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**International Legal Positivism in the Age of Transnational Law**

Dennis Patterson[[1]](#footnote-1)

**Introduction**

This chapter takes up “post-positivism” in the context of transnational law. The basic theme I shall develop is that transnational legal phenomena pose a strong challenge to post-positivism in that these phenomena problematize the notion of “validity” that is central to positivism and post-positivism. I begin by explicating the notion of “positivism.” Here I sketch the basic features of the two leading positivist accounts of law, those of H.L.A. Hart and Hans Kelsen. As I explain, despite the differences in their views, both Hart and Kelsen advance the same “model” of a legal order, that is, one that is built from the bottom up. For each, the “bottom” represents a norm that provides the foundation for a legal order.

In addition to a basic or fundamental norm, there is what Hart refers to as a Rule of Recognition, which provides the validity criteria for legal norms. Taken together, a basic norm and criteria of validity are the tools necessary to identify legal norms as such. Transnational legal phenomena pose a challenge to this picture in so far as transnational legal phenomena arguably cannot be explained or accounted for within this conception of a legal order.

Before taking up the question of the status of transnational legal phenomena, I detail Kelsen and Hart’s views on the nature of international law as “law.” Transnational law arises against the background of the traditional contrast between municipal and international law. To make that discussion more salient, it is necessary or at least helpful to provide detail on Hart and Kelsen’s views on the status of international law.

With respect to transnational legal phenomena, two questions may be asked. The first is “causal” in that it asks the question of “how” or “why” transnational legal phenomena are making their appearance. While there are surely several reasons why this might be so, the causal explanation is a prelude to the main discussion, which is the question whether transnational legal phenomena are genuinely new phenomena or simply variants on existing forms of legality. To answer this question, I adduce three examples of transnational legal phenomena. With respect to each, the question is the same: do these phenomena fall outside the positivist or post-positivist account of a legal order?

To answer the question of the status of transnational legal phenomena, I turn to the work of Jean d’Aspremont. As a post-positivist, d’Aspremont argues that transnational phenomena do not pose a genuine threat to the positivist account of law. D’Aspremont makes a strong case for the proposition that positivism’s tools of “law recognition” can accomodate transnational legal phenomena. I raise some questions in this regard and indicate what issues remain on the table.

**“Positivism”**

Although there are some basic features upon which most scholars converge in their judgments about the fundamentals of positivism, prudence dictates that one’s conception of this central notion be given at least some depth and detail. One reason for this is that there are different constituencies for competing conceptions of “positivism.” I shall mention two. The first is general jurisprudence, specifically analytic jurisprudence. The legacy of H.L.A. Hart has devolved into an intramural dispute between two conceptions of how to carry on the positivist project. Whether inclusive or exclusive positivism wins the day in the forum of analytic jurisprudence, the victory will be narrow in scope. In the international law context, “positivism” denotes an approach to the art of interpretation, that is, deciding what the law is. While positivism has a long and distinguished history in the international law context, it is today largely a matter of conventional doctrinal practice.

The two most important historical figures in the development of positivist legal theory are Hans Kelsen and H.L.A. Hart. I want to talk about transnational legal phenomena form the point of view of two of their central ideas, those being the Grundnorm (Kelsen)[[2]](#footnote-2) and the Rule of Recognition (Hart)[[3]](#footnote-3). Each of these notions was developed to solve the same problem, that of the validity of law. For a norm to be a valid norm of a legal system or legal order, it must derive its validity from another norm. Legal systems are comprised of hierarchies of norms (i.e., propositions), all of which are grounded in a basic norm. As mentioned, for Hart this basic norm is identified by the Rule of Recognition, the most important of what Hart termed “Secondary Rules.” By contrast, Kelsen’s Grundnorm is “hypothetical” in nature in that its existence is presupposed in order to provide the needed basic norm from which unity arises.

Simply from the point of view of “form,” there is little substantive difference between Kelsen’s[[4]](#footnote-4) and Hart’s approaches to the ultimate ground of a legal order. The difference between the Grundnorm and the Rule of Recognition is largely metaphysical. Kelsen’s Grundnorm is a neo-Kantian, transcendental product. By contrast, Hart’s Rule of Recognition is a sociological phenomenon: it exists as a social practice among officials. Apart from these differences, there is a great deal of overlap between the two theorists’ accounts of the structure of a legal system.

What is the function of the Rule of Recognition[[5]](#footnote-5) in a legal order? Hart saw the Rule of Recognition as providing criteria of legality. A rule was a valid legal norm if it passed all of the tests of validity found in the Rule of Recognition. Importantly, the validity tests – the criteria of legality – are grounded solely in an intersubjective practice of officials. Nothing grounds the Rule of Recognition in the same way as other legal rules. As a social practice, the Rule of Recognition provides the “grounds” of law but is itself neither valid nor invalid. Its validity is a matter of ongoing practice among officials. The only “ground” of the Rule of Recognition is the intersubjective agreement among officials on the criteria of legality.

Whether expressed in Kelsenian or Hartian terms, the notion of a Rule of Recognition is not without its critics. Dworkinians, for example, dispute the very existence of a Rule of Recognition. In other words, they think it is sociologically or factually incorrect to claim that there is a Rule of Recognition. The Dworkinian thesis of “theoretical disagreement” is attempt to put the lie to the idea that judges do, in fact, agree on criteria of legality.[[6]](#footnote-6) As evidence of this fact, one need look no further than disputes among judges. If there is a Rule of Recognition, Dworkinians ask, then what are judges fighting about when they dismiss one another’s claims about the grounds of law?

