

## Introduction

This book is in many ways a continuation of our earlier effort, *Legality's Borders*.<sup>1</sup> There we focussed on state-centred descriptive-explanatory theories of law and their weaknesses as approaches that purport to be meaningfully descriptive yet fail to account adequately for novel *prima facie* legal phenomena beyond the state. We offered what we took to be an improvement to analytical approaches to legality by amplifying suggestions made by H. L. A. Hart and Neil MacCormick, amongst others, to arrive at an inter-institutional approach. That approach accounts for varieties of legality within and beyond the state and further offers a clearer and deeper account of the nature of a theory of law as a contribution to human self-knowledge.

As a continuation of the argument of *Legality's Borders*, this book is of a particular kind. Whereas in *Legality's Borders*, we strove to show that state-focussed legal theory is impoverished to the extent that it ignores other legal phenomena for which it ought to account, we now presume that readers share our interest in characterizing what is spoken of and thought to be legality in non-state-centric situations as diverse as international law, trans-boundary law and supranational law, as visible in the European Union. Here we aim to deepen the inter-institutional account using a 'relational' approach derived from Hart. Our approach will serve the explanatory interests of the inquiring ordinary citizen of the twenty-first century as that citizen encounters social and physical phenomena challenging state-based explanations of law, while enabling us to offer new insights into long-standing jurisprudential questions. Where Hart and others began from the ordinary educated person's understanding of the municipal state and explored the relations between law and coercion, law and morality and law and rules, here we start from the broader

<sup>1</sup> K. Culver and M. Giudice, *Legality's Borders* (Oxford: Oxford University Press, 2010).

viewpoint of our contemporary ordinary citizen who travels across legality's old borders. Our ordinary citizen is concerned both with the relations Hart explored in many of the systems of law he examined and, for reasons we explore below, now with law's relation to environment, security and technology in state and non-state contexts. As we add to the relational approach in the context of both state legal systems and non-state legal orders, the phenomena we examine will enable us to provide a renewed appreciation of the problem of continuity, allowing and perhaps demanding characterization of legality in more than the 'momentary' way typical of analytical approaches to explanation of legal system. This extended and enriched view is intended to be dynamic, offering a means to approaching legality which is constantly re-informed by changing phenomena in the social and physical contexts in which legality is found, resulting in an explanation of legality and life under law which is apt in light of the gradually evolving interests of law's subjects. Our approach in this book, as in *Legality's Borders*, is evolutionary rather than revolutionary, extending and amplifying methods and insights of predecessor analytical legal theorists, while admitting the need for corrections where demonstrable errors have been made and attempting to supply those corrections.

#### SALIENT PHENOMENA

The social and physical phenomena we have chosen to investigate in relation to law have been chosen for their interest to an inquirer whose experience of law reaches beyond experience of legal systems and because they serve as a challenge to explanations of law which depart from presumption that legality is found in or authorized by states making exclusive claims to authority over normative life within their borders. Our introduction and exploration of environment, security and technology in Chapter 1 and Part II treat these areas of investigation independently while acknowledging their overlap. In discussion of law's relation to environment, we shall explore natural and human-caused environmental disasters which significantly affect the ability of states to maintain life under law for their subjects. In examination of law's relation to security, we shall explore the ways in which conceptions of security as a form of personal safety enabled by state-based law are outmoded by challenges of collective security in the face of threats beyond the historic prominence of human coercion of other humans. And in discussion of law's relation to technology, we shall explore some of the possibilities of legal-normative life found in cyberspace and the internet of things, focussing in particular on the ways new communications technologies are growing arguably legal practices beyond the control of single sovereign states.

