THE RELATIVE AUTHORITY OF LAW – A CONTRIBUTION TO 'PLURALIST JURISPRUDENCE'

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A key challenge facing philosophers of law is to account for the increasing significance of inter-state, supra-state, and non-state law. This chapter suggests that these instances of law cannot simply be treated as marginal interests in 'legal pluralism,' because they unsettle conventional understandings of law's authority. I argue that the plurality of law in practice requires a 'pluralist jurisprudence,' and offer a theory of legal authority in which authority is plural and relative rather than singular and exclusive. The concept of relative authority can help overcome the obstacles to pluralist jurisprudence, and serve as a building block for a pluralist theory of law.

Introduction

Philosophers of law typically analyse law and legal systems in isolation from one another, where the identity of legal systems is understood by distinguishing between norms that belong to different systems, and concepts of law are built by identifying features of those systems that are universal or near-universal, or truistic and seemingly important (e.g. Raz, 2009; Shapiro 2010) In contrast, what I am calling 'pluralist jurisprudence' examines the implications of overlapping and sometimes conflicting levels of state, supra-state, inter-state and sub-state law. After a long period of separation between general jurisprudence and assorted theories of 'legal pluralism,' recent work in philosophy of law has created room for pluralist

jurisprudence. However, there remain two obstacles to its development. The first is to show that a plurality of legal orders is conceptually coherent and is therefore within the realm of philosophy of law. The second is to show that, if plurality of law is relevant to legal philosophy, it is also at least interesting, and perhaps even important.

To help clear both obstacles, I offer an account of 'relative authority' in which the legitimacy of legal authority can be conditioned by the interaction between multiple and sometimes conflicting levels of law. My account of relative authority overcomes the first obstacle by conceptualising interacting and overlapping authoritative legal systems. The account then passes the second obstacle by showing that such plurality of legal orders is important for philosophy of law, not just a matter of fact for sociological study.

My aim here is topresent the beginnings of a case for a pluralist theory of law, with a concept of 'relative authority' at its centre. A pluralist theory of law is not a theory that simply leaves room for legal pluralism, but a theory which explains what law is like, given the facts of overlapping and interactive legal systems. The concept of relative authority does not answer all the questions that a pluralist theory of law must address, but it is one among several key junctures.[2] If plurality of authority is central to the practice of legal authority, as I argue that it is, then pluralist jurisprudence needs to start by revisiting the accepted wisdom about legitimate authority and law's claim to possess it.

1. An Opening for 'Pluralist' Jurisprudence

Theorists of legal pluralism have in the past spent much energy trying to convince general jurisprudents that analytical and normative analyses of law should include attention to law other than official state law (Beckman, 2002; Michaels, 2008). At its peak, the direct exchange included debates over whether different normative systems were ‘legal’, analyses of the respective merits of official state law and customary, international or other ‘legal’ norms, and rich conceptual debates about the necessary features of law and legal systems. Both Hart and Kelsen directly considered the 'legality' of non-state normative systems as part of their general theories of law. For Hart, the curiosities of international law were treated as a test case for application of his general theory of legal systems, and although international law was famously described as being a set of rules and not a legal system, his whole account leaves open the possibility of plurality of legal systems (Hart, 213-237). Kelsen's conclusions, in contrast, were monist, he denied the possibility of multiple legal systems over the same actors and argued that international and state law could, logically, only be conceived as parts of a single legal order grounded on a single grundnorm. (Kelsen, 1945 pp.325-388).Yet since Hart and Kelsen, the intensification of debates within and between schools of jurisprudence, and the search for ever-more refined versions of positivist or natural law theory, have largely squeezed plurality towards the margins of jurisprudential interest, or even into what Joseph Raz describes as ‘sociological’ inquiry that is outside the proper realm of jurisprudence (Raz, 2009 pp.104-5).Theories drawing upon sociology of law(e.g. Tamanaha, 2001), legal anthropology (e.g. von Benda Beckman et al, 2009),and autopoiesis or systems theory (e.g. Teubner, 1993) offer explanations of law that capture legal pluralism, but these are at the margins of the current Anglophone jurisprudential canon, whose centretreats the facts of plurality of law to be jurisprudentially unimportant; and theories of legal

pluralism to be either jurisprudentially incoherent, irrelevant, or simply uninteresting (Twining, 2007).[3]

