

# Introduction

**Roger Cotterrell and Maksymilian Del Mar**

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## I. OVERVIEW

Amongst the concepts vying for attention in transnational legal theory, authority stands out. It is, after all, the filter through which many of the most difficult and most important questions about law are asked: who makes law and how is it made? Are the relevant powers exercised legitimate and accountable – and, if so, how, and to whom? Certainly, it is also a concept with a rich and complicated history – whether treated as a practice, or as a topic of debate in the history of ideas. Even leaving aside all literature prior to the twentieth century, we can say confidently that one of the central debates in the most recent decades of legal theory has been around the topic of authority, particularly in the form of arguments between proponents and critics of Joseph Raz's conception of it. As much attention as it has received, however, the concept is currently also under considerable strain: its long-standing association with the state renders it both descriptively and normatively awkward in the transnational and global context. The momentum in scholarly inquiry, at the moment, is with the challenge to the concept of authority posed by transnational and global governance – and that is the domain to which the chapters in this collection all contribute.<sup>1</sup>

The idea for this book emerged out of an international conference held in November 2013, funded in part by the *Modern Law Review*, and entitled 'Authority in a Transnational Age'. The conference was hosted by, and indeed launched, the Centre for Law and Society in a Global Context at Queen Mary University of London. The collection includes

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<sup>1</sup> Two other collections that flag their focus on authority in transnational legal theory are: G Handl, J Zekoll, and P Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in the Age of Globalization* (Leiden, Brill, 2012); and a special issue of *Transnational Legal Theory* entitled 'The Turn to Authority Beyond States' (2013, 4(3)), edited by B Peters and J Karlsson Schafer.

some of the papers from that event, as well as specially commissioned pieces. One paper we had hoped to include was by the late Patrick Glenn, the Peter M. Laing Professor of Law at McGill University. We remember him vividly from that event: he presented a marvellous paper – erudite and stimulating, in a way that only Patrick could do – and he had said he would send along a chapter version soon. That was not to be: he passed away on 1 October 2014. We miss him dearly and dedicate this volume to his memory.

The collection is arranged in five parts. The first, ‘Conceiving Authority: Challenging and Defending Traditional Approaches’, has four chapters, all of which tackle basic issues facing any theorist seeking to re-think authority in a transnational age. In particular, this section sets two chapters that seek to show the inadequacies of certain traditional ways of conceiving of authority (Krisch; Culver and Giudice) alongside two (partial) defences of those ways (Troper; Psarras), which draw on Kelsen and Raz respectively. The debates already signalled in this first section – for instance, as to the links between authority and formality, systematicity, sovereignty and jurisdiction – set the scene for what follows.

The second part then offers chapters discussing two frameworks through which authority and other related concepts are often approached in transnational legal theory: constitutionalism (in Walker’s chapter) and pluralism (in Berman’s). Both Walker and Berman helpfully survey the literature, while also staking out a position: Walker defending the continued relevance of constitutional discourse, and Berman carving out a unique space for pluralism (e.g. as compatible with, but still distinct from, liberalism).

Part III turns to the historical dimension of the concept of authority, with one chapter focusing on the authority of informal criteria in Roman law and modern German practice (Jansen) and the other offering a historiographical method for analysing authority in the history of ideas, thereby also seeking to loosen the hold of certain images that have anchored the concept of authority in the state (Del Mar).

The discussion on the role of imagery in theorising authority offers a bridge onto the fourth part of the volume, which centres on methodological issues. The three chapters in this section all consider the methodological implications for theorising authority transnationally: Cotterrell showing how authority can be helpfully framed in terms of practice and experience and studied socio-legally; Roughan arguing that the move from studying authority in the singular to authorities in the plural requires a balancing of sociological and normative methods; and

Falk Moore highlighting the insights yielded by an anthropological approach to what she calls ‘international authority’.

One of the most pressing problems confronting anyone wishing to theorise authority transnationally is the relation between its public and private dimensions. Confronting that issue squarely are the final two chapters in the volume. Muir Watt articulates the promise of, but also some of the problems with, the tradition of private international law, and how it might help in conceptualising transnational authority. Quack, in turn, analyses ways in which the authority of expertise is claimed and legitimised in the transnational context, thereby discussing one of the thorniest issues in this collection: how to describe and evaluate the growing practices of epistemic authority on a global scale.

## II. CONCEPTUAL AND NORMATIVE CHALLENGES OF TRANSNATIONAL GOVERNANCE

Legal and political scholars are by now all too aware of the range and diversity of forms of governance beyond the state. Many of those diverse forms feature in this collection: such as credit-ratings and other forms of ranking (e.g. by the OECD); indicators and other kinds of ‘ideational tools’ (e.g. norms articulated by the Basel Committee on Banking Supervision, the World Bank’s Doing Business indicators); best practice statements and other non-mandatory guides and attempts at standardisation (e.g. by the Counter-Terrorism Committee of the UN Security Council); the multiplicity and range of different relations between adjudicative or quasi-adjudicative institutions; and the rise of networks in which regulation evolves, whether amongst legal professionals or other (self-styled) ‘experts’ or in patterns of social interaction of many different kinds.

