From Authority to Authorities: Bridging the Social/Normative Divide

Nicole Roughan

Plurality of authority is unremarkable for scholars of global governance, transnational law, or international affairs. Within these fields, there is no need to catalogue the range of phenomena that might be treated as instances of authority – from international institutions to transnational private norm-setting regimes and every shade of public/private regulator in between. The remaining questions surround the way in which such phenomena should be explained by theorists in the range of disciplines that share an interest in them; and the range of tests that might be used to evaluate them either independently, or in relation to more established forms of authority.

Arguably, only the latter of these two questions should be of major concern. Though there is merit in conceptual and analytic precision, the reason authority has troubled theorists in moral, political and legal theory for so long is that it has considerable bearing on our practical lives, which must be explained and evaluated. This does not change when the target of evaluation is not authority but authorities. The problem of authorities – whether plural, dispersed, fragmented or integrated – is a problem of justifying their operation against the freedom of their subjects (individual and institutional) and justifying their relationships with other authorities with which they overlap. These normative questions arising from plurality of authorities are among the most pressing problems for theorists of transnational or global governance.

To get to those questions, however, we need clarity about the sort of thing we are talking about. Developments across transnational legal and political institutions threaten to overwhelm or at least outpace conventional understandings of authority, and there is a very real need to clarify just what authority is before we can ask questions about who has it or test its legitimacy. In an era of transnational

claimants (and possible possessors) of authority, it is especially critical, though more difficult, to be clear about what sort of thing authority is. Transnational claims to authority force us to confront questions such as: are private credit rating agencies authorities? Do private transnational bodies regulating forestry or labour standards have authority and if so, of what sort? What sort of power do hybrid public-private bodies have? Or more broadly, what is the difference, if any, between transnational law and transnational regulation? These questions in turn force us to address any ambiguity or variance in the concept of authority in a way that a more homogenous set of claimants such as states or even public international legal institutions do not. Analytic precision matters here because it affects the content and boundaries of the normative questions that follow. Is the authority wielded by international or transnational institutions or norms the same (in kind) as the authority wielded by states? If so, is authority in all contexts justified by the same reasons? Can/should/must we have shared criteria of legitimate authority to enable those authorities to be assessed comparatively?

Answers to all of these questions have been offered with either express or implicit conceptions of authority in mind. Those conceptions divide very roughly into two categories: authority is treated as either a social power (to get other people to do what the authority demands) or a normative power (to impose duties and change the reasons that apply to a subject). More precisely, there are three different divides between approaches to authority. The first is ontological; it divides a conception of authority as a power to rule from a conception of authority as a right to rule. The second is methodological, dividing the techniques of socio-legal, contextual and descriptive analyses of the practice of authority from the philosopher's techniques of abstraction, conceptualization and reflection of those practices. The third is a divide over content; separating explanations of de facto authority from theories of the grounds of legitimate (or rightful) authority. The three dichotomies do not necessarily move in concert, and the divides are not absolute or exclusive, but theorists' choices made at each divide risk creating a significant gap within legal scholarship between those who offer broadly sociological and descriptive

accounts, and those offering some kind of philosophical and normative account. These distinctions have then played into a divide between theorists of legal pluralism and the mainstream of jurisprudence; a divide which is only recently being mended.

This chapter argues that, contrary to what is sometimes suggested, there can be no 'division of labour' between work on the sociological and normative conceptions of authority.[1] And, despite the interest in debates over whether there is either a naturalistic fallacy or a normative fallacy in our approaches to authority, it is not necessary to argue over which has logical/explanatory priority or has greater interest or influence as an account of an aspect of social/political/legal life.[2] Instead, I offer a way to bridge a methodological and conceptual divide that would otherwise separate those who theorize authority as a normative power, replete with obligations and duties and constituted by rules and reasons, from those who treat it as a social power, dependent on de facto obedience or recognition and constituted by facts of salience, compliance or acceptance by individual or collective subjects.

The bridge has two pillars. The first insists upon the mutual dependence of the normative and sociological accounts, driven by a relationship of interdependence between de facto and legitimate authority; succinctly captured in the explanation of authority as a 'normative-social practice'.[3] I argue in

[1] This replicates a division of labour within jurisprudence more generally, between philosophical and sociological approaches. See analysis in N Lacey, 'Analytical Jurisprudence Versus Descriptive Sociology Revisited' (2006) 84 *Texas Law Review* 945; K Walton, 'Legal Philosophy and the Social Sciences: The Potential for Complementarity' (2015) 6 *Jurisprudence* 231.

[2] On the normative fallacy and its counterpoints, see A Rosen, 'The Normative Fallacy Regarding Law's Authority' in W Waluchow and S Sciaraffa (eds) *Philosophical Foundations of the Nature of Law* (Oxford, Oxford University Press, 2013) 75-100.

[3] W Twining, 'A Post-Westphalian Conception of Law' (2003) 37 *Law and Society Review* 199.