Recent changes in practice and in theoretical interests suggest the end of that marginalisation. International law (both public and private) and regional legal systems (of which Europe is the most developed but not the only example) are now the low-hanging fruits of legal pluralism, and the need to make sense of their content, to give them concrete application, and/or to challenge their normativity, places plurality back within the cross-fires of doctrinal legal argument. There are now solid examples of plurality in practice with which to contest the conventional jurisprudential wisdom, and there is no reason to simply ignore these other legal systems, even if we only analyse the least controversial cases in which state law interacts with other types of official (i.e. supra-state or inter-state) law.

In turn, core questions in analytical jurisprudence have been reignited in a way which opens the door for pluralist jurisprudence. The most significant developments are all related, but can be linked to three different themes. The first is a reinvigorated interest in the 'what is law' question, and why it matters (e.g. Shapiro, 2010). Although there remain doubts about the 'legal' credentials of some purported legal systems, those doubts are interesting not because of some desire to categorise, but because they use ideas about the nature of law to challenge conventional ideas about law's authority, validity, normativity, institutionality, and relationship to other normative systems.

The second change is a new set of questions about how we do jurisprudence, which inject methodological awareness into a field which had seemingly left such discipline behind (Halpin, 2006). These methodological studies, particularly but not exclusively those which advocate a naturalistic exploration of actual legal phenomena, open the path to re-integrating analyses of diverse kinds of law, and to analysing the multiplicity and interaction of systems that exist in practice (e.g. Twining, 2009, pp. 55-56).

Thirdly, projects to rethink jurisprudence are isolating what is really important and interesting about the subject, through re-assessments of the often-clichéd exchanges between key theorists or between traditions of natural law and positivism (and species thereof) (e.g. Coleman, 2007). These suggest a new structure to the subject which is no longer concerned with defending positions within jurisprudence, but in making sense of the practices which they explain and the concepts they use to explain them (Coleman, 2010). This shift creates a space for pluralist theories to come in from the margins previously created by the dominance of the traditional debates, and to add their own analyses of legal phenomena. This is not to say an interest in plurality replaces core interests in the metaphysics of law, rather that plurality is a part of those core interests which are now being examined with less worry about how they fit into categories of natural law or positivism. Plurality makes explicit - and challenges - key features of law, including its institutionality, the identity of legal systems, and law's claim to authority. There is no reason to exclude the fact of plural legal systems, and importantly, their interaction, from debates about our concept of law.

Although none of these changes aim at pluralist jurisprudence, they leave an opening for it to proceed. Yet these shifts which have made plurality relevant, and even fashionable, are also responsible for the second obstacle facing pluralist jurisprudence. If it is too obvious or uncontroversial to conceptualise multiple and interacting legal orders - if we are all pluralists now - the risk is that 'pluralism ceases to be an interesting theory - it amounts to little more than the application of standard models of legal systems to a new factual situation.' (Barber, 2006 p.306). Barber himself resists this conclusion, as I do here, but it raises a basic truth: that pluralism does not take shape as a fully worked-out theory of law, rather takes the form of an ethos, a perspective, a narrativeor particular experience of the way the legal world is (Koskenniemi, 2007). Legal pluralism has thus been caught between poles: either it is a theory that is so thin as to be uninteresting, or it is a political project thinly disguised asan ontology.

That status is just beginning to change, with several recent works in general jurisprudence taking seriously the possibility that theories about the plurality of law might actually be interesting or even important within that field. Some make modest claims designed to show that plural legal orders are consistent with conventional approaches to jurisprudence and can be explained using existing analytic tools. For instance, both Barber (2006) and Dickson (2008) explain the possibilities of interacting and overlapping legal systems using the tools of positivist legal theory; including the possibility of multiple and inconsistent rules of recognition, the necessity of claims to supremacy, and the conditions of systemic identity. Other works use existing tools of jurisprudence to engage in detailed philosophical analysis of specific types of non-state law, including international law (e.g. Besson, 2009;

Besson and Tasioulas, 2010); European law(e.g. MacCormick, 2009; Walker, 2003); and customary law (e.g.Postema, 2007). More ambitiously, William Twining insists upon the need to rethink general jurisprudence 'from a global perspective,' in light of different levels of legal order (2009p.117). He challenges scholars of legal pluralism to produce better analytic and normative theory, and general jurisprudents to pay attention to the analytic and normative implications of legal pluralism. To date, the most substantial response to this challenge focuses upon the concept of legality and how it can be decoupled from a 'hierarchical, comprehensive, supreme, and open law-state.' (Culver and Giudice, 2010, xxviii and Ch. 4,5).