One need not be a Dworkinian to have doubts about the explanatory power of the Rule of Recognition. Of course, it is entirely plausible that judges can both share criteria of validity and sometimes dispute whether or not those criteria have been satisfied. In other words, dispute is not always evidence of the lack of agreement. In the view of some, agreement is a necessary presupposition of healthy dispute.[[7]](#footnote-7) But what if a disagreement is so basic that it might be the case that a Rule of Recognition is not even shared by disputants? Can there be multiple Rules of Recognition? If there are, what does this do to the idea of legal validity?

I want to suggest that the context of transnational law may be a place where a new challenge to the explanatory power of the Rule of Recognition could be seen to arise. To set the stage for making this point, I will address three questions regarding transnational legal phenomena. First, what are transnational legal phenomena? Second, what are the jurisprudential problems posed by transnational legal phenomena” Finally, what happens to the core positivist idea of a Grundnorm or Rule of Recogntion in the context of transnational law?

From the Hartian/Kelsenian jurisprudential perspective, cross-border law was largely international law. The sovereign state controlled the domestic municipal sphere while the state, by virtue of its sovereignty, created treaty relations with other sovereign states. The form of bi-lateral joinder is the treaty which, as critics of international law never tire of pointing out, cannot be enforced against an uncooperative sovereign. As the conventional wisdom dictates, sovereign – specifically state sovereignty – lies at the bottom of both the domestic (i.e., municipal) legal order and the international legal order.

Before discussing transnational law, I shall spell out the contrasting views of Kelsen and Hart on the status of international law as “law.” This will provide the needed background for assessment of the impact of transnational legal phenomena on the concept of law, specifically the question whether the positivist accounts of Kelsen and Hart can accommodate transnational legal phenomena.

**Kelsen and Hart on “International Law”**

For Kelsen, the requisite of a legal order is that it is a “coercive order,”[[8]](#footnote-8) i.e., “a set of norms regulating human behavior by attaching certain coercive acts (sanctions) as consequences to certain facts, as delicts, determined by this order as conditions.”[[9]](#footnote-9) The existence of sanctions is thus the requisite of a coercive order.[[10]](#footnote-10) In Kelsen’s view, such sanctions are available in international law. He identifies them as reprisals and war. These sanctions allow international law to qualify as a legal order, and international law is thus “law” in the same sense as national law.

Why are reprisals and war sanctions? Kelsen explains that a state, which considers its interests violated by another state, is authorized to resort to reprisals or war. They take place against the will of the state that has violated the other state’s interests. Under normal circumstances, reprisals and war are prohibited under international law: they are only permissible as reactions against violations of international norms. If they are not such reactions, they are themself international delicts. This is the principle of *bellum iustum*, or “just war.” Kelsen finds this assumption well-founded, as this doctrine is enshrined in the Charter of the UN, which is accepted by most states.[[11]](#footnote-11) In Kelsen’s view, reprisals and war are thus the appropriate sanctions for violations of international norms. Kelsen explains that the sanctions in international law are no different in content from sanctions of national law.[[12]](#footnote-12) In that sense, international law shows the same characteristics as national law.

However, for Kelsen, international law is a primitive legal order.[[13]](#footnote-13) He explains that international law is “in a state of decentralization,” which is “only at the beginning of a development which national law has already completed.”[[14]](#footnote-14) International law is a primitive legal order because it does not have special organs for the creation and application of its norms. The norms are created by the members of the legal community themselves, and not by a legislative organ. When it comes to the application of norms, it is the state itself that has to decide whether the fact of a delict exists, and there exists no authority to decide the conflict: “the technique of self-help, characteristic of primitive law, prevails.”[[15]](#footnote-15) But Kelsen foresees an evolution of international law from this primitive condition. The development is directed toward “centralization,” and the ultimate goal is “the emergence of a world state.”

Despite these shortcomings, even a decentralized order is a legal order in Kelsen’s view. Unlike Austin’s view, the lack of specialized organs for implementing the law – the lack of a sovereign above the state – does not preclude the conception of international law as a legal order. For Kelsen, the central element is the existence of rules regarding the exercise of force, codified as the doctrine *iustum bellum*. Therefore, according to Kelsen, rejecting the iustum bellum doctrine is equivalent to denying the very legal nature of international law.

Having defined the nature of international law, Kelsen then explicates the relationship between international law and national (municipal) law. In Kelsen’s general theory of law, he sees a legal order as a system with hierarchically organized norms. In this hierarchical system, lower-order norms derive their validity from higher-order norms, until the *Grundnorm* is reached. Kelsen advocates a monistic approach, that is, he sees international law and national law as a unity. This means that international law and national law are subject to the same basic norm, which must be found either in international law or in the national legal order.[[16]](#footnote-16) Kelsen rejects a dualistic construction where international law is regarded as a system of binding norms, valid but standing beside national law norms. According to Kelsen, the dualistic construction fails in explaining how the norms of international law obligate the individual state.