Part I below that both normative and sociological analyses are necessary to a plausible explanation of these interdependent elements. Part II offers the second pillar, a conception of authority as a relative normative power. The idea of relative authority illuminates both the social and the normative aspects of authority through an examination of the implications of plurality of authority in the transnational and non-state context. While the interdependence of normative and sociological aspects of authority is true of orthodox, statist accounts of authority quite apart from any questions posed by transnational practices, those practices shed new light on that interdependence. They reveal that both facts and reasons can generate relativity between authorities, so that conceiving of authority in a transnational context requires both a clear account of the normativity of authority – its reason-giving and reason-dependent character, and its sociality – its dependence upon the fact of people accepting, trusting, or at least recognizing actual authorities.

This chapter therefore tries to align two shifts in the task of theorizing authority. The first is a shift away from thinking about authority along only one side of a normative/social divide, while the second is a shift from thinking about authority towards thinking about authorities.

1. Competing concept(tion)s of authority and authorities

a. The relationship between normative and sociological conceptions of legitimate authority

The shift from a divided to an integrated account of authority as a social-normative power must begin by clarifying what both the orthodox normative and sociological conceptions of authority capture, then must characterize the relationship between them. In normative accounts, including both Hobbesian and Razian traditions, authority is conceived as a normative relationship in which one agent has a right to rule, correlating to another's obligation to obey. There is debate about the precise character of the normative power (i.e. is it a right to rule or a duty to govern?), the character of the reasons generated by

an authority (are they preemptive or just weighty?), and the measure of its legitimacy (substantive outputs or procedural inputs); but any normative conception of authority shares the view that authority is a normative power which, when legitimate, binds its subjects.[4] In sociological accounts, the abstract notions of duty and obligation give way to an interest in what people actually regard as rightful or binding. For instance, Weber's classical account treats domination (*Herrschaft*) as the probability that a command will be obeyed, while legitimate domination is domination that is believed (by its subjects) to be morally legitimate, as distinct from power that is merely backed up by coercion.[5] One common thread, amongst a broad array of theorists, is an emphasis on the particular experience and/or practical attitudes of the specific subjects[6] . An alternative and/or complementary thread examines a particular community's practices of treating certain persons or institutions as authorities, perhaps through antecedently-determined procedures.[7]

All of these approaches insist upon a distinction between authority and forms of (mere) power. Whatever it is, authority is not coercion or naked power, nor is it persuasion.[8] For some theorists, the

---

[4] These distinctions are explored in full in N Roughan, *Authorities: Conflict, Cooperation and Transnational Legal Theory* (Oxford, Oxford University Press, 2013) ch 2.

[5] M Weber, *Economy and Society: An outline of Interpretive Sociology* [1922] (University Of California Press, Berkeley,1978): 53, 61-62, 212-14 For my purposes the debates around Weber's usage of *Herrschaft* and *Autorität*, or the role of different motivations for subjects' voluntary recognition of an authority, are not critical. For comment see I Venzke, 'Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction' (2013) 14 *Theoretical Inquiries in Law* 381.

[6] See e.g. Arendt, H Arendt, *What is Authority? In Between Past and Future: Six Exercises in Political Thought* (New York: The Viking Press, 1961)

[7] See e.g. RE Flathman, *The Practice of Political Authority* (Chicago, University of Chicago Press, 1980).

[8] H Arendt, *What is Authority?* in H Arendt, *Between Past and Future: Six Exercises in Political Thought* (New York: The Viking Press, 1961); Venzke 2013.

distinctions lie in the claim to legitimacy that is made by authorities themselves, and/or some special standing the authority holds. For others, it depends upon the belief in legitimacy, or some other individually or collectively experienced response on the part of those who would be an authority's subjects. Thus a key divide among theorists of authority is between those who think there is something special about the purported holder of authority (seeing it as having some standing or making a claim upon its subjects and what they have reason to do), and those who think there is something special about the purported subjects of authority – namely their recognition, belief in or acceptance of an authority rather than their susceptibility to persuasion or coercion. It would be overly simplistic to characterize that divide into a top-down/bottom up dichotomy, but that image does capture the split focuses of attention among theorists of authority.

On its face, the intractability of those differences might be explained by nothing more special than different scholarly interests and instincts. If these are properly deployed with appropriate methodologies, and with the expectation that scholars with each interest will be aware of the key literature and progression of ideas associated with the other, the result may be an unobjectionable division of labour between those who explore and explain the diversity of contemporary practices that are treated as practices of authority, and those who explore the conditions under which such practices are supported by and/or generate reasons. Without more, there would be no particular reason to worry about the different interests or think that one approach is preferable to the other.

