M. Stern, "Dispute Settlement Mechanism—Analysis And Problems," in *The Oxford Handbook on The World Trade Organization*, ed. Amrita Narlikar, Martin Daunton, and Robert M. Stern (Oxford: Oxford University Press, 2012), 491 (references excluded).

system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members."<sup>65</sup> The adherence of all member states is reviewed and the frequency of this review depends on the country's share of participation in world trade. When the General Council convenes as the Trade Policy Review Body it appraises a policy statement supplied by the member country under review and a report provided by the Secretariat. The appraisal occurs in a public meeting where other WTO members have opportunities for questions and suggestions. The reports by the Secretariat and the member under review, as well as the concluding remarks of the process, are made publicly available.

This mechanism does not seek to enforce specific obligations or resolve disputes. Rather, it aims to collectively surveil and monitor the totality of trade policies and practices of individual members and exert communal peer pressure for conformity with treaty commitments.<sup>66</sup> From the Hartian point of view, as the pressure is exerted by the community as a whole and not by specific agents, such a mechanism does not create normenforcers. Hence, the Trade Policy Review Body should be considered as a non-centralized mechanism of the exercise of social pressure to secure compliance with communal rules.

The codified regulations of DSM and TPRM substantially reflect the efficacious social practice of the multilateral trade community. WTO's dispute settlement mechanism has considered more than 570 disputes and has issued over 350 rulings.<sup>67</sup> Moreover, academics have estimated that compliance with panel and Appellate Body rulings is around

<sup>&</sup>lt;sup>65</sup> TPRM, A.(i).

<sup>&</sup>lt;sup>66</sup> Sam Laird and Raymundo Valdés, "The Trade Policy Review Mechanism," in *The Oxford Handbook on The World Trade Organization*, ed. Amrita Narlikar, Martin Daunton, and Robert M. Stern (Oxford: Oxford University Press, 2012), 464. Ibid.

<sup>&</sup>lt;sup>67</sup> "WTO | Dispute Settlement - Appellate Body Members," accessed August 25, 2019, https://www.wto.org/english/tratop\_e/dispu\_e/ab\_members\_descrp\_e.htm.

80%.<sup>68</sup> Likewise, there have been five institutionally mandated appraisals of the TPRM (1999, 2005, 2008, 2011, and 2013), and the sixth one started in 2017. According to commentators, the surveillance mechanism has worked reasonably well and achieved its goals.<sup>69</sup> Furthermore, DSM and TPRM have effectively remedied the defects of normative sets by bringing normative certainty and efficiency to WTO's normative order. Adjudicators decisively identify the valid norms and their content, and social pressure is exerted by the community as a whole and by individual members to support the public norms and settlements. Crucially, as I explain below, the practice of the compound of norm-applying officials and non-centralized enforcement mechanism gives rise to a sophisticated rule of recognition that identifies the valid standards that belong to the practice.

# 3.3 The Constitutive Rules of Change

WTO's procedures to change norms follow the same principles of GATT. All major decisions are taken by the members as a whole, either in the General Council and the Ministerial Conference, and consensus continues to be the accepted practice.<sup>70</sup> In the context of a larger membership (currently, 164 members) and the inclusion of new powerful players (China and Russia), there have been suggestions for reform. However, the

<sup>&</sup>lt;sup>68</sup> "During the time period that was examined (1995-2015) there were 38 suspension requests submitted to the DSB. Using suspension requests as a proxy for non-compliance (based on the reasonable assumption that if a losing member state fails to comply, the prevailing state will submit a suspension request), this indicates a total compliance rate of about 80%. On the one hand, this is not a bad rate and explains why member states have confidence in the system and use is often. On the other hand, 20% non-compliance is not an insignificant percentage, in particular when, as we will see, it is not proportionally distributed among all member states." Arie Reich, *The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2017), 17, accessed August 28, 2019, https://papers.ssrn.com/abstract=2997094.

<sup>&</sup>lt;sup>69</sup> See Mathias Kende, *The Trade Policy Review Mechanism: A Critical Analysis*, Critical edition. (Oxford, United Kingdom: Oxford University Press, 2018).

<sup>&</sup>lt;sup>70</sup> WTO Agreement, Art., IX:1.

consensus rule persists because it is deemed to be the decision-making procedure most compatible with the sovereignty of states and the WTO's nature as a negotiating forum.

Although the WTO still faces difficulties relating to the consensus rule, the new agreement contains several mechanisms to improve its adaptive capacity. The first one is an improved mechanism for treaty modification. Save for some foundational issues that require consensus among all members,<sup>71</sup> the WTO allows decisions about the modification of the treaty to be taken by a two-thirds majority, and the amendment takes effect on those who accept it.<sup>72</sup> The provision, moreover, gives the possibility that a three-quarters majority of members establish a period in which members have to accept the amendment, or "shall be free to withdraw from the WTO or to remain a member with the consent of the Ministerial Conference."<sup>73</sup> In practice, this creates a unique situation in international law in which a majority can "compel" the dissenting members "to accept an amendment that would affect their rights and obligations or leave the organization."<sup>74</sup>

The second modification concerns the creation of constituted norms that regulate disputed issues— waivers, accessions of new members, and authoritative interpretations of the treaty— in which consensus is not necessary. Decisions about the waiver of WTO obligations on specific issues can be taken by a majority of three quarters of members<sup>75</sup> and a special rule establishes that decisions about accessions of new members can be taken by

<sup>&</sup>lt;sup>71</sup> Those are: the principle of most favoured nations (GATT 1994 art. 1 and GATTS article 1 and 4), tariff concessions (art. 2) and the decision-making processes (art. X)

<sup>&</sup>lt;sup>72</sup> WTO Agreement, Art. X:2

<sup>&</sup>lt;sup>73</sup> WTO Agreement, Art. X:3.

<sup>&</sup>lt;sup>74</sup> Palmeter, "The WTO as a Legal System," 476.

<sup>&</sup>lt;sup>75</sup> WTO Agreement, Art. IX:3.

the affirmative vote of two thirds of the members.<sup>76</sup> The Ministerial Conference and the General Council can provide authoritative interpretations of the WTO Agreement and its annexes if accepted by a three-quarters majority.<sup>77</sup>

In addition to this the WTO Agreement also introduced some mechanisms to facilitate the creation of rules and normative deliberations. These include the Councils of the three major treaties (GATT, GATS and TRIPS) which can establish further subsidiary bodies for specific issues. Moreover, there is also a number of specialized committees (such as those on Trade and Development, Balance-of-Payments Restrictions, Budget, Finance and Administration, etc.) which have different decision-making capacities.<sup>78</sup> Some of these Councils and Committees act as community-officials that enact norms on behalf of the community (called "decisions") that, for example, regulate their own procedures. However, most of them work as negotiation forums to debate specialized issues that issue "recommendations" that are brought to the Ministerial Conference and the General Council for decision. In the second sense, Councils and Committees do not operate as norm-creators that issue enactments but as mechanisms that facilitate deliberations of the normative community to reach the necessary consensus. As I explain below, it is a critical feature that these decisions and recommendations are considered by panels and the Appellate Body amongst the standards that guide their adjudicative decisions.

In sum, WTO's system incorporates several mechanisms to streamline the processes to adapt its norms to adapt to new circumstances. These include both technical

<sup>&</sup>lt;sup>76</sup> WTO Agreement, Art. XII:2.

<sup>&</sup>lt;sup>77</sup> WTO Agreement, Article IX:2.

<sup>&</sup>lt;sup>78</sup> WTO, Art. IV:5 and 6.

modifications of the treaty, norm-creating officials, and negotiation forums to improve the deliberative capacity of the community. One international trade lawyer described this transformation as follows:

The constitution of the WTO allows for the change in the international trading system to be taken account of and for effective response to the exigencies of international trade relationships. Thus the agreement establishing the WTO contains provisions allowing under specified circumstances for individual waiver of obligations, authoritative interpretative decisions and amendments of articulations of agreements arrived at the Uruguay Round of Negotiations... In this manner, the integrity of the international trading system is secured whilst avoiding rigidity.<sup>79</sup>

That is, while WTO's rules of change inherit the principles of GATT, they are a substantial improvement that remedies some of the problems of the static character of its predecessor.

# 3.4 The Constitutive Rule of Recognition

Finally, WTO's rule of recognition is authoritatively specified by the practice of the compound of adjudicators of identifying the norms that regulate the international trade community.<sup>80</sup> In fact, WTO's adjudicators have generated a sophisticated proto-doctrine of

<sup>&</sup>lt;sup>79</sup> Asif H. Qureshi, *The World Trade Organization: Implementing International Trade Norms* (Manchester: Manchester University Press, 1996), 7.