In establishing his monistic construction, Kelsen first addresses the question whether there can be an irresolvable conflict between the international legal order and the national legal order.[[17]](#footnote-17) If such conflicts exist, only a dualistic or pluralistic construction would be possible, and a monistic approach would then be excluded. Kelsen explains that in so far as international law is regarded as a system of valid norms (independent of each other in their validity), “the relations could be interpreted only either from the viewpoint of the national legal order or from that of the international legal order.”[[18]](#footnote-18) In Kelsen’s view, this is untenable.

For Kelsen, national legal norms cannot be in contradiction to international norms. Such conflicts do not exist. Kelsen writes: “the situation is exactly analogous to a situation within the state’s legal order, without, on that account, causing any doubts as to its unity.”[[19]](#footnote-19) He explains that a statutory norm in contradiction to the constitution remains valid because the legal order may not provide a special procedure to abolish it. In the same vein, a norm of the national order in contradiction of international law remains valid, because international law provides no procedure in which the norm can be abolished. Kelsen points out that the creation of norms with “opposite content” may activate the condition to which international law attaches its sanctions (reprisals or war).

Kelsen presents two different approaches to his monistic construction. In establishing the unity of international law and national law, one can start either from international law or national law as a valid legal order. He explains: “International law must be conceived either as a legal order delegated by, and therefore included in, the national legal order; or as a total legal order comprising all legal orders as partial legal orders, and superior to all of them.”[[20]](#footnote-20)

If one starts from the validity of a national legal order, the reason for the validity of international law is found in the national legal order. According to this view, general international law is valid for a state only if it is recognized by an individual state as binding.[[21]](#footnote-21) International law is then regarded as part of national law, or as a legal order delegated by the national legal order. The representatives of this approach start from the validity of their own national order, which they consider self-evident.

Taking instead international law as the starting point for validity, international law is at the apex of the pyramid in Kelsen’s hierarchical system. From this point of view, international legal system is characterized as a universal legal order. The international legal system is the “total system,” which encompasses all national legal orders, which are merely “partial legal orders.” The state is an order delegated by international law in its validity. Kelsen rejects the objection that historically, the states preceded the creation of general international law and that the individual state therefore cannot be conceived as an order delegated by international law. He argues that historical and normative-logical relations should not be confounded.[[22]](#footnote-22)

In Kelsen’s monistic construction, the content in international law is the same whether the validity of national law or international law takes precedence. The function of international law is thus the same: through the principle of effectiveness, it determines the reason and sphere of validity of national legal orders. The difference between the two is only the reason for the validity for international law.

The concept of sovereignty is the heart of Kelsen’s monistic construction. Kelsen explains state sovereignty as the decisive factor for assuming the primacy of the national legal order. He writes: “For a state to be ‘sovereign’ merely means that the establishment of the historically first constitution is presupposed as a law-creating fact without a positive norm of international law taken into account which institutes this fact as a law-creating fact.”[[23]](#footnote-23) In his view, sovereignty is a presupposition of a normative order as the highest order whose validity is not derivable from any other higher order.

But the idea of international law as a “universal legal order” is incompatible with this idea of state sovereignty. If one takes international law as the starting point, the concept of sovereignty has to be a different one. Kelsen explains: “Only the international legal order, not the national legal order, is sovereign,”[[24]](#footnote-24) and if states are denominated “sovereign,” this means only that they are subject to the international legal order. The concept of “state” cannot be defined without reference to international law.

From a logical point of view, Kelsen sees these two systems, these two different monistic constructions, as “equally correct and equally justified.” He explains: “it is impossible to decide between them on the basis of the science of law.” Kelsen claims that the decision can only be made on nonscientific, political considerations. He writes: “He who treasures the idea of sovereignty of his state, will prefer the primacy of the national legal order. He who values the idea of legal organization of the world, will prefer the primacy of international law.”[[25]](#footnote-25)

Hart develops his approach to international law in the final chapter of *The Concept of Law*.[[26]](#footnote-26) In Hart’s view, international law is “law,” but it lacks the main characteristics of a legal system (i.e., secondary rules): rules of recognition, change and adjudication. Without these characteristics, international law is not a legal system, merely a set of primary rules. He comes to this conclusion by comparing international law and municipal law, finding that international law and municipal law are analogous in content and function, but different in form.

Hart identifies the two main objections (or “sources of doubt”) as to why international law is not regarded as law. Both of these objections start from municipal law as the standard example of what “law” is. The first objection is that international law is not binding because it lacks sanctions. As Hart points out, the question “is international law binding?” expresses a doubt about the general legal status of international law. It is not a doubt about its applicability. The second objection is the claim that states are fundamentally incapable of being subject to legal obligations. States cannot both be sovereign and at the same time have obligations under international law. Hart repudiates both these objections.

Hart first addresses the objection that international law cannot be law because it lacks sanctions. He points out that Chapter VII of the UN Charter cannot remedy this objection. As Hart sees it, those international sanctions cannot be equated with the sanctions of municipal law, because they are largely inefficient. Whenever their use is of importance, the law enforcement provisions of the UN Charter are likely to be paralyzed by a veto in the Security Council. Thus, for Hart, international law lacks “real” sanctions. But he rejects the notion that this absence disqualifies international law from being law. Hart explains that the view that international law is not law because it lacks sanctions is tacitly accepts the conception of law as a matter of order backed by threats. This is Austin’s command theory, which Hart repudiates in his general theory of law. As Hart shows, the command theory is untenable even in municipal law, so this theory cannot possibly disqualify international law from being law.