But there is more. There is a relationship between the accounts, which is key to explaining and then defending either approach. This is most easily illustrated through the interaction of ideas about legitimate versus de facto authority; their explanatory priority, and the plausibility of isolating one from the other. While many accounts of authority try to incorporate both elements, the difference is in the emphasis and the status each is given in a general conception of authority. For instance, normative accounts (particularly those of a strongly Razian flavour) tend to give explanatory priority to the notion

of legitimate authority because only a claim to such legitimacy can distinguish de facto authority from de facto power.[9] These also accept, however, that an authority can only be legitimate when it can secure, or be likely to secure, conformity with its directives.[10] This makes the experience of the subject(s), and assumptions about those experiences, critical to the very idea of legitimate authority.[11] Indeed any outcome-based measure of legitimacy needs to measure what the authority is actually doing, how successful it is in getting subjects to comply with its directives, and how effectively that compliance meets whatever substantive values are built into the test for legitimacy. Measuring an authority's effectiveness in achieving conformity with reason, or pursuit of some particular substantive value, requires both a normative sense of what reason requires and empirical evidence about what an authority and its subjects are actually doing.

Sociological approaches, in contrast, tend to give explanatory priority to de facto authority because it is the key indicator of subjects' recognition of authority, and without it there is no need for any inquiry into legitimacy. At their core however, still captured by Weber's expositions, they reveal that something akin to a belief in legitimacy or justification is important for understanding what is distinctive about authority, in contrast to mere de facto power to get others to do as one wants, even when that power or ability is somehow systemic or widespread. Descriptive accounts of authority are accounts of what subjects believe to be authoritative, not what they believe to be influential or simply powerful.

That interdependence of the explanations of de facto and legitimate authority somewhat oversimplifies a richer set of engagements across the following lines:

---

[9] J Raz *The Authority of Law*, 2nd edn (Oxford, Oxford University Press, 2009) 8-11.

[10] J Raz, *The Morality of Freedom* (Oxford, Clarendon Press, 1986) 75-76; Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 *Minnesota Law Review* 1003, 1036.

[11] K Rundle, 'Form and Agency in Raz's Legal Positivism' (2013) 32 *Law and Philosophy* 767.

i. Methodology: is there a best way to do jurisprudence – i.e. must it be naturalized? If so, to what extent?[12] Even the most abstract normative accounts of authority depend upon important assumptions about the experiences of those subject to authority, and some degree of analysis of those experiences is warranted.[13] Yet, understanding law is not only a matter of understanding experiences, but also abstracting from them, and even the most sociologically sophisticated accounts must still explain ideas of legality and normativity and their distinctions from other concepts, to the extent that social practices reveal such distinctions being made.[14]

ii. Metaethics: is a separate normative account of legitimate authority plausible? A normative account of legitimate authority might adopt a version of moral anti-realism, so that any statement about the moral legitimacy of authority should be understood as an expression of an attitude of approval for authority, or a prescriptive judgment that authority should be followed, and not a proposition about the truth-value of conditions for legitimate authority.

iii. Substance: a normative account of authority might insist that the legitimacy of authority depends only upon the (social) fact of authority's acceptance/approval by its subjects. (i.e. one can be a moral realist, but think the true theory of legitimate authority is that it depends upon the acceptance/approval of authority's subjects, in which case an inquiry into that acceptance is critically important.) That argument, however, would have to respond to the persuasive criticisms of subjects' consent as a sufficient condition for

[12] See e.g. B Leiter, *Naturalizing Jurisprudence* (Oxford, Oxford University Press, 2007).
[13] See e.g. Rundle 2013, above n 11.
[14] This marrying of the two approaches is fundamental to a number of leading contributions in jurisprudence, most notably Ronald Dworkin's interpretivism.

legitimate authority.[15] In the course of offering such a response, the account must abstract from and justify the social facts it observes, and so cannot escape the task of evaluating reasons and the values they are grounded upon.

Across each of these points of debate, the competing conceptions of authority should not be regarded as talking past each other or even as offering two different sides of the same story. Rather the relationships between de facto and legitimate authority, and between sociological and normative treatments of either or both ideas, should be understood as relationships of interdependence, not isolation.

b. Distinguishing Authority

With this relationship in mind, the core tension for theorists of authority is not a tension between normative and sociological approaches to their subject-matter, but a tension between holding on to some distinctive idea of authority at all, or letting it go. The key motivation for making the distinction, and thus holding on to the notion of authority, as the (actual, claimed or perceived) legitimate use of a power to bind subjects rather than the illegitimate imposition of force or the artful deployment of persuasion, seems to be that social practices themselves embody the distinction.[16] One reason to

[15] See for instance AJ Simmons, *Moral Principles and Political Obligations* (Princeton, Princeton University Press, 1979); Raz 1986, above n 10, 88-94.