<sup>&</sup>lt;sup>80</sup> I believe that the rules of recognition comprise a second element in addition to the criteria of validity the criteria of applicability. On the criteria of applicability, see Eugenio Bulygin, *Essays in Legal Philosophy*, ed. Carlos L. Bernal et al. (New York: Oxford, 2015), chap. 10; Pablo E. Navarro and José Juan Moreso, "Applicability and Effectiveness of Legal Norms," *Law and Philosophy* 16, no. 2 (1997): 201–219. These criteria specify norms that do not belong to the normative system but nonetheless are binding on officials and subjects. In state law the criteria of applicability explain the application of foreign law to domestic cases in accordance with international private law e.g. the application of French law by Canadian courts to resolve a case concerning a marriage that took place in France. Likewise, the criteria of applicability explain the application of norms of the international legal order in international trade legal orders. I will not discuss this second component in this chapter.

the relevant sources of public norms, which has been extensively discussed by international trade lawyers.<sup>81</sup> Here, I present only the most general features of this practice.<sup>82</sup>

The most relevant criteria of validity recognized by WTO's adjudicators are the "covered agreements" subject to the jurisdiction of the Dispute Settlement Mechanism.<sup>83</sup> The main components are the WTO Agreement, its annexes—GATT, GATS, TRIPS, DSU— and all secondary agreements. In addition, WTO agreements also reference other international instruments that have been deemed as "incorporated" into the covered agreements. For example, TRIPS references major conventions on intellectual property. The consistent practice of WTO adjudicators is to recognize their constitutive treaties and the incorporated norms as standards that norm-applying officials must consider in their decisions.

The second group of criteria of validity reflects a close connection between rules of change and rules of recognition. As Hart explains, when a social rule of change confers norm-creating powers on some agents, the rule of recognition also recognizes the enactments of such agents as one of the system's criteria of validity.<sup>84</sup> Thus, decisions taken

<sup>&</sup>lt;sup>81</sup> Petros C. Mavroidis have provided a detailed explanation of WTO's rules of recognition. See Palmeter and Mavroidis, "The WTO Legal System"; Petros C. Mavroidis, "No Outsourcing of Law? WTO Law as Practiced by WTO Courts," *American Journal of International Law* 102, no. 3 (2008): 421–474; Mitsuo Matsushita, Thomas J. Schoenbaum, and Petros C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy*, 3rd ed. (Oxford: Oxford University Press, 2015), chap. 3. See also, Joost Pauwelyn, "Sources of International Trade Law: Mantras and Controversies at the World Trade Organization," in *The Oxford Handbook of the Sources of International Law*, ed. Jean d'Aspremont, Samantha Besson, and Sévrine Knuchel (Oxford: Oxford University Press, 2017), 1027–1046. My description is based on Mavroidis's formulation.

<sup>&</sup>lt;sup>82</sup> Since my objectives are primarily illustrative, I exclude two such putative sources of law—international agreements singed by the WTO as an international organization, and general principles of law—that will complicate unnecessarily my argument.

<sup>&</sup>lt;sup>83</sup> DSU, Art. 1:1, and Appendix 1.

<sup>&</sup>lt;sup>84</sup> See Hart, *The Concept of Law*, 96.

by the Ministerial Conference and the General Council are among the standards that guide the normative community. Moreover, WTO adjudicators also recognize the enactments of those councils and committees that function as norm-creating officials, as well as the recommendations of subsidiary negotiation forums, as public standards that regulate communal life. This view has been manifested in several panel reports and commentators typically cite as an example of this practice the report India—Quantitative Restrictions. In this report, panellists stated that when a committee has settled an issue, the panel should respect those settlements: "We see no reason to assume that the panel would not appropriately take [WTO Committee on Antidumping Practices'] conclusions into account. If the nature of the conclusions were binding... a panel should respect them.<sup>85</sup>" In sum, WTO adjudicators recognize the norms created by the community as a whole and by WTO's incipient norm-applying officials as creating public standards on behalf of the community. As international trade lawyers describe this practice, "adjudicating organs have de facto shown substantial deference toward actions taken collectively by the WTO members, even when such actions were taken at the lowest level of institutional integration, that of WTO committees."86

In addition, WTO adjudicators also recognize some customary norms as valid standards. Some of these customs are usages of general international law constituted and sustained by the international law community. Others are customs specific to the area of

<sup>&</sup>lt;sup>85</sup> Panel Report, India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, paras. 5.93–94

<sup>&</sup>lt;sup>86</sup> Mavroidis, "No Outsourcing of Law?," 9.

international trade law created by the actions of the multilateral trade community.<sup>87</sup> Here, I will only refer to the second kind—i.e. constituted customary norms specific to international trade.<sup>88</sup> WTO adjudicators recognize some usages in international trade considered as binding by member states provided they do not contradict WTO agreements. As described in a panel report, customary international law applies to the economic relationships between WTO members insofar as they do not "contract out" from it, that is, "to the extent that there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently."<sup>89</sup>

Finally, it is a controversial issue in international trade scholarship whether reports of WTO adjudicators count as a source of law. The WTO Agreement did not formally establish a rule of precedent for two reasons. First, the principle of *stare decisis is* not accepted in international law and, second, the legal systems of many WTO members do not incorporate such a principle. However, the practice of WTO adjudicators has acknowledged that adopted and unadopted reports have some value. For example, the WTO Appellate Body claimed that reports "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."<sup>90</sup> In a similar vein, a different report claimed that "absent cogent reasons, an adjudicatory body

<sup>&</sup>lt;sup>87</sup> For a discussion of the rule of custom in international trade, see Patrick Dumberry, "Customary International Law in International Economic Law," in *Elgar Encyclopedia of International Economic Law*, ed. Thomas Cottier and Krista Schefer (Edward Elgar Publishing, 2017), 43–44.

<sup>&</sup>lt;sup>88</sup> An explanation of the relationship of WTO norms to general customary international law (i.e. the customary norms of the international legal system) is a different and more difficult problem. However, the distinction between communities of practice as well as the distinctions between conditions of validity and applicability mentioned in footnote n. 80 *supra* are the key elements that allow the Hartian to frame and answer such a problem.

<sup>&</sup>lt;sup>89</sup> In Korea – Measures Affecting Government Procurement, p. 7.

<sup>&</sup>lt;sup>90</sup> Appellate Body Report, Japan — Alcoholic Beverages II DSR 1996: I, p107-108

will resolve the same legal question in the same way in a subsequent case."<sup>91</sup> For purposes of the quasi-sociological inquiry, it is sufficient to state that WTO adjudicators recognize reports as a source of binding communal norms. The Hartian leaves to doctrinal inquiry the determination of whether the rulings of WTO's adjudications only have a persuasive authority or constitute *de facto* precedents.

As a result, the WTO does not suffer from the persistent uncertainty about the communal rules that characterized GATT. Very differently, WTO's adjudicators practice a complex rule of recognition that establishes the standards that guide communal life, i.e. agreements, enactments, recommendations, customs, and precedents, and that they are bound to apply to specific cases. Through their reports, adjudicators also decisively establish the content of the norms thus identified. As I explain below, normative discourse in the WTO concerns primarily the norms that WTO adjudicators identify and their views about them.

### 3.5 Assessment

In conclusion, since the WTO has an efficacious rule of adjudication, recognition, and change, it can be considered a Hartian legal system. Although the system has less developed mechanisms for the modification of its norms and only a few norm-creating officials, it clearly displays two central elements of my refined account: a constitutive rule of recognition that empowers a compound of norm-appliers whose practice establishes efficacious rules of recognition that identify the rules that are binding in such a normative

<sup>&</sup>lt;sup>91</sup> See e.g. Appellate Body Report, United States – Final Anti-Dumping Measures on Stainless Steel from Mexico, ¶158, WT/DS344/AB/R (April. 30, 2008)

order. In other words, this rule-oriented, officially-administrated practice provides its target community with a clear understanding of the communal rules, how they are created, applied and by whom. As I explain below, this legal system allows for doctrinal debates about the validity of the constituted norms and, crucially, constitutes a structure of political authority whose role is to apply the constellation of norms they identify to specific cases.

In closing my argument I will highlight a critical challenge to the assessment provided. For the past few years the United States has actively blocked the appointment of new Appellate Body Members. Such appointments, like most decisions in the WTO, require the consensus of all members. At the moment of submission (October 2019), the Appellate Body is functioning with only three out of seven members and two are set to expire at the end this year.<sup>92</sup> The lack of judges has affected the Body's capacity to handle cases and if it were to have only one member the Dispute Settlement Procedure would grind to a halt. For the Hartian account, it is critical to note that if the Appellate Body were unable to function it would be necessary to provide a new account of WTO law. In such a situation, it is plausible that international trade law would transform back into a normative set.

### 4. The Virtues of the Hartian Account

### 4.1 *The Explanation of the Central Elements of the Practice*

The Hartian explanation of international trade law enjoys several explanatory virtues. First, the Hartian conception of normative order clarified the double nature of GATT and the WTO as norms part of the international legal system and independent normative orders. On

<sup>92 &</sup>quot;WTO | Dispute Settlement - Appellate Body Members."

this account, while GATT and the WTO preserve their character as creatures of the international normative order, they can also be considered as autonomous practices distinct from other sectors of international law and other norms of international trade law, which are constituted and sustained by the practice of the a specific community of state and state-like actors.

Second, the Hartian distinction between sets and systems further develops several intuitions present in the scholarship. Specifically, these two types of normative orders explain the transition from early GATT's "diplomatic" or "power-oriented" normative order to late GATT's and the WTO's "rule-oriented," "legalistic" or juridical" order. This distinction also captures the defects of GATT's normative order as well as the virtues of the WTO.