2. Relative Authority

My own work takes up Twining's challenge but applies it to the concept of authority. I argue that the central puzzles posed by plurality of law are not to explain legality, but to explain both plurality of legitimate authority and the legitimacy of inter-authority relationships. Specifically, jurisprudence needs to be able to explain the existence and legitimacy of legal authority across the overlapping jurisdictions that are an inescapable part of legal practice, and to provide tools to articulate, explicate and evaluate the inter-authority relationships that result. These phenomena cannot be explained by conventional jurisprudential wisdom, because even if we conceptualise cross-border jurisdictions and decentralised legality, we have not explained how all this dispersal and fragmentation is consistent with law's authority. The leading accounts of legal authority do not adequately explain multiplicity and interactivity between authoritative legal orders. The basic problem is that, under conventional accounts of legitimate authority, and in particular the leading 'service conception'

developed by Joseph Raz, 'to exist, authorities must be knowable,' and their legitimacy must be able to be determined by a subjects' reasonable inquiry (2009b, p.148). The risk is that overlap and multiplicity creates confusion over who has authority - confusion which can collapse authority altogether.

My argument is that to explain plurality of authority, we need a conception of authority which makes the legitimacy of authority knowable in circumstances where there are multiple claimants.The pluralist conception of law's authority offers an account of relative authority which explains that legal authority can be shared or overlapping without being ineffective, by making the legitimacy of legal authority conditional upon the interaction between multiple and sometimes conflicting legal authorities. This pluralist account enables an explanation of authority in circumstances of plurality, by replacing confusion and collapse in the face of conflict, with either toleration, cooperation or coordination. It preserves the possibility of legitimate authority in situations of overlap or even conflict not for its own sake, but because this seems to be a better explanation of the contemporary practice of authority. Importantly, it provides a device for evaluating the legitimacy of inter-authority relationships: whether they should cooperate or coordinate, whether conflicts between them should be tolerated, or whether one ought to exclude another. Although the relativity condition itself does not fill in the details of which reasons apply to actual relationships between plural authorities, it is a theoretical tool to explain how they can have legitimate authority despite (and sometimes because of) their plurality, via an interaction which accords with the balance of procedural reasons about how decisions should be made, and which allows them to help subjects comply with the balance of reasons for action that apply to them.[4]

These different possibilities, and the different arrangements of reasons that justify particular types of relationships between particular authorities, cannot be addressed here and they do not affect the usefulness of the relative authority tool. Instead, it is important to emphasise that the relativity condition of legitimate authority places the onus of appropriate relationships upon authorities, so that subjects can rely upon 'their' authorities to realise their own justifications, and to ensure that any values that attach to particular authorities are not cast aside by the presence of other authorities who simply wield more or better resources.This is an aspirational goal, and sometimes authorities will not be able to avoid some degree of contradiction or incoherence which creates practical conflicts for their subjects, just as independent authorities can fail in this regard. We can therefore weaken the stringency of the requirements of relative authority to say that the purported authorities must always try to coordinate or cooperate on common problems, and if they are generally successful in doing so, this is sufficient for them to share legitimate authority. Occasional failures can be tolerated up to the point at which they obscure the visibility of the shared authority for the subjects and/or remove its reliability, for if subjects cannot identify or trust an authority they cannot be guided by it, and we would be back in the throes of the identification problem that plagues the standard case of independent authority. The importance of visibility also means that purported authorities must not only try to interact, they must be seen to try, so that the subject can rely on following one authority and trust that that authority will work out any contradictions it creates which could otherwise cause problematic practical conflicts for the subject.[5]

3. A Pluralist Theory of Law

If my account of relative authority is plausible, it has implications for understanding the concept of law and the features of legal systems. Most importantly, it unsettles conventional wisdom about law's claims to authority and/or the authority that law has; while at the same time helping to explain some of the puzzles surrounding the interaction of legal systems and their claims to supremacy. The ideas about authority and supremacy are related, but I will explore separately how the conception of relative authority alters (i) law's (claim to) supremacy and (ii) law's (claim to) authority, then consider (iii) what law must be like if it is to make these claims.