[16] Distinctions between these forms of power are made even in the most loosely-rule-governed, non-communal social systems, such as the international system. See I Hurd, 'Legitimate Authority in International Politics' (1999) 53 *International* Organization 379.

distinguish authority from other forms of power, then, is that this is what people (individually and/or in groups) actually do when they are confronted with power in all its forms. In choosing ways to manage their interpersonal relationships, people frequently exercise choices between submitting to an authority (such as a hierarchical dispute resolution process), or merely seeking advice and assistance (through independent mediation). Those choices may be made for any number of reasons, but they reflect participants' understandings that there is a difference between an obligation and a recommendation. Indeed, the wide and easy appeal of Hart's obliged/obligated distinction can be explained by its resonance with peoples' understanding of their power relationships with one another and with figures of authority. I will go further here and suggest that the common social practice of distinguishing between forms of power, including authority, is the strongest reason to hold on to the analytic distinctions between authority and coercion on the one hand, and authority and persuasion on the other. The normative distinction thus becomes contingent, depending on concrete social practices, and the description or analysis of those normative practices falls squarely into the kinds of projects that sociological approaches to authority are best equipped (and most likely) to conduct.

Consider an alternative route to justifying the distinctions on the basis of their normative concerns. Some might argue that an exercise of authority interferes with a subject's autonomy in a different way, or to a different degree, than either coercive or persuasive power; that authority is obligation-imposing, while coercion is choice-restricting, and persuasion is opinion-changing. Yet to infer that the normative concerns are different, and/or their justificatory conditions are different, begs the question. What is so special about authoritative reasons, or obligations? Raz's account of the special preemptive character of authoritative reasons, if correct, gives us an analytic distinction but doesn't justify it on any basis other than analytic clarity. Is there some other reason to make the distinction? If we are primarily concerned about subjects' autonomy, it may matter little whether they are obligated, obliged, or convinced to act; all or any can amount to a significant interference with autonomy, or

enhancement of autonomy if it is legitimate in the Razian sense. Or, if we are concerned with the effectiveness of the power, the distinction may matter even less, as authority, coercion and persuasion do not sit in a hierarchy of effectiveness.

If the implications for autonomy and effectiveness are not divisible according to the type of power wielded, we cannot rely on normative reasons for making a distinction between forms of power. This has the important implication that, while we need to retain a normative conception of authority as (perceived, claimed or actual) legitimate power which generates obligations for its subjects, the best argument for that retention is a sociological one: it maps on to subjects' recognition practices which distinguish between authoritative obligations and persuasive or coercive force.

Why then do subjects of those powers make a distinction, and under what conditions? Arguably, subjects need only care whether they have an obligation, rather than experiencing some other form of power, if there is some reason to worry about legitimacy. For instance, if a subject faces power that is exercised systematically, or on behalf of some collective against an individual, or there is a vast discrepancy between the amount of power wielded and the subject's ability to resist that power, it may seem more important to know whether the power is a legitimate exercise of authority, or not. Yet this by itself does not explain the motivation, for the same concerns could generate worries about the legitimacy of coercion, or persuasion or influence. Perhaps more importantly - and this is critical for my argument in the next section – a need to distinguish legitimate authority from coercion may arise when two or more different power-wielders are in contest to govern or control the same subjects, in the same domain. In those circumstances, it may be important to know whether one exercises legitimate authority and the other(s) mere coercion or influence, for two reasons. First is that the subjects may need to assess whether or not they are bound; second is that the power-wielders themselves may seek to (legitimately or otherwise) interfere with each other's operations. This is problematic, for while plurality of authority can drive the desire to clarify what sort of power is involved, it also introduces

potential confusion for subjects about who has authority, and diversity or complications for theorists attempting to explain authority practices.

2. Authority and Authorities

a. Transnational authority or transnational power?

Even if we use both normative and sociological tools to explore practices of authority and their distinction from other forms of power, it does not necessarily follow that such an understanding of authority is useful for analyzing practices of rule, governance or power in the transnational context. Transnational authority practices are pluralistic, fragmented and diverse. They involve institutions and organizations often too opaque to be easily categorized along a public/private divide or arranged along a spectrum from 'hard to soft'. When we shift from explaining authority to explaining authorities, in a transnational context, is there a case for relaxing the stringency with which both normative and sociological accounts distinguish authority from other forms of power, in order to capture that diversity?

I have argued elsewhere that theories of authority that limit their focus to the orthodox forms of public authority (and especially the authority of the state) miss something important in the contemporary practice of authority.[17] The conception of authority that emerges out of statist theorizing, and in particular the Hobbesian tradition of a monistic rather than pluralistic account of state authority, is not useful in a context in which states are surrounded by competing authority claimants both internally and externally. While the bare fact of competing claimants of authority does not in itself result in a plurality of legitimate authorities – that depends whether those claimants are successful in establishing their authority and whether or not they are legitimate – even the presence of conflicting

[17] Roughan 2013, above n 4.

claims to authority can generate an 'identification problem' in which subjects share reasonable doubt over who has authority or how legitimate it is.[18]

In place of a statist conception of authority, there are several strategies for conceiving of diverse practices of transnational authority. The first offers a conception tailored to the purpose of explaining transnational authority. Just as many municipal law theorists have expressly limited the explanatory focus of their theories of law (e.g. Raz, 2009, pp.104-105),[19] we might devise a theory of authority that is designed especially for explaining transnational authority, and not worry (much) about whether it also captures other phenomena, global or local. There is nothing particularly objectionable about this strategy, and its resulting conception of authority is likely to be rich and interesting for its more narrow focus, but it is likely to be of little use even as an explanation of its target context. If we accept the premise that contemporary practices of authority not only feature diverse locations of authority but also their interaction with one another, then an account which stipulates a conception of authority for a particular context cannot be put to work to analyze interactions that involve authorities from other contexts, and may miss the very significant pressure those interactions put on the target case.