Our inquirer's interest in law's relation to these social and physical facts is not surprising. They are, after all, associated with major practical concerns of the early twenty-first century. Yet, there is a further, and more important, reason why we chose environment, security and technology as salient categories of phenomena which analytical legal theory ought to address. We assume that none will dispute the fact that environment, security and technology are categories of events or forces capable of rapid elimination of a legal system. A sufficiently large earthquake could collapse a state's social order and bring an end to a legal system. A sufficiently large-scale nuclear attack could also destroy the physical and social security of a state and its legal system. Similarly, it is not difficult to imagine applications or perhaps breakdowns of technology that bring an end to legal order. It is also beyond dispute, we suggest, that smaller-scale events, such as natural disasters prompting temporary suspension of certain laws, or insurrections after which states later regain control, pose problems for the normal operation of law and legal-normative expectations of subjects. The effective persistence of state legal systems is not immune to changes in natural and social conditions in which legal systems exist. However, while it can be agreed that such changes can affect the existence and operation of legal order, we wish to explore what might lie beyond such agreement and ask whether exploration of environment, security and technology in relation to law might also merit re-thinking our ideas of law and legal order themselves, as continuity of legality involves forms of legal order beyond the legal system. Our view is that investigation of such phenomena does warrant a kind of conceptual revision or, at the very least, consideration of conceptual alternatives to those that have dominated analytical legal theory. Here we do expect disagreement, but disagreement of the sort that will nonetheless advance the goals and reach of analytical legal theory in much-needed ways.

Our use of exploration of law's relation to environment, security and technology to further explore legality beyond the state may be novel in the context of state-focussed contemporary analytical legal theory, but it has deep roots in historic choices in analytical jurisprudence. Nearly all of analytical jurisprudence offers what Joseph Raz calls 'momentary' or 'static' accounts of legal systems – accounts of the structures and interrelationships of rules and norms which compose legal systems – viewed as if drawn from a snapshot fixed in time.<sup>2</sup> Raz acknowledges that his and adjacent theories, such as Hart's, are limited in this way and suggests work on the dynamic or temporally extended dimension of legal systems, so their continuity is best left to 'other social

<sup>2</sup> J. Raz, *The Concept of a Legal System*, 2nd edn (Oxford: Clarendon Press, 1980), esp. Chapter 8.

sciences'.<sup>3</sup> As we explain in later chapters, we view this as an invitation to think about the preconditions of legal order which bear on questions of continuity and have chosen security, environment and technology as particularly significant types of phenomena serving as preconditions to continuity of legal order. Attention to these phenomena in this role will enable us to challenge Raz's indifference to the problem of continuity in its dynamic dimensions as a problem of analytical jurisprudence and his view that such an investigation has little or no potential to disrupt core claims and presumptions about the nature of law – particularly core claims and presumptions about the centrality of state legal systems as evidentiary bases for inferences about the nature of law. Contrary to Raz, we hold that exploration of the preconditions of legal order understood as the means to continuity of a given legal order will show such claims and presumptions to be far from stable and will demonstrate the new unsteadiness of the state's role in authoritatively regulating the social lives of subjects by means of law. A different approach is needed, we shall argue, learning from characterizations of law beyond the state just how legal orders continue and change identity, looking eventually to an understanding of law which does not presume and examine the consequences of hierarchically organized state systems of law as the main object of legal experience worth examining and is instead sensitive to legality's traces from early appearance to sophisticated expression in legal orders such as state systems of law.

#### A NOTE ON METHODOLOGY

Our attention to social and physical phenomena in relation to law and exploration of the implications of that relational approach to law for legal concepts raises questions as to just what our total approach is and what it delivers. As a second preliminary step, we must therefore introduce and explain more precisely the kind of conceptual explanation we employ and situate that explanation in relation to more familiar methods of analytical jurisprudence (though we will leave full explanation of our method to Chapter 1). What we can summarize as our approach to 'contextualized conceptual explanation' begins from but does not end with conceptual analysis. Conceptual analysis in legal theory, as employed by Hart and explained by Raz, refers to the exercise of trying to make explicit what is already implicit in some community's or culture's self-understanding, of trying to help people understand how they already understand themselves. As Raz puts it on the final page of his celebrated article 'Authority, Law, and Morality', 'it is a major task of legal theory to advance our

<sup>3</sup> Ibid., p. 189.