Hart also provides an additional argument in the same context. While the existence of sanctions might be a necessary condition in municipal law, sanctions might play a different role in international law. He writes: “In societies of individuals, approximately equal in strength and vulnerability, physical sanctions are both necessary and possible.”[[27]](#footnote-27) In municipal law, sanctions may be used successfully with small risk, and the threat of them would add much to the natural deterrent. But the situation is different in the international context. Hart claims that the organization of international sanctions involves risks, and the threat of them adds little to natural deterrence. The use of violence on the international level is public, which means that there is a risk that third parties will get involved: “To initiate a war is, even for the strongest power, to risk much for an outcome which is rarely predictable with reasonable confidence.”[[28]](#footnote-28) On the international level, there is an unequal distribution of power and strength among states, and sanctions does not guarantee that powerful states obey the rules. Hart argues that although sanctions might have different functions in international law than in municipal law, this is not a reason for depriving international law its character as law.

 The second objection Hart considers is that states are incapable of being subjects of legal obligation, i.e., states cannot both be sovereign and at the same time have obligations under international law. Hart sees this as a “radical inconsistency.” He repudiates the assumption that sovereignty would mean being above the law, a notion associated with voluntarist theories or theories of auto-limitation. These theories claim that international obligations arise from the consent of the party bound. Hart argues that auto-limitation theories fail to explain not only how it is known that states can be bound by self-imposed obligations, but also why their absolutist view of sovereignty should be accepted. Hart further argues that not all international obligations are self-imposed. He provides two examples showing that the voluntarist doctrine cannot be correct. The first example is the case of a new state. A new state is bound by the general obligations of international law including the rules that give binding force to treaties. The second example is the case of a state acquiring territory or undergoing some other change. He writes: “this brings with it the incidence of obligations under rules which previously it had no opportunity to observe or break, and no occasion to give or withhold consent.”[[29]](#footnote-29)

For Hart, sovereignty means “independence.” He shows that there are many possible forms and degrees of dependence and independence.[[30]](#footnote-30) For Hart, it is instead the international rules that define the scope of sovereignty: “we can only know which states are sovereign, and what extent of their sovereignty is, when we know what the rules are.”[[31]](#footnote-31)

After having answered two objections to the statute of international law as law, Hart turns to the claim that international law is best understood as morality. This insistence, he argues, is sometimes inspired by the dogmatism that any form of social structure that is not reducible to orders backed by threats can only be a form of “morality.” Hart offers some reasons why this is untenable. First, states often reproach one another for immoral conduct or praise themselves or others for living up to a standard of international morality. Hart points out that such appraisals are recognizably different from legal assessments under the rules of international law. When states address one another over disputed matters of international law, they refer to precedents, treaties and juristic writings, but often no mention is made of morality. Thus, states differentiate between moral and legal assessments.

The second reason why international law cannot be reduced to morality is that the rules of international law (like rules of municipal law) are morally indifferent. Hart explains that unlike morality, legal rules contain much specific detail, and draw arbitrary distinctions. He writes: “regard for forms and detail carried to excess, has earned for law the reproaches of formalism and legalism.”[[32]](#footnote-32) Hart explains that some rules exist only because it is convenient to have some clear fixed rule about the subjects with which it is concerned, but not because any moral importance is attached to the particular rule.

The third reason is that unlike morality, the rules of international law are subject to deliberate change. Morality is conceived as the ultimate standards by which human actions are evaluated. The notion of a legislature making moral rules is therefore absurd. Hart contrasts this with the situation in international law, where the lack of a legislature is just a defect that might one day be repaired. Hart finally points out that there can be many reasons to why states obey international obligations, and moral obligations may be one of them. But it is not a necessary feature of international law.

In the final part of his chapter on international law, Hart explains why international law is not a “legal system.” The absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions, make international law resemble a simple form of social structure. In Hart’s view, international law resembles a simple regime of primary rules in form, but not in content. Internaitonal law resembles a municipal system, but only in function and content, not in form.

Hart explains that in minimizing the formal differences between international law and municipal law, some theorists have exaggerated the analogies. The fact that the parties generally follow judgments of the International Court of Justice could not compensate for the lack of a compulsory and comprehensive jurisdiction of any international court. He also considers analogies between the use of force, as a sanction in municipal law, and the “decentralized sanctions” in international law (e.g., for Kelsen, the international law sanctions available are war and reprisal). Hart reminds that there is no international court with a jurisdiction similar to courts in municipal law, and that the law enforcement provisions under the UN Charter have been paralyzed by veto.

Hart then considers Kelsen’s insistence that international law must contain a basic norm, which represents the ground of the validity of all norms, and which constitutes the unity in the international legal system. According to Hart, the opposite view is that international law merely consists of a set of primary rules of obligations. Hart reminds us that there have only been fruitless attempts to formulate a unifying basic norm in international law. Thus, the suggestion that the basic norm could be the principle *pacta sunt servanda* is incompatible with the fact that not all obligations under international law arise from pacta. Equally untenable is the rule that “states should behave as they customarily behave.” Hart sees this as an “empty repetition” of the fact that the international society observes certain standards of conduct as obligatory rules.