A second strategy would adopt the approach often derided as a 'labelling' approach, wherein whatever is treated as an instance of authority within a community is considered to fix the conceptual category.[20] The difficulties with this approach in the pursuit of legal theory have been widely documented and it is difficult to see it faring any better in pursuit of an account of authority.[21] Importantly, a labelling approach would still need to identify what people used to distinguish their

[18] Ibid, 114-22.
[19] E.g. Raz,*The Authority of Law* (Oxford University Press, 1979, 2nd edn 2009), pp.104-105
[20] Again in parallel with a theory of law, this time Brian Tamanaha's formulation: 'Law is whatever people identify and treat through their social practices as law (or *droit, recht,* etc.).' See BZ Tamanaha, *A General Jurisprudence of Law and Society* (Oxford, Oxford University Press, 2001) 166-71, 194.

[21] E.g. Twining 2003, above n 3.

practices of authority from their other practices of power, and in the process would identify a useful analytic element of their concept of authority.

A third strategy would still insist on some analytic content to the idea of authority, but would thin out, water down, or 'relax' that analytic conception in order to ensure that it encompassed all relevant governing/ruling practices. In the same way that some theorists have offered a pluralist conception of law that can accommodate diverse instances of non-state law as well as state law, we might look for a conception of authority capable of capturing transnational authority as well as more traditional state (or state-like) forms of authority.[22] This has the advantage of prioritizing neither the state-based nor the pluralist conception, but the obvious danger in doing so is that the resulting conception is too thin to be either analytically useful or normatively compelling. More specifically, working with a thin conception makes it difficult to distinguish the target phenomena from others which are similar or which share many of the same (thinly-articulated) features. In the case of authority, the worry is that a very thin conception of authority will not distinguish authority from mere (coercive or persuasive) power.

A fourth strategy treats authority itself as a variable phenomenon inviting different but coexisting conceptions – sometimes authority appears in 'hard' or 'solid' forms, such as the typical political and legal authority claimed by a sovereign state, while at other times it appears in soft or 'liquid' forms, capable of being diluted and shared (fluidly) among actors such as transnational

[22] See e.g. W Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge, Cambridge University Press, 2009) 75-9, 243-4; E Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Farnham, Ashgate, 2009).

regulatory bodies, international institutions and even institutions that govern through 'indicators'.[23] This approach has the same drawback as that described above: it may be impossible to distinguish authority from mere power. However, it also raises additional problems of its own. The most obvious include: how to draw the further distinction between hard and soft, or solid and liquid forms of authority; then whether there are different tests for the legitimacy of these different forms of authority; and importantly, whether one is more legitimate than the other in domains in which they overlap.

Such a mixed conception of authority might offer either normative or sociological features of authority in order to identify relevant hard or soft authority practices. For instance, it might seem possible to treat hard authority as a duty-imposing power and soft authority as a reason-giving (but not duty-imposing) power; both are normative characterizations of authority and the distinction between them would lie in the character of their normativity or the weight of the reasons they generate for subjects. Reframing this sociologically: hard authority would be a power regarded by subjects as imposing a duty, while soft authority would be a power treated by the subjects as giving influential or persuasive reasons for action. Both characterizations are problematic. The sociological view would turn the distinction on peoples' beliefs about being obligated versus being obliged; the normative view would turn the distinction on the weight or type of reasons being either sufficient or insufficient to establish duties. Both would blend authority in to all the other practices of power that the orthodox conceptions of authority as belief in/existence of *legitimate* obligation or *rightful* rule have sought to distinguish.

Consider one approach to authority, suggested by Krisch's chapter in this volume, which avoids the 'solid' conception of authority as a right to rule correlative to an obligation to obey, and instead conceives of authority as a systemic ability to induce deference, coupled with recognition of that ability.

[23] See Krisch in this volume; K Davis et al (eds), *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford, Oxford University Press, 2012).

Here, the core of authority is an ability, not a right or a duty, and it is distinguished from other forms of power by its systemic character and the fact of its recognition - manifested in a subject's deference - which can occur for non-committed reasons. Thus framed, it is difficult to see how authority can retain any distinctive character at all. Instead, if authority appears in both solid and liquid forms, and is located in ruling practices which range from states setting criminal sentences to agencies setting credit ratings, then authority loses its distinctiveness and becomes simply systemic power that is likely to be followed.