understanding of society by helping us understand how people understand themselves'.<sup>4</sup> While conceptual analysis forms an important beginning in any theoretical investigation of law, it cannot mark the end or objective, since the resulting concept, i.e., the result of the exercise of analysis, might reveal a view of law that is parochial, distorting or even contradictory when compared against social reality. The concept of law delivered by largely Anglophone conceptual analysis to date has revealed a concept which suffers, we think, from many of these flaws. More specifically, conceptual analysis of law as practiced so far has revealed that the dominant and pervasive way in which people have understood law is, as we argued in *Legality's Borders*, unacceptably state limited. To move beyond the limitations of the state-based approach to understanding law, we need to move beyond conceptual analysis as previously practiced. We offer an improvement we call *contextualized conceptual explanation*. This, as we shall explain, is the exercise of building new conceptual tools which aspire to general application and which respond to the defects of existing concepts when tested against observationally available evidence and phenomena.<sup>5</sup> Seeking to construct concepts in this phenomena-responsive way follows in the footsteps of prior legal theorists while insisting on examination of novel phenomena and permitting the explanatory demands of those phenomena to motivate use of new explanatory concepts and categories. We can do no less once we recognize that characterization of legality drawn from a frozen moment of a state system of law is incomplete in terms of both the phenomena examined and its change over time. Whether law is found in state-based legal systems changing with the societies which constitute them or in non-state legal orders interacting with state legal systems and one another, law's promise to protect expectations is always in tension with social and natural change, giving rise to law's always unsteady state.

## CHAPTER OVERVIEW

Our argument is set out in two parts, the first part establishing the need for contextualized conceptual explanation, the second exemplifying our approach. We begin Chapter 1 by exploring what we think our antecedent, Hart, meant by a relational approach to law, together with further examination of how such an approach offers a distinctively philosophical contribution to understanding

<sup>4</sup> J. Raz, 'Authority, law, and morality', in *Ethics in the Public Domain*, rev. edn (Oxford: Clarendon Press), p. 237.

<sup>5</sup> Contextualized conceptual explanation is essentially a particular form of what one of us has termed in previous work *constructive conceptual explanation*. See M. Giudice, *Understanding the Nature of Law* (Cheltenham, UK: Edward Elgar, 2015).

of law, and how such an approach is valuable, even if it is only partial and needs connection to other investigations of law both theoretical and empirical.

In Chapters 2 and 3 we begin our analysis of the relation between the state and legality. In Chapter 2 we analyse the first half of the relation, the state, as the presumed primary and natural social context of law. We argue that while law must have a social foundation for its existence, it is not necessary to suppose that such a foundation must be the modern sovereign state and that there is contrary evidence suggesting that legality is found in other social settings. One consequence of this view is the remarkable continuity it reveals between analytical legal theory and socio-legal theories of legal pluralism. Such continuity helps to show where analytical legal theorists might look for observationally available phenomena to which their theories must respond to keep pace with the dynamic nature of law in a globalizing world.

In Chapter 3 we turn to the second half of the relation and investigate the adequacy of the conception of law which is typically presumed in the relation between the state and legality. This is the idea of the state legal system, conceived as a special union of different types of rules, which, in the hands of its officials and institutions, makes special normative claims of authority over the lives of its subjects. Just as the idea of the state is only one way – and probably not the best way – of understanding the social foundation of law, so we argue in this chapter that the idea of the state legal system is only one way – and probably not the best way – of understanding the nature of law. This analysis yields the conclusion that the relation between modern sovereign states and state legal systems is only one way of conceiving the relation between society and law and that other conceptions might be better suited for analytical legal theory's task of offering phenomena- and interest-responsive conceptual explanations of law.

In Chapter 4 we proceed to offer what we take to be a better way of conceiving of law which avoids many of the pitfalls faced by a system-centred account. We recapitulate and extend the inter-institutional view articulated in *Legality's Borders*, responding in that discussion to critics who claimed that our positive argument for the existence of legal orders alongside well-established legal systems was less thorough than the criticism we offered contra the idea of legal system. Our discussion of the nature of legal order leads us to further discussion of the purpose of conceptual explanation and its relation to social phenomena, as a contribution to self-understanding which may make its contribution in a phenomena-responsive way, while falling short of providing demarcation criteria distinguishing each instance of legality from moral, religious or aesthetic norms.