First, a general note about claiming and its significance for jurisprudential inquiry. The claims that law makes are often treated as central to theories about the nature of law, particularly when these claims are thought to be moral claims (Raz, 2009, pp.29-33; Gardner, 2010). In analytical jurisprudence, the significance of any claims that law necessarily makes is that they enable us to theorise about what law must be like if it is to make those claims in good faith. Yet a claim to authority is not the same thing as having authority, so we can also engage in normative theorising about the conditions under which law's claims are true or justified, and use these to test any particular claims that are made. In both the analytical and the normative inquiries, the actual practice of claiming is not the target of the inquiry, rather it is the trigger for analysing whether law lives up to its claims, and what the making of those claims reveals about law itself.

i. Law's (Claims to) Supremacy

Raz suggests that our ‘general knowledge about the law and human society’ reveals that law makes a claim to supremacy, and he argues that this claim is one of the existence conditions for a municipal legal system (2009, pp.118-20). The claim to supremacy takes two forms: (i) a claim to supremacy over non-legal systems, including an entitlement to regulate, exclude, or otherwise control their operation through recognition or incorporation of their norms; and (ii) a claim to supremacy over other legal systems. The first claim seems straightforwardly coherent, although there are disputes about whether the claim is a necessary feature of law itself, or merely a contingent feature of modern state legal systems (Marmor, 200,1 pp.39-42). The second claim is more difficult; it is much less clear whether law's claim to supremacy includes a claim to supremacy over other systems of law. Raz thinks it does, and that ‘since all legal systems claim to be supreme with respect to their subject-community, none can acknowledge any claim to supremacy over the same community which may be made by another legal system.’ (2009, p.119)

Both the necessary and the sovereignty-contingent views of the supremacy claim run counter to the practices of constitutional pluralism and transnational law, in which there are many prima facie legal systems, including some in sovereign states, which do not claim supremacy over all others, or which even claim subjection to others. This is an empirical objection; even if law claims supremacy over (for instance) the rules of voluntary associations or family life, it is simply not true that all prima facie legal systems claim supremacy over others. Historically, medieval legal systems were surrounded by others and did not claim supremacy over them, but the objection also holds true in contemporary practice where there are many instances of municipal legal systems claiming inferiority to international or regional law regarding certain matters

in which both legal systems apply to the subject-community (Marmor, 2001, pp.40-41). Even between state systems, claims to supremacy are not always clearly made. A state's legal system cannot exempt members of its subject-community from also being subject to any extra-territorial rules that other states enact - such as rules regulating cross-border commercial, criminal or tortious activity. The legal system of the 'home' state does not always claim supremacy over these other prescriptions, or even supremacy of jurisdiction, even though executive enforcement authorities in that state may elect not to engage in extraditions or other processes that would give effect to another state's law. Even when such enforcement is refused, all that is claimed is supremacy of enforcement authority, not supremacy of authority to prescribe or supreme jurisdiction. Furthermore, there are federal states and states with complex divisions of sovereignty for indigenous groups, for example, which do not straightforwardly have single legal systems claiming supremacy (Culver &Giudice, 2010). If the supremacy claim is a necessary condition of being a legal system, we would have to either limit it to a claim about the enforcement of laws in a way that runs counter to the contemporary jurisprudential interest in normativity rather than sanction; or deny that any of these systems were legal systems, despite their meeting all other existence conditions and/or displaying other truistic features of legal systems.[6]

Although I think the basic truth of the empirical objection is important, indeed it captures the very practice of plurality that the core of jurisprudence can no longer ignore, it is not entirely successful as a response to Raz's point. Raz accepts that claims to non-supremacy and multiplicity of legal systems can exist in fact; his point is not that no systems acknowledge each other's supremacy, but that, conceptually, or

‘as a matter of law’, they cannot (Raz, 2009, p.118). The empirical objection is not satisfactory unless it is accompanied by a conceptual account about law which denies that legal systems necessarily claim supremacy and/or which explains how different supremacy claims can be integrated and mutually recognised.