Third, and finally, since the Hartian explanation does not rely on state features it can respond to those critics who demand new conceptual tools to explain international trade law and other forms of non-state legal phenomena. As suggested above, the Hartian individuation of normative orders compares favourably to functionalist autonomous theories. Considerations of familiarity and consilience also support the case for Hartian theory over novel conceptual tools developed to explain GATT and the WTO: the theory is familiar to lawyers, legal scholars, and philosophers of different traditions, and is also consistent with the language and conceptual tools used in other areas of philosophy, legal scholarship, and some empirical disciplines. Thus there is no need to resort to new conceptual tools as the well-established notions can provide an illuminating account of international trade law and other non-state legal phenomena.

# 4.2 A Framework for Politico-Moral and Doctrinal Inquiry

The Hartian account also provides a framework in which several doctrinal and politicomoral issues can be formulated and answered. First, the distinction between sets and systems relates to the emergence of structures of authority—sets lack such structures while systems include them—which brings with it different questions about the legitimacy of officials and their dictates. For example, since GATT lacked an efficacious structure of authority, the politico-moral questions we could ask concern the legitimacy of the arrangement and its norms as well as the obedience that contracting parties owed to the standards they jointly created and applied.

In contrast, the WTO has a structure of authority composed of several bodies with the capacity to identify, create, and apply norms. Clarity on the systematic character of a given practice allows us to frame several questions not evident in simpler arrangements. One such question concerns the legitimacy of the community's structure of practical authority and its capacity to guide the behaviour of subjects. That is, theorists and participants can ask whether WTO's bodies are legitimate practical authorities worthy of the respect of member states. A second question queries the legitimacy of the system of norms that officials identify and their decisions about those norms. That is, we can question whether WTO's framework of collective norms, enactments, and settlements are based on the proper principles of justice or correctly embody or develop such principles. Yet a third question centres on the obedience that participants of the practice owe to the normative framework that officials identify, create, and apply, and the circumstances where subjects are morally justified to disobey those norms. That is, this third problem queries what reasons justify the obedience that states owe to the mandates of WTO bodies and the circumstances in which member states can justifiably depart from such mandates. Moreover, there is an additional iteration of this question concerning non-WTO participants (e.g. citizens of domestic states, NGO's, or traders) who are nonetheless affected by WTO decisions.

On the doctrinal side, the discourse about the content of the normative order and its application operates differently in early GATT, late GATT, and the WTO. Early GATT lacked institutions to create and apply its norms so its normative content equated to the rules practised by the community at large, often those imposed by the most powerful states. GATT's dispute settlement mechanism introduced some degree of institutional discourse. As described by the specialized literature, GATT panels "built up a body of jurisprudence, which remains important today, and followed an increasingly rules-based approach and juridical style of reasoning in their reports."<sup>93</sup> However, this body of jurisprudence was not efficaciously practiced in the community due to the structural defects of the dispute resolution mechanism. On the other hand, WTO's panels, Appellate Body, and other institutions have generated a sophisticated body of jurisprudence, efficaciously practiced by community members, that authoritatively establishes the communal rules and the content of these norms.<sup>94</sup> In this sense, the WTO has efficaciously institutionalized its doctrinal discourse. As a result, determination of the content of WTO's system is not simply

<sup>&</sup>lt;sup>93</sup> World Trade Organization, A Handbook on the WTO Dispute Settlement System, 13.

<sup>&</sup>lt;sup>94</sup> The jurisprudence of WTO bodies is compiled in an article-by-article Analytical Index that provides an authoritative interpretation of the WTO agreements. See "WTO | WTO Analytical Index — Guide to WTO Law and Practice (Updated Electronic Version)," accessed April 16, 2019, https://www.wto.org/english/res\_e/publications\_e/ai17\_e/wto\_agree\_e.htm.

an inquiry about which norms are *de facto* obeyed in the community but a query about the rules that norm-applying officials efficaciously identify and enforce.

To be clear, the Hartian socio-hermeneutical explanation only attempts to show that GATT and the WTO are different kinds of social objects which allow for different doctrinal or normative inquiries. However, such a description does not entail a judgement about their value or the superiority of one type over the other. As Hart suggested, the institutionalization of authority and normative discourse might bring efficiency and clarity, but they might also lead to further difficulties not present in simpler arrangements. These problems are evident in international trade law: WTO's "legalistic" system is less flexible and less prone to negotiation and voluntary cooperation than GATT's "diplomatic" normative set.<sup>95</sup> Moreover, the introduction of authorities precludes WTO members themselves from dealing directly with their issues, so there are risks of alienation and undemocratic rule by "faceless Geneva bureaucrats" who do not respond to domestic democratic constituencies, and dangers of "activism" from adjudicative bodies who are not subject to proper "check and balances."<sup>96</sup>

### 5. Conclusion

This chapter discussed the normative orders of international trade to exemplify the Hartian theory of non-state legal phenomena. The argument served both to illustrate the capacity of the theory to develop an illuminating account of non-state practices and to highlight its

<sup>&</sup>lt;sup>95</sup> B. Peter Rosendorff, "Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedure," *The American Political Science Review* 99, no. 3 (2005): 389–400.

<sup>&</sup>lt;sup>96</sup> Lorand Bartels, "The Separation of Powers in WTO," *International & Comparative Law Quarterly* 53, no. 4 (2004): 861–895.

distinctive approach to normative phenomena. As developed here, the Hartian identifies normative orders and communities and distinguishes as legal those that govern relevant moral-political issues through the exercise of intense social pressure. Legal and non-legal normative orders can be explained in terms of sets and systems. This account, in turn, provides a framework in which doctrinal and normative questions can be raised. This is the core of the Hartian unified, demarcationist account of state and non-state legal phenomena—a theory of the constellation of normative orders that exist at the domestic, non-domestic, international, transnational, and global levels. I will adumbrate the main prospects of this account in the concluding chapter.

## Chapter 5: Conclusions and Future Directions

### **1.** The Central Insights

This dissertation developed the rudiments of a theory of law capable of explaining state law and forms of non-domestic, international, supra-national, transnational, and global law. To develop such a theory the bulk of the argument focused on resolving two puzzles generated by putative forms of non-state legal phenomena, i.e. what are, if any, the common features of form, structure, and content between state and non-state legal phenomena; and what are the features, if any, that allows us to distinguish between legal and non-legal phenomena?

In response I offered what I have called a unified, demarcationist account of nonstate legal phenomena inspired by some central themes in the theory of law of HLA Hart. The master explanatory concept of this theory is the notion of *norms*—i.e. conduct-guiding standards. For the Hartian practiced norms refer to the conduct and attitudes of certain groups that I called *normative communities*. Moreover, norms are typically part of a unified complex of interrelated norms that I called *normative orders*. Orders can be divided into two kinds: *sets* that lack standards regulating the identification, modification, and application of its rules and *systems* that include norms that govern these central normative activities and empower agents to perform them. The three constitutive rules of a legal system are rules of recognition, change, and adjudication. These constitutive rules, in turn, introduce the notion of *community officials* i.e. agents who authoritatively exercise normative powers on behalf of the community. Sets and systems are, then, different kinds of normative objects that allow for different politico-moral and doctrinal questions.

This conceptual apparatus was further developed by way of response to challenges to the applicability of the Hartian account to non-state contexts. By clarifying the rationale of the distinction between systems and sets, I claimed that the rules of change and adjudication parallel the rule of recognition as constitutive rules of normative orders. Moreover, I identified two kinds of officials, one created by valid rules and another created by efficacious social constitutive rules of change and adjudication. The distinction between the system's constitutive rule of recognition and its constitutive rules of change and adjudication enables the Hartian theorist to fend off a recurring objection that finds a vicious circularity in the account. Finally, I introduced a proto-doctrinal understanding of the constitutive rules of legal systems. Per this account the constitutive rule of recognition is a social rule constituted by the shared understanding amongst norm-applying officials regarding the criteria that identify the rules of the normative system. Likewise, the constitutive rules of change and adjudication are the result of the shared understanding concerning the compound of norm-creators and norm-appliers that exercises the central normative functions in the system.

I also offered a novel account of the distinction between legal and non-legal phenomena. While state and non-state normative phenomena can be conceived in terms of sets and systems, the Hartian considers as "law" those norms and normative orders that constitute *political communities* i.e. groups that exercise strong or intense forms of social pressure in politico-moral relevant domains. On this account there are no reasons to connect

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or restrict legality to state-law or situations where features like hierarchies of norms or officials are present. For the Hartian legal orders are simply a sub-type of normative practice phenomena that constitute and regulate political communities.

This account was taken for a test-drive in international trade law. GATT 1947 and WTO serve as the ideal illustration of the theoretical relevance of some central insights of the Hartian account: the relevance of the identification of normative orders, the distinction between sets and systems, and the framework for doctrinal and political inquiries it generates.