In Hart’s view, there is no rule of recognition in international law. Since there is no rule of recognition, international law cannot be a legal system. It is instead a “set” of rules. But a rule of recognition is not a necessity for international rules to be binding.[[33]](#footnote-33) The existence of international rules depends instead on whether they are accepted. International law is thus a set of social rules. In his view, no other social rules are so close to municipal law as those of international law.

Hart argues that the differences between international law and municipal law might eventually be overcome. International law might be in a stage of transition, which would bring it nearer in structure to a municipal system. This would be the case if it were generally recognized that multilateral treaties could bind states that are not parties. Such treaties would be legislative enactments. A rule of recognition could then be formulated in international law, and international law would then resemble municipal law not only in content and function, but also in form.

**Transnational Legal Phenomena**

Globalization (or Denationalization[[34]](#footnote-34)) has produced transnational legal phenomena that challenge the boundaries of traditional legal theory such as positivism. In *Legality’s Borders*, Keith Culver and Michael Giudice identify four novel forms of legal order that challenge the conventional “law-state”[[35]](#footnote-35) understanding of a legal order. They are: intra-state legality (e.g., distributed or shared governance); trans-state legality (i.e., legality produced by non-state agents that is somehow “binding” with the law-state); supra-state legality (e.g., The European Union and super-state legality (e.g., *Jus Cogens*).[[36]](#footnote-36) Each form of legal order presents its own explanatory challenges to the traditional law-state conception of a legal order. As mentioned at the outset, I shall discuss just one of these, that of trans-state or transnational law.

Of course, the concept of transnational law starts with Philip Jessup who, in 1956, described it as “all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.”[[37]](#footnote-37) Transnational legal challenges now fall under the umbrella of “global governance,” which, according to Peer Zumbansen, exhibits “frustration with and problematisation of the absence of stable institutions of norm creation and enforcement outside of the nation state.”[[38]](#footnote-38) “Global governance” identifies a need, that is, a need for regulation. The mode of regulation under law is norms. Even assuming stable institutions, norm creation outside the nation state poses a problem of “validity” or “legitimacy”. By what authority are norms created by non-state actors? In virtue of what are those norms valid? Can those norms be challenged, altered, or extinguished, and by whom? These are just a few of the challenges posed by normativity outside the bounds of the nation-state.

**Causal and Normative Questions**

There are two different types of questions one might ask about transnational legal phenomena. These questions usually appear in the form of two different types of explanation. I have in mind the distinction between causal and normative explanation. I shall explain each of these.

Causal explanation answer a “why” question. Here is one: why have private legal orders appeared now?[[39]](#footnote-39) Consider Lisa Bernstein’s work on private legal orders.[[40]](#footnote-40) Why have the merchants she describes opted out of the legal system and promulgated and functioned with their own set of norms? What explains this? Why has this development occurred?

All of these questions seek a causal explanation: we want to know the forces behind the appearance of this phenomenon. No position need be taken on the merits of a phenomenon. All that is asked is some explanation of “Why this, now?” There can be several explanations for the appearance of a private order. Dissatisfaction with some aspect of the state system is the most obvious explanation. Whether it be time delays, costs or lack of expertise on the part of the regulator (e.g., an administrative agency), a causal explanation seeks to identify why some development has come to pass.

Causal explanations can serve as background to legal discussions but lawyers are interested in normative or conceptual questions. Typical jurisprudential questions include border disputes between law and morality and the grounds of legal validity. In the transnational sphere, our interest lies in the “ontology” of norms. We want to know whether transnational legal phenomena are of a different kind or order than what we normally find in the municipal sphere. If these phenomena are different, in virtue of what are they different? These may sound like empirical questions but they are not. The reason for this is that the answers are driven by concepts of law, concepts that are largely normative in character.

**Transnational Law: Examples**

I now turn to three examples of transnational law. With each example, I endeavor to sustain the claim that normativity arises outside a municipal legal order only to reach inside that legal order with an effect no less efficacious than domestic legal norms. Obviously, my claim is both empirical and conceptual. The empirical dimension is a matter of adducing facts in support of my contention that these phenomena now exist. The conceptual claim is the more difficult one to sustain, that is, my contention that these phenomena cannot be accounted for by positivist or post-positivist models of law.

My first example is the North American Free Trade Agreement (“NAFTA”).[[41]](#footnote-41) Under NAFTA, a “foreign” (vis-à-vis domestic courts) tribunal may pass judgment on the degree to which domestic courts (i.e., US courts) have provided “fair process.” The NAFTA treaty does not permit NAFTA tribunals to overturn or alter domestic judgments. However, the treaty does enable the tribunals to impose financial sanctions (e.g., fines) against the federal governments of domestic states.

Thus, in the *Loewen* case,[[42]](#footnote-42) a Mississippi State Supreme Court decision was found to violate due process norms. As mentioned, the tribunal enjoys only the power of financial sanction (against the Federal government, not the State of Mississippi). Is this decision part of the law of Mississippi? Will it serve as a precedent? If it does serve as a precedent, under what account of precedent would such a decision be made part of Mississippi law? I submit there are no easy answers to these questions.