The concept of relative authority can do both - if we can show that law's claim is to relative authority, not supreme authority, we also have a way of integrating competing claims to supremacy. We can avoid Raz’s concern that legal systems cannot recognise the supremacy of another, by substituting supremacy for relativity: even if a legal system cannot recognise another system’s claim to supremacy, it can recognise the relativity of its own claim to the claims of others, and of their claims to its own. Furthermore, no claim to supreme authority over other legal systems could be justified wherever it turns out that legal authority is relative, and therefore no claim to supremacy could be made in good faith, and nothing would follow about the nature of law or legal systems from the fact that some systems actually make such a claim. In short, if we can show that under some conditions legal systems have relative and not supreme authority, then we deny that a claim to supremacy can be a necessary condition of the existence of legal systems.

ii. Law's (Claim to) Authority

Much has been written about the coherence, contingency or necessity of law's claim to legitimate authority (e.g. Raz,1994; cfKramer, 1999 pp.78-112). We can set aside, momentarily, the dispute over the claim's necessity, because the modifications that are required by the concept of relative authority apply whether or not claiming authority

is a necessary or merely common feature of legal systems, and they apply similarly to the claiming of authority and to its existence.

When there are multiple purported authorities in interacting or overlapping domains, and there is no outweighing procedural reason to have just one singular authority, then those purported authorities can have only relative authority and must coordinate or cooperate or tolerate one another in order to be legitimate for their subjects. In these circumstances, law can still claim to possess legitimate authority (indeed making a claim to legitimate authority is an important part of law's having authority because it can have authority only if it can, as a matter of fact, secure a degree of respect for its directives), but there is no reason why law cannot instead claim relative authority.

A claim to relative authority is simply a claim to achieve legitimate authority through appropriate relationships with other authorities. It links the legitimacy of authority with its interdependence. The claim is really a subspecies of a claim to legitimate authority which just includes an indication about how that legitimacy is to be achieved. The relativised claim is a claim to change the moral reasons applying to the subject by working with others who share or also have this normative power, and whose cooperation or coordination is needed for the authority to be legitimate. It is important though that a claim to relative authority is not a claim to reduced authority, but a claim that acknowledges the conditionality of one's authority upon appropriate interaction with others. In this respect it is a more genuine claim which builds in conditions that the simple claim to legitimate authority leaves implicit, and is to be preferred to the more sweeping claims that, it turns out, cannot be sustained when facts support relativity.

Legal systems in situations of plurality do make claims to relative authority, and these are conceptually plausible when made in conjunction with recognizing the interdependent authority claims of those other legal authorities with whom they must cooperate or coordinate. There are examples of such claims to relative authority among legal institutions at different levels of law. The most obvious involve claims to subsidiary or complementary jurisdiction, which can be seen as claims to relative authority in which one body's legal authority is conditional upon the non-action of another - a type of coordination of their authority. Other examples include arrangements of overlapping, concurrent, or shared jurisdiction, which occur not only within the much-discussed setting of the European Union, but can also feature in self-government claims by groups within states and states' responses to those claims. Where such concurrency or complementarity or overlap of authority is expressly claimed, these are claims to relative authority.

I will leave open whether a claim to relative authority is a necessary feature of law. That would depend upon the further question of whether there is always plurality of law, so that it would be conceptually impossible for law to exist in isolation from other instances of law. One might imagine a customary legal system of an isolated community whose members have no interaction with members of outside communities (or at least no interactions involving legal questions); which does not participate in any policy projects involving outside communities; and which applies only its own rules which are not in any way designed to replicate or be compatible with the rules of outside communities. Yet although such a monist account remains a conceptual possibility, it is practically implausible due to the dominance of the state

as a political structure which overlays 'official' state law onto such customary legal systems, and in doing so creates plurality between the official and the customary systems while also (usually) triggering interaction with other states. To the extent that official law came to replace customary and/or religious laws in the Westphalian era, one might think the monist picture was restored, but if so, that monism was short-lived. It is arguable that in the post-Westphalian practice of law, plurality is always present to greater or lesser degrees, and therefore law can only make a genuine claim to relative and not to supreme authority.