The conception developed here can respond to the concerns both of fragmentary accounts and non-demarcationist accounts. For the Hartian scholars who advocate these projects are "disappointed absolutists" who hold that, since they are unable to find the relevant continuities (often in the form of a definition of law or an account of the nature of law in terms of necessary and sufficient conditions) or a sharp distinction between law and non-law, we should simply stop looking. Both types of skepticism are premature and unwarranted. Contra fragmentary accounts, such as those of Tamanaha and Twining, I was able to show that there are useful continuities amongst the different forms of legality. *Pace* Twining there is nothing in the Hartian account that could be deemed as ethnocentric or imperialistic. The Hartian uses widely accepted conceptual tools that provide third-person explanations of different kinds of normative phenomena that highlight central features of the phenomena and allow us to frame some theoretically and practically relevant questions. No component of the theory involves judgements of cultural superiority or the imposition of Western concepts over the concepts of other societies.

Contra non-demarcationist accounts I argued that the recognition of non-state legal phenomena does not lead to a rejection of the distinction between legal and non-legal phenomena. The notion of political community provides an explanatorily useful border while recognizing the fuzzy nature of the distinction and the possibility of theoretical disagreements about the legal character of certain phenomena. Moreover, the Hartian account avoids potential defects of non-demarcationist accounts that put different kinds of normative phenomena on an equal footing. For these accounts there is "law" both in the norms that children create while playing in the schoolyard as well as in states, lex mercatoria, and the European Union. By contrast, the Hartian suggest that legal and political philosophers should distinguish between normative phenomena that occupy a prominent social role for their use intense social pressure on key politico-moral issues (e.g. state law, lex mercatoria and EU law) and other norms that lack such features (e.g. playground rules). In doing so, the Hartian attempt to capture the distinction between legal and non-legal phenomena of our ordinary discourse and facilitate the formulation of politico-moral and doctrinal inquiries.

## 2. Towards a refined Hartian Account of Non-State Legal Phenomena

The Hartian resources advanced here provide the foundations for an illuminating theory of non-state legal phenomena identified in Chapter 1. In this section, I will offer illustrative examples of provisional explanations of non-domestic, international, transnational, and global law.

### 2.1 Non-Domestic Law

The refined Hartian account provides an explanation of types of *non-domestic law* such as customary, indigenous, religious, and community-based legal phenomena that avoid some of the problems of Hart's original theory. Per the most common interpretation, Hart's description of "pre-legal" and "primitive" societies (i.e. communities without secondary rules characteristic of the legal system) refers to what I have called here non-domestic law. In the common reading, primitive societies are not societies ruled by law. Thus, Hart's theory denies legal character to customary, indigenous and community-based legal phenomena. Some writers have even argued that Hart's language of "primitive law" suggests that he considered forms of non-domestic law as inferior to, barbaric or lesser than the systematic law of nation-states.<sup>1</sup>

Whatever defects of Hart's theory, these do not affect the Hartian account as developed here. For the refined account we need to identify first the relevant specific normative orders, not areas of practice. To use familiar examples, we can characterize as *prima facie* normative orders the *xeer*, the traditional customary laws that govern central aspects of Somalia's society;<sup>2</sup> the norms of the Colombian U'Wa people<sup>3</sup> or the North

<sup>&</sup>lt;sup>1</sup> For some examples of this claim see Donald Gallaway, "The Axiology of Analytical Jurisprudence: A Study of the Underlying Sociological Assumptions and Ideological Predilections," in *Law in a Social Context: Liber Amicorum Honouring Professor Lon L. Fuller* (Kluwer: Deventer, 1978), 85–88; Antony N. Allott, *The Limits of Law* (London: Butterworth, 1980), 49–50; Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), 192–210; Morton J. Horwitz, "Why Is Anglo-American Jurisprudence Unhistorical?," *Oxford Journal of Legal Studies* 17, no. 4 (1997): 582–3; Menski, *Comparative Law in a Global Context*, 99–101; Tamanaha, "Understanding Legal Pluralism," 382.

<sup>&</sup>lt;sup>2</sup> See Joakim Gundel, *The Predicament of the 'Oday', The Role of Traditional Structures in Security, Rights, Law and Development in Somalia* (Nairobi: Danish Refugee Council & Oxfam, 2006), https://logcluster.org/sites/default/files/documents/Gundel\_The%2520role%2520of%2520traditional%2520 structures.pdf.

<sup>&</sup>lt;sup>3</sup> For a discussion of U'Wa Law, Lindahl, *Fault Lines of Globalization*, 56–9.

American Haudenosaunee;<sup>4</sup> or the specific form of Sharia' Law practiced in Nigeria.<sup>5</sup> For the Hartian, the legality of these orders is not a function of their systematic character or recognition by state law but of the issues regulated by the community and the type of social pressure they utilize. That is, non-domestic normative orders that govern significant moral and political issues through the exercise of strong social pressure are to be deemed "legal practices."

Furthermore, the Hartian can consider non-domestic normative orders either as sets or as systems. Those normative orders that do not regulate central normative activities are examples of sets, while those that include criteria to identify its norms and agents or institutions in charge of norm-creation and norm-application are examples of Hartian systems. For instance, clan elders (*oday*) in Somalia's *xeer* exercise significant powers to resolve disputes and identify and enforce norms; the Great Law of Peace of the Haudenosaunee is a sophisticated democratic normative order with rule-creating and ruleapplying institutions, and Nigerian Sharia law has a system of courts and legislators. As these practices seem to include the trio of constitutive rules, they are candidate Hartian legal systems.

In this sense, while Hart's choice of language is occasionally unfortunate, the charge of ethnographic imperialism is false. The determination of the non-systematic nature of a practice is an explanatory statement, not an assessment of its merit or cultural

<sup>&</sup>lt;sup>4</sup> Kayanesenh Paul Williams, *Kayanerenkó:Wa: The Great Law of Peace* (Winnipeg: University of Manitoba Press, 2018).

<sup>&</sup>lt;sup>5</sup> See Yushau Sodiq, "A History of Islamic Law in Nigeria," in *A History of the Application of Islamic Law in Nigeria*, ed. Yushau Sodiq (Cham: Springer International Publishing, 2017), 27–50, accessed August 22, 2019, https://doi.org/10.1007/978-3-319-50600-5\_2.

advancement. For the Hartian a normative order is primitive or rudimentary if it lacks the effective trio of constitutive rules. As we saw in the previous chapter, GATT and other Western normative orders would also be considered as primitive if they do not regulate their central normative activities.

Finally, while the lack of hierarchies could be an impediment to the use of Hart's original theory in non-domestic law, it does not pose an obstacle for the proto-doctrinal interpretation of the rule of recognition. On this account, a rule of recognition consists of the unified perspective on the criteria of validity of a given community. We have already shown how some forms of African customary law illustrates the possibility of non-hierarchical rules of recognition.

### 2.2 International Law

The Hartian account provides the foundation of a novel account of contemporary international law. For an important sector of the scholarship, the theoretically relevant question is to explain the legality of international law, i.e. to answer the question "is international law 'law'?" Many scholars have recurred to Hart's influential theory to address this question. According to the standard interpretation, Hart distinguishes between pre-legal communities governed by sets that lack standards that guide the identification, modification, and application of their rules and systems that do include those standards. To determine whether international law is law, then, the theorist must verify whether they constitute legal systems, i.e. whether international legal practice contains rules that regulate the identification, creation and application of international norms. In other words, the standard application of Hart's theory to international law attempts to resolve the questions

about the legal nature and explanation of this practice by identifying constitutive rules of change, adjudication, and recognition in the international legal practice.<sup>6</sup>

The Hartian perspective differs from this standard approach in two relevant aspects. On the one hand the legal character of international law does not depend on its systematic nature. That is, international law might be a normative set and still be a legal practice that makes up an international *polity*. On the other hand, and more importantly, the inquiry about the systematic or non-systematic character of international law presumes that we have identified a normative order—i.e. a unified complex of interrelated norms. However, the most commonly encountered attempts to apply Hart's theory of international law do not specify a particular normative order but instead study an area of practice-i.e. what is taught in international law courses or the content of international law treatises. However, there is no guarantee that each area of practice corresponds to a normative order, or that there is only one normative order in every area of practice. As we discussed in previous chapters, in addition to general international law, many sectors in the doctrinal area of practice called international law, such as the WTO, international criminal law or the international regime of human rights, could be characterized as independent normative orders.

<sup>&</sup>lt;sup>6</sup> For examples of this view, see Franck, *Fairness in International Law and Institutions*; Lefkowitz, "(Dis)Solving the Chronological Paradox in Customary International Law"; Patrick Capps, *Human Dignity and the Foundations of International Law* (Oxford: Hart Publishing, 2009); Samantha Besson and John Tasioulas, eds., *The Philosophy of International Law* (New York: Oxford University Press, USA, 2010); d'Aspremont, *Formalism and the Sources of International Law*; Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A. Hart"; Waldron, "International Law: 'A Relatively Small and Unimportant' Part of Jurisprudence?"; Collins, *The Institutional Problem in Modern International Law*; David Lefkowitz, "What Makes a Social Order Primitive? In Defence of Hart's Take on International Law," *Legal Theory* (2017): 1–25; Carmen E. Pavel, "Is International Law a Hartian Legal System?," *Ratio Juris* 31, no. 3 (2018): 307–325.