Now to EU law. There is an important distinction between so-called primary and secondary law. The EU treaties, which are adopted by the Member States, constitute primary law.[[43]](#footnote-43) By contrast, secondary law, e.g., directives and regulations, are derived from the EU Treaties, and adopted by the EU institutions.[[44]](#footnote-44) While primary law can be labeled “acts of the Member States,” secondary law can be described as “Union acts.”[[45]](#footnote-45) It is sometimes argued that the ability to adopt secondary norms, which are binding and directly applicable, is a feature that distinguishes the EU from international organizations.[[46]](#footnote-46) Indeed, the Court of Justice of the European Union characterizes the EU legal order as an “autonomous legal system,” distinct from both international law and national (municipal) law.[[47]](#footnote-47) But as Kaarlo Tuori points out, not only is EU law intertwined with the legal systems of Member States, “when national courts apply EU norms, they act simultaneously as institutions of both the municipal and the EU legal system.”[[48]](#footnote-48)

My third and final example is similar to that of EU law. It is the law of the World Trade Organization (“WTO”). Like the European Union, WTO law is treaty-based. The institutional structure of the WTO is such that disputes are settled by panels (dispute settlement panels), whose decisions may be appealed to the Appellate Body. Again, quoting Tuori, “[t]hese organs also produce normative material specifying and complementing treaty provisions.”[[49]](#footnote-49) It is these decisions, and their normative content, that is both (1) produced in a manner “beyond” the international treaty and (2) binding within the municipal orders of all signatory states.

I have advanced these three examples to support the claim that there are legal phenomena not cognizable under the rubric “law” as understood by positivism. With respect to the key concept(s) of Rule of Recognition or Grundnorm, these three phenomena fall outside the scope of this central analytical precept of positivism. If this central claim is false, then positivism survives as a jurisprudential account of “law.” Can these phenomena be accomodated by the Rule of Recognition?

In his finely-wrought *Formalism and the Sources of International Law*, [[50]](#footnote-50) Jean d’Aspremont directly takes up the question of law ascertainment by non-State actors. Believing that the products of such non-State actors can be incorporated into “law,” d’Aspremont is skeptical of the notion that the phenomena described above are “new” in the sense that they are produced by non-State actors (he concedes this, as he must) but, importantly, are binding within the municipal legal order in ways not explicable by a concept of law with the Rule of Recognition as the centerpiece of validity claims.

To make his case, d’Aspremont relies upon Brian Tamanaha’s reconstruction/enhancement of Hart’s understanding of who is a “legal official” vis-à-vis the Rule of Recognition. As d’Aspremont explains, “[t]he refinement advocated by Tamanaha boils down to considering that a ‘legal official’ is ‘whomever, as a matter of social practice, members of the group (including legal officials themselves) identify and treat as ‘legal officials.’”[[51]](#footnote-51) The key to Tamanaha’s position and, thus, d’Aspremont’s, is in the capacious account they provide of who is a “legal official” for purposes of law production. It is by thus revamping Hart’s Social Theory of Rules that d’Aspremont is able to say “[t]he social practice on which the rule of recognition is based must accordingly not be restricted to strictly-defined law applying officials but must include all social actors.”[[52]](#footnote-52)

An uncharitable reading of this move is that it is question-begging. The very matter in dispute – i.e., who counts as a “legal official” – cannot be waived away with the platitude “anyone is a legal official who is recognized as a ‘legal official’.” This is the same problem with Tamanaha’s account of the nature of law. [[53]](#footnote-53) Law is whatever is called “law.” D’Aspremont seems to sense that more needs to be said for, indeed, he has more to say.

Instead of focusing on who counts as a legal official, d’Aspremont looks at what domestic judges do. His central contention is even if “international law is not the ‘law of the land’ because it has not been incorporated, it may still yield effects in the domestic legal order if judges interpret national law in accordance with international law.”[[54]](#footnote-54) As long as the practice of officials is such that there is intersubjective agreement on sources of law, then fatal indeterminacy is avoided. D’Aspremont describes this as a system of “mutual confirmation”[[55]](#footnote-55) of law ascertainment criteria.[[56]](#footnote-56)

What is one to say if Mississippi courts start to make decisions that pay sufficient attention to the demands of fair process? Will the social rules thesis of Hart, duly enhanced by Tamanaha and d’Aspremont, be vindicated? One way to look at the matter is through the lens of power. By signing on to the NAFTA, the United States forced every state in the United States to comply with a certain level of due process. This was akin to the imposition of Federal Law on states; hardly a new phenomenon.

But the point is that without the acquiescence of the federal government, no norms would have gained entry into the legal sphere of the United States. The power point is that the federal government possesses the power to force states to comply with increased standards of due process. In other words, the Federal government has the power to coerce compliance with the due process standards of the NAFTA and anything else it deems appropriate and within the limits of its constitutional powers. When the story is told this way, it seems to have the effect of deflating the ontological claims for “new legal phenomena.” In fact, one has the impression that the State has found new ways of accommodating the need for regional economic agreements and use the treaty powers of the Federal government to further those ends. In short, nothing new.

**Conclusion**

We are in a time of increasing growth in transnational legal phenomena. It is all but impossible to deny the growth in courts and similar institutions, all of which are producing normativity that seemingly arises outside the jurisdictional boundaries of the state. And yet, it does seem that each example of transnational phenomena has a state somewhere near the center of the story. It is, perhaps, too early to tell if non-State normativity is indeed a genuine phenomenon or whether it is the State doing what states do but in a manner more indirect and less obvious. Finally, it is still unclear whether or not these phenomena pose a serious challenge to the theoretical foundations of positivism. It may simply be too early to tell.