Thus if Raz is right, and it is of the nature of law that it claims legitimate authority, then in situations of plurality we must reinterpret this claim as a relative claim - one which is made in interaction with a host of other legal systems. Even if Raz is wrong, and law does not necessarily claim any authority, let alone relative authority, we can still ask about the character of claims to authority which law does make, and from those claims we can learn about important contingent features of law, albeit not necessary ones.

iii. The Features of Relatively Authoritative Law

A theory of law would be incomplete if it failed to explain the features of law that the claim to relative authority entails, whether they are necessary or merely contingent. The key feature is a capacity to be responsive to other instances of law, not merely open to them, as Raz has argued (1999, p.119). More precisely, legal systems, through the officials who make claims and act on law's behalf, must be capable of being responsive to one another. For example, imagine a dispute between a member

state of the EU and an EU institution over respective competencies, involving questions of national and EU constitutional interpretation, which could be determined equally well (although perhaps differently) by a national supreme court applying national law, and the European Court of Justice (i.e. the different courts are relative authorities). Suppose that this same issue arises not just in one member state, but in many, and suppose there is a procedural reason to want a coordinated or cooperative settlement of these questions. In that context, legal actors within those systems must either cooperate to enact a clearer demarcation of who should resolve the conflict of authority, or engage in the kind of dialogue that can, incrementally, arrive at coordinated or consistent results.

Here we can draw a distinction between two possible types of responsiveness between legal systems, which can both satisfy the demands of relative authority though in different ways. Elsewhere I have discussed unilateral 'association', involving action from only one system which incorporates rules from another system, or elects to apply the rules of the other system in order to achieve coordinated outcomes of compatibility and harmonisation (Roughan, 2009). Incorporation involves a unilateral outreach by one system, of which the target system need not even be aware, andinvolves borrowing content from another system by replicating it in one's own system. It does not necessarily involve acknowledging the authority of the system from which the content is borrowed, merely that its content is desirable. Similarly, giving direct effect to rules of a different legal system might involve recognition of its separate authority, but this separate authority is then subsumed under the control of the host legal system and, specifically, its law-applying institutions. Both kinds of associations between systems are unilateral, operating under the authority of just one

of the systems. Both are paths to securing authority in situations of relativity, for instance where reason is equally or incommensurably balanced between the options proposed by the two different systems, and there are reasons to coordinate their content, one system's unilateral decision to adopt, incorporate or directly apply the option chosen by the other has the effect of securing the authority of both. Relative authority makes each system's authority conditional on the conduct of the other authority, but this does not necessarily mean they need to cooperate to come up with a joint solution. They may simply need to be made compatible, and this can be achieved through the unilateral conduct of either system.

In contrast, 'interactions' involve multiple legal systems engaging in cooperative activity or dialogue which harmonizes or makes compatible their respective content and its application, or which arranges their content and application to achieve some outcome to which they both contribute. Cooperation pursues this directly and entails joint mutual commitments; dialogue pursues it through mutual responsiveness with incremental adjustments that may be less overt. Neither process requires harmonisation of laws, but it does require either working out procedures to adjudicate those conflicts that need to be resolved, or otherwise finding ways to ensure that the rules of the overlapping/interacting systems are not so confusing or inconsistent for subjects that they cannot use them as reliable guides for their practical reasoning and planning. This might mean arriving at rules that are consistent or compatible, or at least applying those rules in ways that are compatible. In this the roles of courts and legislatures are both important. For instance, where courts in two systems are aware of a potential conflict between their respective laws, and aware of the importance of coming to compatible decisions, then they may engage in a dialogical coordination by

rendering compatible decisions. Similarly, legislatures can enact laws which give effect to cooperative bilateral or multilateral commitments, or which make dialogical gestures aimed at encouraging another system's law-making institutions to do likewise and eventually achieve compatibility (Berman, 2009).

In both the unilateral and multilateral forms of association, legal systems are not simply open to other systems, they are responsive to them. When different systems have relative rather than independent authority, this responsivity is crucial to their having authority at all.