The lack of proper individuation of the normative order under investigation might be a source of confusion. For example, one might try to identify the rule of adjudication of international law in the norm-appliers of its constituent normative orders, like the WTO or international criminal law. In contrast, proper individuation of the normative orders generates a more sophisticated account. We could suggest that international law is a macrolegal order which gives rise to a plurality of normative orders, each of them created by their own normative communities. These normative orders might exhibit different degrees of systematic character i.e. they might display a proto-doctrine shared by its norm-applying officials. In this sense, the Hartian is open to the possibility that the proper account concludes that general international law is a set, while some of its constituents' normative orders could be characterized as normative systems. In any case, the general international legal order would be considered a legal practice insofar as it regulates important moral issues through intense forms of social pressure. While these speculative ruminations are far from being a detailed theory, the key point remains that the Hartian account provides a useful illumination on how to frame and answer the central questions of international legal practice.

### 2.3 Supra-National Phenomena

In similar terms, the Hartian can provide the foundations for accounts of different types of supra-national legal phenomena like the European Union (EU) and similar arrangements, regional systems of human rights, and different kinds of trade and investment agreements. As the third type was tangentially discussed in the previous chapter, I will say something about the first two examples here.

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The literature on the EU, the most developed form of supra-national law, has been focused on how to conceive the EU as a legal system.<sup>7</sup> Many conceptions identify legal systems as those that make a claim of supremacy or primacy over other institutionalized systems, namely a capacity to regulate all other normative orders in a given jurisdiction; non-supreme, subordinate complexes are, subsequently, not legal systems.<sup>8</sup> Many scholars have suggested that this understanding, particularly as developed by Joseph Raz, does not square easily with non-state legal phenomena such as the European Union.<sup>9</sup> In particular, while both EU and member-state courts accept the supremacy of EU norms over conflicting member-state norms, they offer radically different accounts of this feature.<sup>10</sup> Per EU's officials, this supremacy stems from EU law; whereas for member-state courts supremacy is the result of an authorization of national law. Many scholars have noted that there is a possible conflict between these two supremacy claims, which cannot be simultaneously

<sup>&</sup>lt;sup>7</sup> EU has monopolized theoretical attention and, thereby, distracted focus from other important practices such as the African Union, MERCOSUR, or CARICOM which bring their own unique puzzles to legal theory. For example, CARICOM is the Caribbean Community, a union of fifteen Caribbean state and state-dependencies (primarily English-speaking) established in 1973 for purposes of economic integration and cooperation. In 2012 the original treaty was revised, and CARICOM created a single market and established the Caribbean Court of Justice. This Court has a double jurisdiction. On the one hand, on its "original jurisdiction," it is an international court with compulsory and exclusive authority to interpret the 1973 treaty. On the other hand it also has an "appellate jurisdiction" in which the Court operates as the final court in civil and criminal matters for five former British Colonies (Barbados, Belize, Dominica, and Guyana). That is, the supreme judicial authority of these states is a non-state tribunal. It is not intuitively clear how contemporary legal theories, particularly those inspired by Raz's understanding of legal systems, help us to understand such arrangements.

<sup>&</sup>lt;sup>8</sup> It is noticeable ed that late Hart came to endorse such a requirement;. "the distinctive features of law are the provision it makes by secondary rules for the identification, change, and enforcement of its standards and *the general claim it makes to priority over other standards.*"

<sup>&</sup>lt;sup>9</sup> For example, Andrei Marmor, *Positive Law and Objective Values* (Oxford: Oxford University Press, 2001), 40; Tamanaha, *A General Jurisprudence of Law and Society*, 140; Culver and Giudice, *Legality's Borders*, chap. 2; Julie Dickson, "Towards a Theory of European Union Legal Systems," in *Philosophical Foundations of European Union Law*, ed. Julie Dickson and Pavlos Eleftheriadis (Oxford: Oxford University Press, 2012), 40; Roughan, *Authorities*, chap. 9; Jennifer W. Primmer, "Beyond the Law-State: The Adequacy of Raz's Account of Legal Systems in Explaining Intra-State and Supra-State Legality," *Ratio Juris* 28, no. 1 (2014): 149–158.

<sup>&</sup>lt;sup>10</sup> See Craig and Búrca, EU Law, chap. 9.

true.<sup>11</sup> Consequently, by the critics' lights, the EU cannot be appropriately explained using the notion of legal system.

The Hartian account avoids this debate for it characterizes the EU as a legal system without resorting to the requirement of supremacy. On this account the constitutive treaties of the EU give rise to a distinct normative order different from legal systems of the member states and general international law. Furthermore, even from a textbook description of the EU, it is possible to identify some central elements of a Hartian normative system in the sense defined here; the EU has a sophisticated compound of norm-creating and norm-applying officials who converge on a sophisticated proto-doctrine of criteria of validity. As this system governs issues of major political and moral relevance and employs strong means of social pressure (directly, or through the action of states), the EU could be *prima facie* characterized as a legal order. This provisory description, of course, needs to be backed by further doctrinal and empirical evidence as suggested above. However, it clarifies our pre-theoretical impression and serves as a point of departure for inquiries about EU law.

<sup>&</sup>lt;sup>11</sup> See Culver and Giudice, *Legality's Borders*; "Not a System but an Order: An Inter-Institutional View of European Union Law," in *Philosophical Foundations of European Union Law*, ed. Julie Dickson and Pavlos Eleftheriadis (Oxford: Oxford University Press, 2012), 54–76. In related papers, Michael Giudice alone has articulated the methodological implications of this argument. See *Understanding the Nature of Law*, chap. 6. For other articulations of this objection, see Pavlos Eleftheriadis, "Begging the Constitutional Question," *JCMS: Journal of Common Market Studies* 36, no. 2 (1998): 255–272; MacCormick, *Questioning Sovereignty*, 1999; Ines Weyland, "The Application of Kelsen's Theory of the Legal System to European Community Law – The Supremacy Puzzle Resolved," *Law and Philosophy* 21, no. 1 (2002): 1–37; Julie Dickson, "How Many Legal Systems? Some Puzzles Regarding the Identity Conditions of, and Relations Between, Legal Systems in the European Union," *Problema. Anuario de Filosofía y Teoría del Derecho* 5 (2008): 81–116; Dickson, "Towards a Theory"; Justin Lindeboom, "Why EU Law Claims Supremacy," *Oxford Journal of Legal Studies* 38, no. 2 (2018): 328–356.

The second example consists of the influential regional human rights orders seen in Europe, Africa and across the Americas. From the Hartian perspective each of these practices constitutes a normative order different from general international law and their parent legal orders (i.e. the EU in the case of the European system). Moreover, although they might share several norms both among them and with the international law of human rights, such convergence does not render them into a macro-normative order. Instead, they are autonomous normative orders backed up by the practices of specific communities and with their own norm-applying officials. Since they have norm-applying officials and protodoctrines of their criteria of validity, they are candidate Hartian legal systems.

## 2.4 Transnational Law

The Hartian framework offers a repository of resources to begin to explain the numerous forms of transnational legal phenomena and the first task in providing such an explanation is to specify the relevant normative orders and the communities of agents who generate them. The Hartian conception of normative orders contrasts with common understandings in the literature, such as the one developed by Halliday and Shaffer. For these writers a transnational legal order is a "collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions."<sup>12</sup> On this account the totality of norms about taxation, soft

<sup>&</sup>lt;sup>12</sup> Terence C. Halliday and Gregory Shaffer, eds., *Transnational Legal Orders* (New York: Cambridge University Press, 2016), 5, 11, 475.

law, food, climate change, pharmaceutical patents and even the notion of rule of law are normative orders.<sup>13</sup>

For the Hartian, many of the complexes of norms that Halliday and Shaffer mention do not constitute normative orders for their norms do not display normative relationships among them or lack a distinctive sense of unity. Instead, they could be characterized as regimes—i.e. norms about a similar topic—and, for this reason, they could not be described in terms of sets or systems. To discuss the notion of the rule of law the Hartian would divide between its normative and non-normative components. The normative component refers to the norms state and non-state normative orders that enshrine rule of law values. The nonnormative component is the non-institutionalized or grammatical elements, the values or principles that are associated with the legal orders of liberal nation-states. In either case, the norms or principles of the rule of law do not constitute a Hartian normative order.

With similar resources, the Hartian can begin to provide accounts of so-called autonomous orders such as *lex mercatoria, lex constructionis, lex digitalis* or *lex sportiva*. Significant work has been advanced in demonstrating the systematic character of these practices. To see this point consider Gralf-Peter Calliess' description of *lex mercatoria*:

According to the proponents of an autonomous new LM, transnational commercial law denotes a third category of legal system beyond the traditional dichotomy of domestic laws and (public) international law. (1) Its foundations are (a) general principles of law, derived from a functional comparative analysis of the common core of domestic legal systems, and (b) the usages and customs of the international business community as expressed in standard form contracts and model clauses. (2)

<sup>&</sup>lt;sup>13</sup> Halliday and Shaffer, *Transnational Legal Orders*.