Krisch uses this conception to open up the concept of authority so that a range of soft, liquid forms of governance are understood as instances of authority, thereby capturing a larger set of the range of contemporary transnational practices of ruling. Yet it is not clear what is gained by including all these practices within the same conceptual category, particularly when the participants in those practices (both the subjects and those who wield the powers) still seem to separate the kind of practice they are engaged in. As Krisch's own examples reveal, some power-wielders make normative claims, some don't. Some recipients see themselves as bound and respond accordingly, some don't. Importantly, there also seems to be a cost in relaxing the conception of authority this far. A diluted account of authority conceives of a set of practices of rule in which authority is often contested by competing claimants. This puts pressure on the social element of an explanation of authority – in circumstances of conflict, it is harder for would-be subjects of authority to offer the recognition necessary to the existence of authority on this (or indeed any) account. In short, if authority is everywhere, it cannot be anywhere.

By muddying the waters with liquid authority, we also make it more difficult to know whether a subject is required to fulfil an obligation, or just has the option to use some particular indicator or to participate in some habitual social practice of deference. A subject deciding what to do needs to be able to work out whether he has a choice, and that involves making distinctions between the types of reasons that different power-wielders generate for him in order to factor them into his practical

reasoning. The same is true of states, which are often the subject of these transnational governance practices. A state's officials need to know whether they are bound by or free to ignore an exercise of transnational power; and a state's subjects (or other potential critics) can similarly make use of such normative distinctions to criticize that state for either bending to influence when it was not bound or failing to fulfil its obligations. In the assessments surrounding legitimacy, then, lie the reasons for needing a distinction between authority and other forms of power.

Finally, and perhaps most importantly, Krisch's formulation, and others of a similar vein, do not allow for the instance in which a subject population recognizes that a claimant, such as a state, or an international credit rating agency, or an international judicial or law-making organization, has a systemic ability to induce deference and is likely to be followed, *despite* its illegitimacy due to some substantive or procedural flaw, and that (in the subjects' view) the illegitimacy is what disqualifies that power-wielder from having authority.

The challenge, then, is to conceive of authority in a way that keeps authority distinct by insisting upon actual, claimed or perceived legitimacy, while still capturing its practice beyond the state context, and being sufficiently attentive to both its sociological and normative elements. Indeed, I think there is a strong reason to revise the prevailing conception of authority in order to better account for transnational practices of authority in particular, and plurality of authority in general, but this is not a reason to reject a normative conception outright, or in any other way loosen the solid object of analysis.

b. A Revision: Relative Authorities

The trouble is that analytic precision about fluid transnational phenomena poses a real methodological challenge – to produce work that is responsive to the contemporary state of analytic and normative jurisprudence, and is also engaged with work of a sociological and/or anthropological nature which examines the relationship between law(s) and particular societies or social groups. It is not sufficient for

general jurisprudents simply to be grateful to sociologists of law for pointing out facets or examples of legal pluralism or transnational law which might otherwise be difficult to trace, and then to overlay a set of conclusions, derived from analysis and evaluation of state law, about the nature of law and its authority or a set of normative concerns about law's legitimacy.[24] Nor is it sufficient for sociologists of law and theorists of legal pluralism to gloss over the details of the concepts they rely upon to distinguish target law/authority practices from other surrounding social or normative practices. Even if sociologists of law need only "provisional, flexible and endlessly revisable specifications" of the concepts capturing the practices they study, those concepts must still be sufficiently clear and distinct to be useful.[25]

One way of doing this is to build the facts of plurality into a theory of authority at both the normative and social points of the explanation. Both the reasons that constitute authority relationships, and the actual practices of recognition of those relationships by those who are subject, can and very often do generate multiple overlapping or competing authorities. In earlier work, I have argued that when there is such plurality of authority, authority is best understood as a 'relative' power, whose legitimacy depends upon relationships of cooperation, coordination, toleration of difference, or (in some cases) conflict between the overlapping authorities.[26] Relative authority arises where the overlap in the subjects or in the activities the authorities seek to govern means that they cannot have independently legitimate authority.

---

[24] Many recent theorists of pluralist jurisprudence avoid this pitfall. See e.g. Twining 2009, above n 22; K Culver and M Giudice, *Legality's Borders* (Oxford, Oxford University Press, 2010); P Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism' (2011) *Comparative Research in Law & Political Economy. Research Paper No. 21/2011.* http://digitalcommons.osgoode.yorku.ca/clpe/59

[25] See R Cotterrell, Review of Melissaris, *Ubiquitous Law* (2009) 19 *Law and Politics Book Review* 774;the quoted phrase is from the abstract for the SSRN version ('Does Legal Pluralism Need a Concept of Law?') http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550176 .

[26] Roughan 2013, above n 4, ch.7.