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2. See Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (N.J.: Lawbook Exchange, 2002 [1967]). [↑](#footnote-ref-2)
3. See H.L.A. Hart, *The Concept of Law* (2nd edn, 1994) [↑](#footnote-ref-3)
4. Kaarlo Tuori nicely summarizes the Kelsenian perspective thus: “Kelsen’s hierarchical legal order, Stufenbau, is, above all, the legal order of a nation state: the basic norm crowning the hierarchy commands obedience to the (historically first) constitution of the nation state, while the norms on the lower echelons are issued by state organs empowered by this constitution.” Kaarlo Tuori, Towards a Theory of Transnational Law (unpublished, 26.8.2010). [↑](#footnote-ref-4)
5. From this point forward, I shall refer only to the Rule of Recognition and not to Kelsen’s Grundnorm. Of course, there are differences between the two notions. But for my purposes, which is a discussion of the ultimate validity of a legal system, the differences are not important. [↑](#footnote-ref-5)
6. Ronald Dworkin, Law’s Empire (1986). [↑](#footnote-ref-6)
7. I develop this point in Dennis Patterson, Interpretation in Law, 42 *U. San Diego Law Review* 685 (2005). [↑](#footnote-ref-7)
8. Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (N.J.: Lawbook Exchange, 2002[1967]), pp 30-58. [↑](#footnote-ref-8)
9. *Ibid*., p 320. [↑](#footnote-ref-9)
10. In Kelsen’s view, international law regulates the behavior of human beings even where it regulates the behavior of states. [↑](#footnote-ref-10)
11. Kelsen explains that the difference between reprisal and war as one of degree. [↑](#footnote-ref-11)
12. “These sanctions, like the sanctions of national law consist in the forcible deprivation of life, liberty, and other goods, notably economic values. In a war, human beings are killed maimed, imprisoned, and national or private property is destroyed; by way of reprisals national or private property is confiscated and other legal rights are infringed. These sanctions of international law are not different in content from those of national law. But they are ‘directed against the state’ as the saying goes.” *Ibid*., p 322. [↑](#footnote-ref-12)
13. *Ibid*., p 323. [↑](#footnote-ref-13)
14. *Ibid*. [↑](#footnote-ref-14)
15. *Ibid*. [↑](#footnote-ref-15)
16. For Kelsen, this monistic construction is “inevitable.” He says that “international law must be conceived either as a legal order delegated by, and therefore included in, the national legal order; or as a total legal order comprising all national legal orders as partial orders, and superior to all of them.” *Ibid*., 333. [↑](#footnote-ref-16)
17. *Ibid*., p. 329. [↑](#footnote-ref-17)
18. “The view that national and international law are two different legal orders, independent from each other in their validity, is usually justified by the existence of insoluble conflicts between them.” [↑](#footnote-ref-18)
19. *Ibid*, p 300. [↑](#footnote-ref-19)
20. *Ibid*., p 333. [↑](#footnote-ref-20)
21. The recognition can be express recognition (by an act of the legislature or of the government) or by tacit recognition (by application of the norms, e.g., by the conclusion of treaties). [↑](#footnote-ref-21)
22. *Ibid*., p 339. [↑](#footnote-ref-22)
23. *Ibid*., p 335. [↑](#footnote-ref-23)
24. *Ibid.,* p 338. [↑](#footnote-ref-24)
25. *Ibid.,* p 346. Kelsen stresses that the theory of the primacy of national law is not less favorable to the idea of a legal organization of the world than the theory of the primacy of international law. But it seems to supply the justification for a policy that rejects far-reaching restrictions of the state’s freedom of action. He explains that this justification is based on a fallacy caused by the ambiguity of the concept of sovereignty as either highest legal authority or unlimited freedom of action. He writes: “This fallacy has to be accepted as an essential element of the political ideology of imperialism, which operates with the dogma of state sovereignty.” And likewise, the theory of the primacy of international law seems to justify more a far-reaching limitation of a state’s freedom of action that the primacy of the national legal order. This justification is based on a fallacy, which plays a decisive part in the political ideology of pacifism. *Ibid*. [↑](#footnote-ref-25)
26. Hart, H. L. A., The concept of law, 2. ed., Clarendon, Oxford, 1994. [↑](#footnote-ref-26)
27. *Ibid*., p. 213. [↑](#footnote-ref-27)
28. *Ibid*., p 214. [↑](#footnote-ref-28)
29. *Ibid*., 221. [↑](#footnote-ref-29)
30. “Dependence of one territorial unit on another (..) is not the only form in which its independence may be limited.” *Ibid*., p 217. [↑](#footnote-ref-30)
31. *Ibid*., 218. [↑](#footnote-ref-31)
32. *Ibid*., 224. [↑](#footnote-ref-32)
33. He writes: “It is a mistake to suppose that a basic rule or a rule of recognition is a generally necessary condition of the existence of rules of obligations or binding rules. This is not a necessity, but a luxury, found in advanced social systems.” *Ibid*., 229. [↑](#footnote-ref-33)
34. See Saskia Sassen, “Globalization or Denationalization?” (2003) 10 Rev. Int'l Pol. Econ. 1. [↑](#footnote-ref-34)
35. According to Giudice and Culver, the theories of Hart and Raz are good examples of theories of the “law-state.” The nation state is the source of law, the state is jurisdictionally limited, and nothing can be “law” that is not produced or at least sanctioned by the state. ([S]tate law exists where there are primary rules of obligation and secondary rules of recognition, change an adjudication which in combination and in the hands of central law-applying officials claim with a certain degree of success to govern comprehensively, supremely and openly.”) GC at xxiv. [↑](#footnote-ref-35)
36. Giudice and Culver, xi. [↑](#footnote-ref-36)
37. Jessup, P. C. (1956), Transnational Law. New Haven, Yale University Press, p. 2. [↑](#footnote-ref-37)
38. Zumbansen, 142. [↑](#footnote-ref-38)
39. See, e.g., Robert C. Ellickson, Order without Law: How Neighbors Settle Disputes 126–132 (1991); Eric A. Posner, Law and Social Norms (2000); Barak D. Richman, Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering, 104 Colum. L. Rev. 2328, 2338–48 (2004). [↑](#footnote-ref-39)
40. See, e.g., Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Legal Stud. 115 (1992). [↑](#footnote-ref-40)
41. North American Free Trade Agreement, U.S.-Can.-Mex., Jan. 1, 1994 [↑](#footnote-ref-41)
42. Loewen Group, Inc. v. United States, ICSID (W. Bank) Case No. ARB(AF)/98/3. [↑](#footnote-ref-42)
43. In addition to the EU treaties, primary law consists of protocols and annexes (which according to Article 51 TEU form an integral part of the treaties) and the acts of accession. [↑](#footnote-ref-43)
44. The EU Treaties provides a set of legal acts: regulations, directives and decisions, recommendations and opinions, Article 288 TFEU. [↑](#footnote-ref-44)
45. Trevor Hartley makes this distinction in *The Foundations of European Union Law*, Oxford: Oxford University Press, 2010. In EU law, general principles and international agreements are often described as separate sources of law. In the hierarchy between primary law and secondary law, they are placed somewhere in between. [↑](#footnote-ref-45)
46. As Bruno de Witte notes, there are different views on what kind of “creature” the EU is. Some scholars argue that the EU has evolved and moved beyond the status of an international organization. In their view, the EU as a *sui generis* order, which does not fit into the dichotomy between international organizations and the traditional notion of a state. They emphasize the EU’s “supranational” decision-making procedures, its extensive scope of competence, its effective judicial enforcement, and its direct effect and primacy in the national legal orders. Other scholars, mainly in the field of public international law, prefer to describe the EU as highly developed international organization. See Bruno de Witte, “The European Union as an international legal experiment,” in The worlds of European constitutionalism, ed by Gráinne de Búrca and J. H. H. Weiler (Cambridge; New York: Cambridge University Press, 2011), 19-56. [↑](#footnote-ref-46)
47. Already in 1964, in the landmark case *Costa Enel*, the Court held that Community law was autonomous in relation to the law of its member states: “The law stemming from the Treaty, an independent source of law.” See Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585. A similar formulation is found in Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, para. 3. See also the *Kadi* judgment, where the Court referred to the autonomy in relation to international law, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council*, ECR [2008] I-06351, para. 282 and 316. [↑](#footnote-ref-47)
48. Tuori at 6. [↑](#footnote-ref-48)
49. Ibid. [↑](#footnote-ref-49)
50. Jean d’Aspremont, Jean, Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules(OUP: 2011). [↑](#footnote-ref-50)
51. Ibid. at 60. [↑](#footnote-ref-51)
52. Ibid at 203-204. [↑](#footnote-ref-52)
53. Tamanaha’s writes:

 What law is and what law does cannot be captured in any single concept, or by any single definition. Law is whatever we attach the label law to, and we have attached it to a variety of multifaceted, multifunctional phenomena: natural law, international law, state law, religious law, and customary law on the general level, and an almost infinite variety on the specific level, from lex mercatoria to the state law of Massachusetts and the law of the Barotse, from the law of Nazi Germany to the Nuremberg Trials, to the Universal Declaration of Human Rights and the International Court of Justice. Despite the shared label ‘law’, these are diverse phenomena, not variations of a single phenomenon, and each one of these does many different things and/or is used to do many things. There is no law is ...; there are these kinds of law and those kinds of law; there are these phenomena called law and those phenomena called law; there are these manifestations and those manifestations of law ... No wonder, then, that the multitude of concepts of law circulating in the literature have failed to capture the essence of law—it has no essence.

Brian Tamanaha 2001. *A General Jurisprudence of Law and Society*. 193 New York: Oxford University Press. [↑](#footnote-ref-53)
54. D’Aspremont at 206. D’Aspremont makes the same point about non-State actors and the norms they produce. Ibid at 207 (“It cannot be denied that some non-State actors also provide interesting insights as to the meaning of law-ascertainment criteria.”) [↑](#footnote-ref-54)
55. Ibid at 202. [↑](#footnote-ref-55)
56. Ibid at 207 (It has thus become undeniable that domestic courts count as actors participating in the generation of the communitarian semantics of law-ascertainment as well.”). [↑](#footnote-ref-56)