Its administration and further development lie in the hands of private judges involved in international commercial arbitration, and (3) its enforcement rests predominantly on social sanctions such as reputation and exclusion. Finally (4) its rules are codified —if at all— in the form of lists of principles, rules and standards, codes of conduct, or best practices promulgated by private norm entrepreneurs.<sup>14</sup>

The key idea is that there is a normative order generated by general principles of law and Hartian social rules of the community of traders (the "international business community") that regulates international commercial law. Moreover, in the description above some elements of a proto-Hartian legal system can be identified. Rules of adjudication empowers non-state arbitrators (e.g. the International Court of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration, the International Center for Dispute Resolution of the American Arbitration Association, or the Hong Kong International Arbitration Centre) as adjudicators who, in turn, play a central role in the identification of the system's proto-doctrine of validity. Furthermore, rules of change that empower some institutions to codify the rules created and practiced by traders. While intergovernmental institutions create general codifications of transnational commercial law (e.g. the United Nations Commission on International Trade Law, or International Institute for the Unification of Private Law), private organizations commonly create rules on specific issues (e.g. Lloyds of London creates rules for insurance, the International Accounting Standards Board for accounting rules, and the International Chamber of Commerce for rules abound letters of credit).

<sup>&</sup>lt;sup>14</sup> Gralf-Peter Calliess, *Lex Mercatoria*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, April 22, 2015), accessed August 23, 2019, https://papers.ssrn.com/abstract=2597583.

From the Hartian perspective, while the previous remarks offer a promising point of departure, one central clarification should be made. Many extant accounts of *lex mercatoria* depart from functionalist assumptions in which a normative order is comprised of the totality of norms that regulate the sector of global society that governs commercial law. The Hartian is wary of such a characterization as functional individuation might not specify one normative order or there might be more than one community of international traders. Thus, any successful theory of *lex mercatoria* should identify both the relevant normative order and the community of traders.

Finally, the Hartian notion of political community also provides elements to frame the discussion concerning the legal nature of transnational normative practices. On this account the question about the legal character of a normative order has to consider the kind of issues it regulates, and the social pressure its participants exert to secure compliance with its norms. Thus, the Hartian theorist could, in principle, characterize the normative orders that govern international commercial law (i.e. *lex mercatoria*), construction projects (i.e. *lex constructionis*), and internet transactions (i.e. *lex digitalis*) as legal practices, because they regulate relevant moral, economic, and political issues through the use of intense forms of social pressure. In contrast, these elements shed doubt on the legal character of multinational enterprises and clarify the discussions about the legality of *lex sportiva*.

First, multinational enterprises are "companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways,"<sup>15</sup>

<sup>&</sup>lt;sup>15</sup> OECD (Organization for Economic Co-Operation and Development), *OECD Guidelines for Multinational Enterprises* (Paris: OECD Publishing, 2011), http://www.oecd.org/daf/inv/mne/48004323.pdf.

such as Siemens, Exxon, Unilever, Coca-Cola, Starbucks, Novartis, etc. According to many scholars, each enterprise (multinational or domestic) "is an island of law having the character of a true legal order."<sup>16</sup> The Hartian account supports this characterization of multinationals as independent normative orders. Although multinational corporations have their origin in legal acts performed according to commercial laws of a certain domestic jurisdiction, they can display all the hallmarks of a normative order, in particular, a distinctive sense of unity. Moreover, since the norms of these enterprises can establish their own criteria of validity and norm-creating and norm-applying institutions, they could be considered as normative systems.

However, from the Hartian perspective, non-state legal scholars have not made a decisive argument for the distinctive legal nature of multinational enterprises. In general, the case for denoting a legal character is based on the influence that multinationals have on the normative systems of nation-states and their subjects, aptly summarized by John Ruggie—former UN Secretary-General's Special Representative for Business and Human Rights:

[Multinationals] exercise authority through the private law of contracts, the new *lex mercatoria*, which can affect workplace conditions, the welfare of communities and environmental practices in more jurisdictions than there are UN Member States — and which can be more effectively enforced than the typical UN resolution and convention. Moreover, multinational enterprises exercise authority in relation to States themselves through binding international arbitration provisions in investment agreements. These give multinationals legal standing to sue States for damages, not only in cases of expropriation without prompt and adequate compensation, but also

<sup>&</sup>lt;sup>16</sup> See Robé, "Multinational Enterprises: The Constitution of a Pluralistic Legal Order," 53.

if the economic equilibrium that existed when the investment was made was upset through policy measures that an arbitration panel might construe as uncompensated regulatory takings, which can include progressive labour regulations, human rights standards and environmental requirements.<sup>17</sup>

For the Hartian, while this passage makes it clear that multinationals exercise influence over states and citizens, it is not clear whether they exercise normative powers that would constitute them as practical authorities. For example, having the capacity to sue states through investment agreements does not involve a normative power to settle normative situations on behalf of a certain normative community. In such a case, it seems, the relevant norm-constituted authority is the adjudicator that settles the dispute exercising powers created by investment agreement's normative order. Furthermore, the influence that Ruggie highlights relates to the capacity of multinational enterprises to factually influence state behaviour, not with the application of norms that multinational enterprises create and enforce. In other words, the argument for the legal character of multinationals seems to conflate *de facto* authority or ability to induce behaviour with normative authority created by power-conferring norms. As a result, from the Hartian perspective, the legality of corporations remains an open question.

Finally, *lex sportiva* concerns an area of practice that regulates sports and professional sports associations, such as the *Fédération Internationale de Football Association* (FIFA) that regulates professional football<sup>18</sup> and the World Anti-Doping

<sup>&</sup>lt;sup>17</sup> John Gerald Ruggie, "Foreword: Constitutionalization and the Regulation of Transnational Firms," in *Multinationals and the Constitutionalization of the World Power System*, ed. Jean-Philippe Robé, Antoine Lyon-Caen, and Stéphane Vernac (Abingdon: Routledge, 2016), xiii.

<sup>&</sup>lt;sup>18</sup> FIFA.com, "Who We Are - FIFA.Com," *FIFA*, accessed October 18, 2019, https://www.fifa.com/about-fifa/who-we-are/.

Agency (WADA) that that brings "consistency to anti-doping policies and regulations within sport organizations and governments right across the world."<sup>19</sup> Unlike the functionalist, the Hartian theorist does not presume a normative order in the sector of the global society that rules sports-related activities but seeks to identify the relevant normative orders in this area of practice. For example, there seem to be normative orders in FIFA and WADA, and these orders include norm-applying officials that resolve disputes and identify and apply the order's norms: WADA's World Anti-Doping Code is applied by the Court of Arbitration for Sport (CAS) as well as by other internal tribunals of International Federations and National Anti-Doping Organizations, while FIFA's norms are applied by its Disciplinary and Appeal Committees.<sup>20</sup>

One pivotal virtue of the Hartian approach is that it allows a more evident formulation of the central question that puzzles scholars of this area, i.e. "in what sense is *lex sportiva* 'law'?" To determine the legal character of these practices the Hartian theorist has to consider two aspects; namely, (1) the issues they regulate and (2) the type of social pressure they employ. Regarding the first aspect, theorists must debate for each normative order whether they regulate issues of sufficient politico-moral relevance. While one might be skeptical about whether sports are sufficiently relevant, we should also note that these complexes of norms also regulate other matters which might involve significant politicomoral concerns. For instance, FIFA norms not only govern the game of football but also

<sup>&</sup>lt;sup>19</sup> "What We Do," *World Anti-Doping Agency*, last modified November 14, 2013, accessed August 23, 2019, https://www.wada-ama.org/en/what-we-do.

<sup>&</sup>lt;sup>20</sup> FIFA.com, "FIFA Committees - FIFA.Com," *Www.Fifa.Com*, accessed August 23, 2019, https://www.fifa.com/about-fifa/who-we-are/committees/.
other topics such as labour conditions for soccer players, bidding processes for tournaments, crowd violence and corruption as well as some human rights issues, e.g. the rights of children regarding safety, work conditions and prevention of human trafficking and exploitation or the rights of women to attend soccer matches.

Regarding the second issue theorists must consider the kind of social pressure these normative orders exert and whether such pressure is the result of the application of the orders' norms. Again, FIFA provides a relevant example. Norm-applying football officials have the capacity to exercise intense forms of social pressures, including the power to impose hefty fines against clubs and players and exclude them from competitions as a consequence of the violation of FIFA norms. However, this norm-mediated pressure contrasts with other non-norm mediated ways in which FIFA influences other actors such as states. For example, it is often claimed that FIFA acts as an "authority" because it was able to pressure Brazil to modify the rules of liquor consumption in stadiums during the 2014 World Cup,<sup>21</sup> and has had substantial influence on the regulations governing labourers building the stadiums for the 2022 Qatar World Cup.<sup>22</sup> For the Hartian, the first type of exercise of social pressure concerns the creation and application of FIFA rules and, thereby, constitutes FIFA as a practical authority over its subjects, i.e. clubs and soccer players. By contrast, the second type is factual influence that it is not based on the exercise of normative

<sup>&</sup>lt;sup>21</sup> "Soccer-FIFA Tells Brazil It Must Have Beer at World Cup," *Reuters*, January 19, 2012, accessed September 11, 2019, https://www.reuters.com/article/soccer-world-beer-idUSL3E8CJ03K20120119.