4.Relative Legal Authority inNormative and Explanatory Analyses

It should be clear from the foregoing that there are normative implications of a theory of relative legal authority, and that the account of relative authority is parasitic upon a normative defence of plurality of law. Normative argumentsdetermine when plurality of law and the interaction of relative authorities might be valuable, or when the need for singular or hierarchically centralised law outweighs any value in plurality.Arguments about plurality also indicate whether justifiedrelationships between authorities must be hierarchical or heterarchical; and whether on some matters, degrees of difference and even conflict can remain without upsetting the legitimacy of authority.

The advantages and disadvantages of plurality of law have been analysed in detail elsewhere (e.g. Krisch, 2009).Suggested advantages sometimes tie the presence of multiple, fragmented, and disordered systems of law to principles of political or

philosophical pluralism (e.g. Rosenfeld, 2008;Berman, 2007; de Sousa Santos, 2002), arguing that a plurality of systems of law can give effect to competition or simple coexistence between different eligible conceptions of the good, between the practices and beliefs of different communities, and even between different kinds of affiliations that individuals share. At other times, plurality is linked to a particular value, such as individual autonomy or community self-determination (McWhinney, 2002). Others argue for plurality as a type of check and balance on power, in which one level or law can keep other levels in check (Cover, 1981).

The arguments on the other sidechallenge the consistency of plurality with the formal and substantive versions of the rule of law. The formal objection is concerned with the ability of law to guide conduct in a way that treats subjects with respect, i.e. by meeting the formal requirements of the rule of law which enable subjects to plan their lives around clear, consistent and coherent rules. The substantive objection is concerned with the substantive principle of equality, and the need to ensure that a plurality of legal orders does not mean that some members of a community are worse off than others because of their subjection to different rules (Waldron, 2008).

Debates about plurality are sometimes framed as a contest between singularity or centrality of legal orders on the one hand, and plurality on the other. Yet that framing is misleading, for neither monist nor pluralist arrangements are necessarily better at serving their supposedly respective values (Krisch, 2009). The theory of relative legal authority reframes this debate by linking plurality with the normative concept of legitimate authority. It shows that both the value and the danger of plurality are instrumental, tied to its success or failure in achieving legitimate authority. We make

any values that plurality can carry dependent upon the success of pluralist arrangements in having authority that is effective and also justified. Plurality itself is justified only where the justification of authority requires or permits it. On this view, any pluralist arrangements which fail to serve their subjects due to inconsistencies or uncertainties or any other defect, or which interfere with the procedural justification of other overlapping or interactive authorities, are not authoritative, but the defect is in their authority, not in plurality itself.

Thus we can isolate the true location of the value and danger of plurality, and demonstrate that the concerns about the consistency of plurality with the rule of law are no greater than they would be for any singular legal order. Pluralist arrangements might in fact be stable, certain and predictable, yet fail to really give effect to values of pluralism or self-determination or, worse, they might magnify the risk of oppression. On the other hand, monist arrangements might be changeable or incoherent or unevenly applied and so lack the virtues associated with the rule of law, even while having content that supports political pluralism or self-determination in forms that are more successful than simply having separate legal systems.The response to Waldron's worry - that under a plurality of orders, like cases may not be treated alike (2008) - is not the obvious retort that there is sometimes good reason to treat like cases differently, because the real concern is the case where not only is there no good reason to treat like cases differently, but doing so is actually contrary to reason. This concern targets the kind of plurality in which minority or ethnic or religious communities have their own legal standards which are contrary to reason in a way that outweighs any value associated with that community's self-determination. Yet this is no objection to plurality of law per se, rather an objection to legal standards

that have such immoral content. The moral problem is not that some people are treated differently than their neighbours under different legal systems, but that some people are treated badly.

The theory of relative authority makes it clear that such legal orders whose content is, independently, contrary to reason, cannot be contenders for sharing in legitimate authority. To have authority, they must be capable of meeting the normal justification for authority, conditional upon their appropriate interactions with other legal orders similarly qualified. Thus a legal order which instantiates requirements contrary to reason is not even prima facie authoritative, and even if its officials do cooperate or coordinate with authoritative legal orders, that interaction does not make them authoritative unless they actually remove those rules that are contrary to reason. As a matter of authority, there is no relative authority from the outset because there is only one authority in play.