An account of relative authority resonates directly with work in legal pluralism, which has adopted methods from the sociological or anthropological sides of the legal theory divide, and which observes the facts of plurality of legal systems claiming authority in the same domains. It is indeed unremarkable, within scholarship on legal pluralism, to suggest that the legitimate authority of these legal systems might be relative to one another, in the sense that they can be compared and contrasted, measuring the extent of their legitimate authority by reference to one another rather than in absolute terms.[27] Yet there is a different sense in which authority can be relative. It can be relative in the sense of being interdependent, so that one authority cannot be legitimate without an engagement (through cooperation or coordination or toleration or conflict) with any other authorities with which it shares the domain. I have argued that relative authority is the best way to understand many quite familiar authority-sharing arrangements in or involving the state, including federal structures, separation of powers between branches of government, some state-indigenous law relationships, and aspects of the European constitutional/Member State structure.[28] In those practices, subjects do not and need not always straightforwardly recognize one authority; rather they can recognize two or more authorities operating in sometimes complex yet still effective relationships. The subjects of these regimes can and do put their faith in the eventual working out of the details of each relationship, sometimes through the creation of ordering rules and hierarchies, but at other times through ongoing dialogical interactions with no ordered end in sight.[29] In the sociological sense, what matters is the belief in the legitimacy of

[27] See R Cotterrell, 'Transnational Communities and the Concept of Law' (2008) 21 *Ratio Juris* 1.

[28] Roughan 2013, above n 4.

[29] Even supposedly-orderly constitutional relationships often have this dialogical character; for example, those between branches of government in systems which lend themselves to continual revision of the practices of judicial review or legislative supremacy.

the authorities, given (and indeed because of) their relationship with one another. In other words, belief in the legitimacy of their relative authority.

As with all forms of authority, in order for relative authority to exist and to fulfil the social element of the phenomenon of authority it must be recognized. Recognition of relative authority involves subjects' understanding and acceptance that an overlapping legitimate authority zone is a sphere of relative authority. It requires patience while compromise/coordination rules are figured out, and/or a peaceful form of conflict which prioritizes engaged and reasoned public debates rather than polemical or dogmatic stances. Subjects' practices in recognizing relative authority matter because they generate the cooperative or at least tolerant spaces in which multiple legitimate authorities can work out the precise relationship that will allow them to share legitimate relative authority. Yet, in the process, those authorities must still be recognized as such, or else there will be no authority at all.

This account of the relativity of authority thus poses no difficulty for the sociological aspect of a theory of authority, and there are familiar examples and plausible explanations of authority practices that involve cooperative, coordinated or workable conflicting relationships, hierarchical or otherwise, and which are recognized by subjects. The normative side of the explanation is a little more problematic. How can plurality of authority be fitted into the strongly normative account of authority favoured by most theorists of state law, in which legitimate authority is constituted by reasons and entails a right to rule and/or a duty to obey? In that account, authority is assumed to have a binary character, and this framing appears unsympathetic to plurality, let alone relativity. Yet plurality can be accommodated within this account by close attention to the reasons that confer legitimacy upon an

authority or authorities, which in turn generate relativity and new requirements for appropriate inter-authority relationships.[30]

The reasons that confer either procedural or substantive legitimacy upon an authority will sometimes, and perhaps often, confer legitimacy upon more than one authority within the same domain. Relative authority is most clearly generated by substantive reasons when the purported authorities need to coordinate if they are to realize some particular substantive value which either authority alone cannot achieve, or when incommensurable reasons/values confer substantive legitimacy upon two or more different authorities. Relative authority can also be generated by procedural for legitimacy, when subjects have conferred standing upon more than one purported authority (e.g. through giving their consent), or when subjects, who have conferred standing on one authority, interact with subjects who have conferred standing upon another authority in ways that require the involvement of their respective authorities. Both structures of reasons illustrate that relativity cannot be simply a measure of degrees of authority between different institutions or bodies, or a mere description of those degrees, because that would deny either the substantive or procedural value of the slighted authority and, ultimately, the autonomy of its subjects. Instead, the reasons (and values) that are at the core of

[30] Tangentially, note that this account of *legitimate* relative authority was the primary concern of my work in *Authorities*. In contrast, Psarras' chapter in this volume, which is in part a critique of that work, argues that jurisdictional rules determining legal validity, in cases of overlapping legal-systemic authorities, can be explained by a theory of law without needing a full-blown account of legitimate authority, and he concludes that this blunts my critique of the Razian authority approach. His chapter helpfully revises Raz's own explanation as well as giving a clear elucidation of a theory of the conflict of laws. However, as a critique of my arguments in *Authorities*, it misses the mark in so far as my account is about the conditions of legitimate authority in circumstances of overlap, rather than simply the explanation of what, conceptually, makes such jurisdictional overlaps possible. See Roughan 2013, above n 4, 4-5, 97-101.

the normative account generate interdependence between those authorities that have the standing of authority and are tasked with realizing those values or helping their subjects to do the same.