<sup>&</sup>lt;sup>22</sup> Franck Latty, "Non-State Authority: FIFA," in *Global Private International Law*, ed. Horatia Muir Watt (Cheltenham, UK: Elgar Publishing, 2019), 151–160.

powers, and thereby does not constitute FIFA as a practical authority. Only the first type is relevant for the characterization of FIFA's normative system as a legal practice.

#### 2.5 Global Law

Lastly, Hartian theory can clarify the possibility of *global*, *world* or *cosmopolitan* legal phenomena—namely, some forms of legal regulation with global influence, outside the control of the nation-state or any other authority. While it is recognized that the notion of global law reflects an interesting intuition, critics have suggested that current accounts of the notion are "slippery," so the concept "ends up either empty in its critical application or else susceptible to an almost infinite manipulation and application to support any particular vision of law's re-imagination in its seemingly ineluctable global future."<sup>23</sup> The Hartian account can provide the building blocks of a response to this critique.

For the Hartian, a great deal of the "slipperiness" of global law derives from the confusion between normative and non-normative phenomena. Two examples illustrate this confusion. My first example is global administrative law (GAL), one of the most discussed instances of putative global legal phenomena. According to the familiar understanding, GAL refers to the processes through which some principles of administrative action (e.g. transparency, accountability, legality, etc.) have come to regulate the actions of international organizations, intergovernmental regulatory bodies and non-state organizations such as the United Nations, the European Union, the WTO, ICANN, etc.<sup>24</sup>

<sup>&</sup>lt;sup>23</sup> Richard Collins, "The Slipperiness of 'Global Law," *Oxford Journal of Legal Studies* 37, no. 3 (2017): 714–739.

<sup>&</sup>lt;sup>24</sup> Kingsbury, Krisch, and Stewart, "The Emergence of Global Administrative Law." Kingsbury alters the Hartian account to incorporate one requirements of "publicness" in law.

GAL is also used to refer to an academic movement that explains such phenomena. Theoretical discussion of this phenomenon is typically focussed on explaining GAL's putative legal character. As Benedict Kingsbury—one of the founding fathers of this field— puts it, the central question is: "What constitutes 'law' in the efflorescent field of 'global administrative law'?" Kingsbury offers an answer to such a query using an amended version of Hart's theory.<sup>25</sup> On this account, GAL is law for it constitutes a normative system with a trio of rules of change, adjudication, and recognition.

The Hartian rejects Kingsbury's diagnosis. From the Hartian perspective it is necessary to distinguish GAL's normative and non-normative components as well as the normative orders that could be explained using Hartian tools. Thus, the Hartian can identify and elucidate some normative orders (e.g. the UN, EU, WTO, etc.) and doctrinal analysis of such orders might reveal that their norms embody administrative principles. Moreover, the Hartian can also recognize some potential social rules enshrining administrative principles that might arise from the convergent practice of the norm-applying officials in these normative orders of accepting the same normative standards. We can provisionally call them inter-communal social rules. These orders and social rules should be distinguished from non-rule created concepts, values and goals that are embedded in normative orders. We can call the non-ruled based components the "grammar" of administrative law.<sup>26</sup> There is also a research agenda that studies these processes. While the

<sup>&</sup>lt;sup>25</sup> Benedict Kingsbury, "The Concept of 'Law' in Global Administrative Law," *European Journal of International Law* 20, no. 1 (2009): 23–57.

<sup>&</sup>lt;sup>26</sup> I take this label from Hubert Schwyzer, "Rules and Practices," *Philosophical Review* 78, no. 4 (1969): 451–467.

Hartian can illuminate the first two elements, the second two are not part of its purview. Furthermore, *pace* Kingsbury, there is no *prima facie* evidence of an overarching normative order of GAL, let alone a Hartian normative system with a trio of constitutive rules of change, adjudication, and recognition.

The second example is Neil Walker's influential "adjectival" conception of law. Neil Walker's understanding is adjectival in the sense that it attempts to explain the "global" character of some law and law-related phenomena. Thus, he offers a new concept of "law" which is not limited to the norms coming from a specific source as the "traditionalist" or "past-oriented" conceptions do, but he also allows for other law-related "pre-positive" and "non-positive" dimensions such as historical processes, concepts, theories, etc.<sup>27</sup>

For the Hartian the confusion between normative and non-normative phenomena is the source of Walker's slippery conception of law. The Hartian understanding of law is centred on normative phenomena, i.e. standards that guide or strive to guide conduct, which should be distinguished from norm-related discourses that do not directly attempt to govern behaviour. Hence, the Hartian would separate theories and concepts about norms from the norms themselves; genealogies or histories of practices or proposals for new normative orders from the existing practices; and normative orders from the values or principles that such orders embody. Among those normative phenomena, the Hartian would characterize as legal those whose participants employ intense forms of social pressure to secure conformity to norms that regulate relevant politico-moral issues.

<sup>&</sup>lt;sup>27</sup> Walker, Intimations of Global Law, chap. 5.

As a result, the Hartian conception of global law can remedy the instability of the alternatives. First, the Hartian conception would focus only on some practice-based norms and normative orders i.e. practices that attempt to guide conduct. From these practices, moreover, it would characterize as "global" those that have the capacity to constitute a relevantly global political community, i.e. an inescapable polity that covers all members of humanity. It would be a matter of detailed socio-hermeneutical inquiry to determine if such a community exists. While this is far from a detailed theory, it serves as a point of departure for a separate investigation into the possibility of global law.

### 2.6 The Hartian Account of Non-State Legal Phenomena

The Hartian reconstructs the legal domains as constituted by a constellation of interacting normative orders that make up political communities at the state, non-domestic, international, transnational, and, potentially, global levels. *Xeer* customary norms, Nigerian Sharia Law, the Great Law of Peace of the Haudenosaunee, the international legal order, transnational commercial law, the European Union, human rights regimes and multinational enterprises are examples of such normative orders. Some of them are best explained as systems while others constitute sets. Further, we also have resources to separate legal and non-legal phenomena. While many of these examples constitute political communities and thereby fall within the province of jurisprudence, multi-nationals and some forms of *lex sportiva* might not be aptly characterized as legal phenomena.

The Hartian norm-centred conception contrasts with other conceptions of non-state legal phenomena. For some scholars non-state "law" has been also used to refer to *processes* or *activities* at the domestic level and non-state level: how non-state norms have

penetrated the domestic level; how domestic norms have been applied beyond their jurisdiction; how judges of different normative orders communicate and interact to create a "global legal order;" and how transnational and global economic, political and social processes are "legalized" or "constitutionalized" or subject to principles or values commonly associated with "law."<sup>28</sup> For other scholars "law" is a *procedure* or *method* to solve disputes, so "non-state law" consists primarily of how transnational and global disputes are resolved; e.g. how to resolve disputes among merchants not regulated by state law, how to deal with the contradiction between French and US law on freedom of expression, or between human rights and investment protections.<sup>29</sup> Finally, "law" has also been considered as an *academic field of inquiry*, so "non-state" law is not new complexes of norms but "a method" or "a thought experiment in law and legal theory."<sup>30</sup>

For the Hartian a provisional understanding of non-state normative and normative phenomena also illuminates these other senses of non-state law. Regarding the conception of law qua process, the Hartian account helps to clarify some normative processes and to distinguish between normative and non-normative ones: while some of these activities concern state-to-state interactions others relate to activities and interactions between statelegal orders and non-state ones or to interactions amongst different non-state normative phenomena. Moreover, the Hartian would further distinguish between norm-related

<sup>&</sup>lt;sup>28</sup> See e.g. Harold Hongju Koh, "Transnational Legal Process," *Nebraska Law Review* 75 (1996): 181–208; Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2005), chap. 2.

<sup>&</sup>lt;sup>29</sup> See e.g. Emmanuel Gaillard, "Transnational Law: A Legal System or a Method of Decision Making?," *Arbitration International* 17, no. 1 (2001): 59–72; Paul Schiff Berman, "Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism," *Indiana Journal of Global Legal Studies* 20 (2013): 665–695.

<sup>&</sup>lt;sup>30</sup> Peer Zumbansen, "Transnational Law, Evolving," in *Encyclopedia of Comparative Law*, ed. Jan Smits, 2nd ed. (Cheltenham, UK: Elgar Publishing, 2012), 899–925.

processes that entail the creation or application of norms (e.g. the fact that domestic courts must take account of international human rights norms in their decisions) and purely factual interactions (e.g. the fact that domestic courts are sometimes influenced by non-binding decisions of international courts or courts of other states).

Secondly, the Hartian account of normative orders also illuminates the sense of law as a method of dispute resolution since the norms used to resolve disputes are typically part of state or non-state normative orders. Moreover, the forums where disputes are held and the norm-applying officials that resolve them are typically part of Hartian systems in the sense developed above. These officials, in turn, exercise social pressure as the result of the application of the norms of a certain normative order, not merely factual influence.

Finally, I believe that part of the unwillingness of some scholars to explore nonstate law as normative phenomena—i.e. as a branch or body of law—stems from the lack of a proper account of normative orders. By providing the building blocks of such an account, the Hartian theory clarifies the transformation in law and legal studies advocated by these scholars; the method or approach of non-state law or legal studies attempts to include within the purview of "legal" studies those non-state normative phenomena which were excluded in traditional, state-centred legal approaches.