The theory of relative authority also indicates how any defects of plurality in securing the formal rule of law can be overcome. The requirements of relative authority impose a burden on legal actors in pluralist arrangements to cooperate or coordinate to achieve authority that can serve subjects and avoid the harms caused by instability, opacity or unevenness. It is the responsibility of the authorities to avoid placing their joint or interactive subjects in situations of problematic practical conflict, uncertainty, or confusion about their legal rights and obligations. To succeed *qua* authorities, legal officials (on behalf of their systems) must be responsive to other systems with whom they share subjects or domains of activity, and if they are not, in respect of

problems which need an authority to resolve, the legal officials and the legal systems lack authority.

Finally, the theory of relative authority establishes grounds for evaluating the interactions of legal officials with one another. Relative authorities who fail to realise their authority through cooperation or coordination can rightly be criticized. When they do, that is cause for celebration. For instance, we can identify dialogical relationships between the ECJ and national courts which has already settled some areas of overlapping authority through devices of deference or consistent interpretation. Similarly, some practices of judicial notice of foreign law can be seen as moves to realise relative authority. The role of foreign legal norms in judicial reasoning will often be driven by courts simply wanting to learn from each other's solutions, but sometimes a system's legal content will need to be aligned with foreign law in order to meet the substantive conditions of legitimate authority, including the relativity condition. We can therefore use the relative authority theory as a tool for analysing when such alignments are required, not merely desirable, and as a way to respond to arguments that the practice is unprincipled (e.g. Waldron, 2005). Instead of searching for a theory about the authority or influence of foreign law, it offers a theory of the relative authority of laws, regardless of their location.

Conclusion

It should not be surprising that many legal officials are, on behalf of their systems, already engaged in realising their legitimate authority in the way that is required by the relativity condition. After all, the account of relative authority is simply designed

to explain - using the tools of legal philosophy and in a way that shows its importance for that field - the phenomenon of plurality that has become a staple feature of the contemporary practice of law.My account offers one piece of the explanation that a new 'pluralist' jurisprudence must give for the facts of overlapping and interactive legal systems; and one response to the challenge of integrating theories of legal pluralism into the jurisprudential canon. In doing so, it offers a step towards a pluralist theory of law.

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[1]'This extract is taken from the author's original manuscript and has not been edited. The definitive version of this piece may be found in New Waves in Philosophy of Law edited by Maksymilian Del Mar which can be accessed from www.palgrave.com . The account here draws upon arguments that developed in full in my as-yet unpublished doctoral thesis. I am grateful to my supervision committee: Jules Coleman, Bruce Ackerman and Daniel Markovits, for feedback on drafts of the larger thesis project. All mistakes are my own.

[2]I say nothing here about other key junctures: including the justification of coercion or the broader question of political obligation.

[3] Apart from work which directly takes up or challenges Hart's or Kelsen's conclusions about international law, analytical jurisprudence has concentrated on theorising about state law. (See for

instance Raz, 2009, pp.10 4-105). Exceptions to this trend include analyses of customary (international) law (e.g. Finnis, 1980 pp.238-245; Fuller 1982 pp. 211-246).

[4] I propose the relativity condition as an addition to a theory of legitimate authority which combines the substantive justification offered by Raz, with a procedural justification which requires that authorities have a special moral standing. See for example the different versions of requirements of standing offered by Darwall (2009), Hershovits (2010) and Waldron (2003).

[5]Not all practical conflicts are problematic or cause for concern. Practical conflicts are problematic when (for instance) they lead to a subject's inaction in situations where some form of action is required, or when there are consequences of the failure to comply with competing obligations (includuing punishment), or when the practical conflict involves competing solutions to a coordination problem between subjects.

[6] It is possible to treat law's claim to supremacy as a claim to a monopoly on justified coercion within a particular community, rather than a claim about authority. Questions about justified coercion are top of the list of questions that are implicated by discussions of plurality but cannot be explored here. These include questioning the possibility of overlapping communities with competing claims to coercive monopolies; and the possibility that more than one claim could be equally or incommensurably justifiable within a single community.