In the second part of the book we turn away from questions regarding the need for new approaches to phenomena beyond state systems of law, towards and beyond a challenge William Twining first proposed for legal theory: to understand the implications of globalization for law. Twining suggests that the argument of his *Globalization and Legal Theory*<sup>6</sup> has three main consequences for legal theory. First, it is no longer possible, or advisable, to treat legal systems, societies or states as black boxes, immune from interaction with outside influences and forces. Second, legal theorists concerned to offer general explanations of law must include within their subject matter more types of law than simply the Westphalian duo of state law and public international law. Third, greater effort must be devoted to cross-cultural comparison, or comparative law more generally, to see which legal concepts travel well and which do not. For his part, Twining has recently renewed his commitment to comparative law, attaching to it a special prominence for legal theory and globalization scholars. In Chapters 5, 6 and 7 we accept and respond to Twining's first two claims, while challenging the third claim regarding the centrality of comparative law as a first response to the implications of globalization for law. We argue instead that amongst the clear and unmistakable demands globalization makes of legal theory, we must not just compare various conditions of legality but reach further to attempt to understand the social and physical *preconditions* of legality, an issue which earlier analytical legal theorists have acknowledged but not investigated in detail. In Chapter 5 we offer a general account of the importance of analysis of preconditions of legality for legal theory, before turning to an account of law's relation to environment. We argue that if part of analytical legal theory's task is to offer a morally neutral account of the nature and limits of law as a means of social organization, it cannot afford to avoid analysis of the relation between environmental conditions and the aspirations of legal order. We give particular attention to the effects of the 2004 Indian Ocean tsunami on legality in the Indonesian province of Aceh and to the possible legal effects of sea-level rise for the Pacific island state of Kiribati.

In Chapter 6 we turn to a further relation of interest to our ordinary citizen who travels: the relation between law and security. When security is little discussed by legal and political theorists, the range of questions and issues receiving attention tends to narrow rapidly to questions of the obligation of states to their own and other states' citizens, in matters such as state limitation of rights and freedoms in times of emergency. Our aim in this chapter is to broaden this discussion to include investigation of the conditions of security

<sup>6</sup> W. Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000).

which constitute and so make legal order possible. While individual security might have primary or intrinsic moral value, from an analytical and explanatory perspective, individual security presumes conditions of stability. Such conditions might be provided at the state level, but often the conditions of security and stability are satisfied (and compromised) at diverse levels, both within and beyond particular states. We take up with particular interest the question of what may be learned about legality from pandemics such as Ebola, and Joseph Raz's observation that facts arising from state and international organizations' responses to Ebola may give reasons for a negative response to the question: 'Is the state likely to remain the most comprehensive legal social organization within its domain?'<sup>7</sup> We suggest in a subsequent argument that the idea of legal systems may now be most usefully understood as an ideal roughly analogous to the rule of law insofar as achievement of each is distinctive of a particular kind of legal order, yet legal orders can exist without them.

In Chapter 7 we conclude our exploration of the social and physical pre-conditions of law, turning to the way new information communication technologies present the possibility that states may undermine their own claims to sovereignty as they embrace some technologies, while other technologies create legal order beyond states and with little need for them. We begin by examining the case of trans-boundary electricity grids enabled by the joint choice of states deploying legal norms to enact that choice, creating a subsequent trans-boundary web of legality in which state sovereignty is supplanted by a technological legal order supported but not determined by individual states. We then explore the development of virtual currencies, focussing on Bitcoin, occurring with and without recognition by state legal systems. Both examples compel re-thinking of legal concepts, and perhaps even jurisprudential problems, as the intersection and interaction of legal system, technology and legal order lead us to ask whether the problem of continuity, once conceived largely as a matter of legal system replacing legal system, has now become the problem of continuity and transition amongst legal orders.

We close this volume in traditional fashion in Chapter 8, encapsulating prior argument in summary terms we can only deploy once readers have journeyed through the preceding chapters. We may nonetheless offer here a 'sequel teaser'. *Legality's Borders* developed an inter-institutional view of legality and urged its application beyond the state. Here, in *The Unsteady State*, we have extended application of that view to new phenomena and, in facing familiar jurisprudential problems, have re-framed them in light of new phenomena.

<sup>7</sup> J. Raz, 'Why the state?', King's College London Law School Research Paper No. 2014-38, p. 13. Available from <http://ssrn.com/abstract=2339522>.



We intend in our next steps to follow phenomena and problems into the most prominent non-state instances of legality in the twenty-first century – legality’s place in territorial and virtual *regions*. But first, let us invite you to explore with us in the following chapters the nature and jurisprudential consequences of law’s unsteady state.