### 3. A Framework for Doctrinal and Politico-Moral Inquiry

The central virtue of Hartian theory is its capacity to create a theoretical framework in which empirical, doctrinal, and politico-moral questions can be formulated and answered. On this conception, empirical questions of legal sociology and legal anthropology will be concerned with the identification and study of the particularities of the norms and orders that regulate political communities. In turn, most doctrinal issues that interest lawyers and legal scholars relate to determining the content of the plurality of normative orders and the application of these norms to resolve cases. As suggested above, whilst the distinction between sets and systems does not directly illuminate doctrinal inquiries, it does guides how lawyers can approach and resolve them: the content of normative sets relates to the norms *de facto* practised by the community, while the content of systems is identified by the compound of efficacious norm-applying officials. Thus, normative systems give rise to forms of institutionalized discourse not available in simpler arrangements.

Similarly, Hartian conceptual tools improve the formulation of moral and political inquiries. The identification of norms and normative orders allows us to distinguish between different arenas in which politico-moral questions can be raised, as well as to more successfully formulate these inquiries. Some moral and political issues are independent of normative practices and other institutional settings, while other inquiries can only be asked directed to normative practices, orders and norm-created institutions.

In moral philosophy we encounter questions about the duties we have to other agents that could be asked outside any normative setting i.e.. "what do we owe to each other?". We also find inquiries about the duties that we have qua participants of normative practices, and the powers, officials, positions and roles these orders create i.e. "what do we owe to other participants of our normative community?" A second type of question concerns the duty that the collective owes to its participants, i.e. "what does the community owe to its subjects?" And finally, there are specific questions about the moral duties of the officials of specific normative orders, i.e. "what moral duties do the norm-creators and

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norm-appliers of a certain order have?" Thus, an improved account of normative orders and the positions they create might help to distinguish practice-dependent and practiceindependent moral inquiry, and it is a prerequisite for any successful account of practicebound moral duties.

The distinction between practice-dependent and practice-independent inquiries also applies to political questions concerning justice, authority, and legitimacy. For example, if we follow Rawls in holding that justice is the main virtue of institutions of a given community,<sup>31</sup> many of the questions about "international, "transnational" and "global" justice are practice-dependent. Thus, while some inquiries of political philosophy are preinstitutional (e.g. "does justice demand the creation of institutions to resolve issues of international trade or crimes against humanity?"), the central question of justice concern whether existing normative orders and institutional arrangement embody proper principles of justice (e.g. "do the WTO's institutional framework embody the proper principles of distributive justice?" or "does the system of international criminal law embody the proper retributive principles?"). Likewise, questions of legitimacy and authority are also practicedependent. For instance, political theorists inquiry whether a specific normative framework or institutions are legitimate (e.g. "are the WTO or the international criminal court legitimate authorities according to politico-moral standards such as democratic credentials, expertise, coordination capacity, etc.?"). Practice-dependent politico-moral inquiries require an explanation of the normative practices and institutions, and the Hartian account is suited to provide such an explanation.

<sup>&</sup>lt;sup>31</sup> Rawls, A Theory of Justice, 3.

Furthermore, the distinction between sets and systems illuminates further politicomoral and doctrinal questions. The main questions we can inquire about normative sets concern the legitimacy of *de facto* practiced norms, the obedience that subjects owe to them, and the circumstances of justified disobedience. In contrast, normative systems typically institutionalize the structure of communal practical authority so it is possible to pose additional politico-moral questions. One such question queries the legitimacy of the community's structure of practical authority and its capacity to guide the behaviour of subjects; a second question queries the legitimacy of the system of norms that officials identify and their decisions about those norms; and a third question asks about the obedience that subjects owe to the normative framework that officials identify, create, apply, and enforce as well as the circumstances where subjects are morally justified to disobey those norms.

In sum, we can see how the Hartian account sets the stage for further inquiries about normative phenomena, since some moral and political questions are practice-dependent, and the Hartian illuminates those normative practices in which these questions can be framed and answered.

## 4. Concluding Remarks

I am aware that the argument of this dissertation is inconclusive and incomplete, and that it requires the further development of several components. These include the development of a theory of the content of normative orders; an account of the normative relationships between different orders; a theory of the non-institutionalized component of normative orders; and a theory of the several normative claims that officials make on behalf of legal systems such as the claims of supremacy or legitimate authority.

There are also some specific challenges that should be addressed. It has also been argued, for example, that the Hartian theory needs to include new secondary rules, even tertiary rules, to the relationships between different types of legal phenomena.<sup>32</sup> Furthermore, there is a number of problems relating to the notion of legal officials. For some state-based theorists Hartian officials are those agents and such monopoly ultimately becomes the mark of their official character.<sup>33</sup> Agents without the control of social pressure are officials in name only, as they are unable to remedy the defects of the unstructured community. In response to this influential view, an important group of theorists hold that interpretation merely replaces the Austinian sovereign with officials who now monopolize physical sanctions, so it could be affected by Hart's objections to Austin's theory.<sup>34</sup> This

<sup>&</sup>lt;sup>32</sup> See von Daniels, *The Concept of Law from a Transnational Perspective*; Michaels, "Law and Recognition — Towards a Relational Concept of Law."

<sup>&</sup>lt;sup>33</sup> Ernesto Garzón Valdes, "Acerca de Las Nociones de Validez, Eficacia y Existencia En H. L. A. Hart (1967)," in *Derecho, Ética y Política* (Madrid: Centro de Estudios Constitucionales, 1993), 114. Cf. Georg Henrik von Wright, *Norm and Action: A Logical Enquiry* (London: Routledge and Kegan Paul, 1963), 148; Ernesto Garzón Valdes, *El Concepto de Estabilidad En Los Sistemas Políticos* (Madrid: Centro de Estudios Constitucionales, 1987), 41; Francisco Laporta, *Entre el derecho y la moral* (México: Fontamara, 1995), 92–5; Gregorio Peces Barba, *Curso de Derechos Fundamentales: Teoría General* (Madrid: Boletín Oficial del Estado, BOE, 1999), 334. Cf. Raz, *The Concept of a Legal System*, 192–3. Similar conclusions have been reached by other authors as putative solution to problems of circularity and indeterminacy. See MacCormick, *H.L.A. Hart*, 113, condition (c); Juan Ruiz Manero, *Jurisdicción y Normas* (Madrid: Centro de Estudios Constitucionales, 1990), 134. Carlos Santiago Nino, *Introducción al análisis del derecho*, 2nd ed. (Buenos Aires: Astrea, 1980), 128, 130.

<sup>&</sup>lt;sup>34</sup> For examples see, Roscoe E Hill, "Legal Validity and Legal Obligation," *Yale Law Journal* 80 (1970): 47–74; Anthony Kronman, "Hart, Austin, and the Concept of a Legal System: The Primacy of Sanctions," *Yale Law Journal* 84, no. 3 (1975): 584–607; Michael Payne, "Hart's Concept of a Legal System," *William and Mary Law Review* 18 (1976): 287–319; Michael Payne, "Law Based on Accepted Authority," *William and Mary Law Review* 23 (1982): 501–528; Jeffrey D. Goldsworthy, "The Self-Destruction of Legal Positivism," *Oxford Journal of Legal Studies* 10, no. 4 (1990): 449–486; Kenneth E. Himma, "Law's Claim to Authority," in *Hart's Postscript: Essays on the Postscript to The Concept of Law*, ed. Jules L Coleman (New York: Oxford University Press, 2001), 307–8; Michael A. Helfand, "The Persistence of Sovereignty and the Rise of the Legal Subject," in *Negotiating State and Non-State Law* (Cambridge: Cambridge University Press, 2015), 323.

has given way to non-positivist accounts of officials according to which some moral facts that justify the legal system or the official's authority are necessary to differentiate between genuine officials from groups of bandits that apply norms.<sup>35</sup> As a result, it is a central task of the Hartian project to further its account of officials to respond and accommodate the state-based and non-positivist conceptions of officials.

Moreover, Hartians must also demonstrate that their theory compares favourably to other candidate theories of law in several respects, including simplicity, coherence, consilience, and generality. In my view there are four contending unified theories that deserve a closer study. These are: functionalist theories of the kind developed by Niklas Luhmann and Gunther Teubner; Brian Tamanaha's conventionalist account; C&G's interinstitutional account; and Lindahl's account of law as an institutionalized authoritative collective action. The Hartian polity-based account also needs to be compared with other demarcationist approaches such as those based on mutual recognition between normative orders, specific legal goods, or distinctive epistemic content. Finally, since the proof is in the pudding, the Hartian needs to advance the agenda of practical jurisprudence of the phenomena identified in Chapter 1. I will engage with these problems in the next stage of my research.

While there is substantial unfinished business for the Hartian framework, I hope to have shown that the refined account offered here clarifies foundational puzzles about the notion of law and serves as an illuminating starting point for further doctrinal and normative inquires about law.

<sup>&</sup>lt;sup>35</sup> See e.g. Hill, "Legal Validity and Legal Obligation," 74.

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