In the transnational context, relativity of authority has a special significance. Inquiries into the legitimacy of any particular transnational authority-claimant must be conscious of its possible relativity with any particular state or public international legal authority. Opportunities for legitimacy exist most obviously when a state (or states) have failed (either substantively or procedurally) to govern a particular area of activity in which there is a need for some authority. If there is a need for public authority, e.g. to coordinate behaviour or settle disputes, and states have individually or collectively failed to constitute an authority to perform that function, then a private or hybrid transnational regime which fills that void will likely have legitimate authority, provided it has a modicum of its own procedural value through the acceptance, recognition or approval of those who are affected by its exercise..

The possibility of relativity suggests that the most interesting question to ask about transnational authority may not be whether particular transnational authority claimants actually have legitimate authority, but rather whether any authority (at all) is justified in the particular realm in which it is claimed.[31] Many of the contenders for having authority in the transnational context are not clearly meeting some justified need for authority. Bodies such as I-CANN or the Forest Stewardship Council perform important functions and can exert a great deal of influence, but it is arguable whether their functions are justified exercises of authority or are instead justified exercises of mere power or influence which some people voluntarily adopt or follow. The difficulty, of course, is that the question of what

[31] This restates Raz's independence condition, which requires that authority can only be legitimate if it is first justified as being appropriate for the sort of activity in question. On some matters, Raz reminds us, it is more important for the subject to decide autonomously, even if he would do better by following authority: see Raz 2006, above n 10, 1014.

counts as a matter of common rather than private concern, and thus the question of when authority is needed, are themselves contested and likely to be essentially so.

If authority is clearly justified, then questions of who (in singular or in plural) has it, and how they should interact with others, are particularly difficult to answer given the private, hybrid or quasi-public character of many transnational regulatory/legal regimes. When these interact with or overlap more clearly public instances of authority, the relativity equation has to account for the (potentially quite considerable) procedural and substantive values that a particular state or international authority has, in relation to whatever procedural or substantive values reside in the purported transnational authority.[32] There is a critical 'public versus private' dimension to that equation. Many purported transnational authorities are voluntary bodies constituted by private actors such as corporations or financial institutions to serve their own (rather than public) interests. They may obligate and bind those who sign up to them, but not others. In those instances, an assessment of relative authority requires weighing up the specific values of the respective authorities, but also the more abstract and difficult evaluation of the values of public and private authority in that particular domain. Transnational loci of private authority will only share in legitimate relative authority when there are sufficiently powerful reasons to have authority that is both private and transnational. If there are, then public international, state or sub-national public authorities will be required to recognize, coordinate with, or simply tolerate the rules and obligations that such private authorities generate for their members in that domain. Here, the analysis is no different, in structure, from the analysis applying to relativity between public authorities.

[32] On the legitimacy of private regulatory governance, see e.g. P Zumbansen, 'Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power' (2013) 76 *Law and Contemporary Problems* 117; AC Cutler, *Private Power and Global Authority* (Cambridge, Cambridge University Press, 2003).

The structure of analysis, however, once again turns attention to the question of whether public authority is needed on any particular matter in which there are private transnational claimants of authority, or whether the domain can be legitimately governed privately. Debates over that question permeate all aspects of transnational regimes, but are most obvious where there is a direct conflict or competition between different claimants of authority: private or public; transnational, international or local. For instance, the explosion of international arbitration of investor-state disputes raises the question of whether that domain should be subject to some kind of public authority to generate coherence and consistency, to ensure rules and principles of natural justice are applied, and to enable review for quality assurance or to ensure access to justice.

This chapter is not the place to determine an answer to that question, or indeed to flesh out the particular relative authority relationships generated by the practices of international arbitration and national legislation or adjudication. Rather, the advantage of treating these practices as (potential) instances of relative authority is to focus attention on what these purported authorities do in their relationships with one another. How often, and under what conditions, does one of them defer to another? How do subjects respond to that deference or other forms of interaction? The social aspect of relative authority does not only encompass the authority-subject nexus, but also includes the social practices of inter-authority interaction – from deference to challenge, or from toleration to intervention. In addition, each of these inquiries must be subjected to a normative analysis. How should the authorities interact? Should one authority defer to another that is more valuable, or more democratic, or more successful? Or are they evenly poised so that they should tolerate each other's operations even when these generate practical conflicts for their subjects or cause uncertainty?

In short, the contribution of the relative authority account is that it enables plurality of authorities to be explained within both the social and the normative aspects of a theory of authority. It explains how conflicts or confusion over who has authority can exist without defeating the recognition

of authority that the social element deems necessary to authority's very existence. It then explains that incommensurable or equally-weighted reasons justifying different authorities do not cancel each other out or defeat the core normative structures of legitimacy and obligation (or belief therein) that are critical to distinguishing authority from other forms of power. If transnational authority, as well as state or public international authority with which it interacts, is conceived as relative, then there is a way to analyze some of the new, fluid, opaque and sometimes messy arrangements that characterize transnational governance or rule, as practices of authority, rather than having to water down that concept in order to analyze this important emerging field.