Despite their familiarity, however, these practices and technologies of governance on a scale different from (though not necessarily without some involvement of) the state, raise serious conceptual and normative questions for legal and political theorists. This is because these scholars are used to operating with concepts – again, both descriptive and normative – that have developed on the back of examples that make sense within a municipal or domestic (and territorially largely stable) order, but that struggle to provide orientation for analysis beyond those examples. Put another way, one could argue that the concepts of contemporary legal and political theory developed within a particular spatio-temporal frame: of norm-making by relatively well-recognised officials, moored also to relatively stable communities, and often by reference to a common

tradition (which both constrains and enables change). As Neil Walker demonstrated in his innovative *Intimations of Global Law*,<sup>2</sup> what can be seen on the global stage is a different kind of spatio-temporality: a forward-looking, de-spatialised (or at least spatially loose) set of normative practices, where it is no longer clear who is an official (and indeed, who is the subject and who the object of governance), where the composition and boundaries of communal networks are fluid and dynamic, and where many past traditions are mixed or in fact neglected in more free-floating visions for the future.

When the challenge is as sweeping as this, one seems forced as a theorist to go back to the drawing-board – to look anew at the frames, models, images being relied on (consciously or, more commonly, unconsciously), and to experiment with new ways of seeing. Indeed, some chapters in this volume are themselves experimental and positively call for more revision – seeking to re-think the conceptual and normative tools of legal theory radically, from the ground up – while others continue to insist on the utility and adaptability of concepts developed in the domestic / municipal context. Common to all, however, is their taking seriously and directly confronting the above challenge.

**Nico Krisch's** chapter certainly does not shy away from experimentation – he offers a new model, encompassing both descriptive and normative orientations, which, he argues, will help us better to see and to evaluate novel forms of transnational governance. The model is based on a contrast between two ways of thinking about governance: solid and liquid.<sup>3</sup> To think solidly, he writes, is to look for and see 'commands and binding rules issued by an identifiable governor (or governing institution) over those subject to his or her rule'. In the context of conceptualisations of authority, Krisch traces solid thinking to Max Weber,<sup>4</sup> and the imagery of 'hierarchical relations of superiors and subordinates and to commands and rules that are intended to trigger compliance'. Solidity here is a broader frame – of hierarchies and clear demarcations between the governing and the governed – and, within that frame, authority is but one way in which compliance is secured (if one accepts Hannah Arendt's

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<sup>2</sup> N Walker, *Intimations of Global Law* (Cambridge, Cambridge University Press, 2014).

<sup>3</sup> Krisch is, however, careful to note that these two models are ideal types, and that in reality, forms of authority may be, or even are likely to be, mixed, containing both liquid and solid features.

<sup>4</sup> Elsewhere in this volume, Cotterrell sees Weber's thought as useful in modelling transnational authority, in particular via his concept of charisma.

trifecta, the other two ways are reason and power).<sup>5</sup> The same hierarchical imagery appears in much contemporary legal theory, with its inquiry into the justification of the duty to obey the law, and (for Krisch) its concomitant emphasis on binding and formal obligations issued by well-established forms of authority (often judicial, as in Raz).

If applied to the transnational or global context, this orientation towards ‘hierarchies, commands and obligations’, and bindingness, formality, and availability of successful enforcement, may suggest a lack of authority in that context. Or, in the alternative, it encourages theorists to focus on a very limited range of institutions – e.g. the UN Security Council, the WTO Dispute Settlement Body. One of Krisch’s important points is that this is not only a matter of what theorists see, but also how they evaluate: ‘The more authority is seen through a principal-agent prism, the more delegatory rather than participatory accountability will be the dominant frame’. Similarly with legitimacy: for instance, insofar as transnational governance institutions are treated as ‘like governments’, traditional notions like consent and delegation will be emphasised.

Under the liquid frame, by contrast, more dynamic authority structures can be seen – ones with multiple actors, occupying positions of authority ‘with varying degrees of stability and consolidation.’ Looking for liquidity, we also see informality rather than formality, and substantive rather than formal grounds of authority (i.e. ‘expertise, moral principles and values, or problem-solving capacity’). Liquidity is not, however, just a different conceptual framing. The broadening of the object of authority encourages evaluation, scrutiny and criticism. Thus, a liquidity-oriented theorist will be able to discern, and critically reflect on, ways of exercising power that otherwise might go unnoticed, being more dispersed, often disguised, and generally much harder to identify and locate. While it is not yet clear how such awareness might translate into forms of accountability and legitimacy appropriate to this liquid authority,<sup>6</sup> or whether indeed it demands a different normative vocabulary altogether, it

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<sup>5</sup> Arendt famously and influentially situated authority as falling somewhere between reason and power: it was not reason, for that was persuasion between equals, but it was also not power, which was concerned with domination. So situated, authority was about legitimate reasons for subordination. See H Arendt, ‘What Was Authority?’ in CJ Friedrich (ed.), *Authority* (Cambridge MA, Harvard University Press, 1958) and, for a recent discussion in the context of jurisdiction, see S Dorsett and S McVeigh, *Jurisdiction* (Abingdon, Routledge, 2012), especially chapter 3.

<sup>6</sup> Krisch suggests looking at ‘spontaneous or experimentalist accountability’.

gives some clue as to what kind of power-constraining / power-diffusing technologies need to be built.

Where Krisch sees the imagery of solidity as an obstacle to meeting the challenges of transnational governance, **Keith Culver** and **Michael Giudice** point to a more familiar staple in the repertoire of legal theory: systematicity. In doing so, they offer a timely reminder that the idea of law as a system characterises not only analytical jurisprudence but also much of the legal pluralism literature. Whether one fastens onto one system and attempts to ascertain its identity, or is interested in the relations between normative orders, the concept of system plays an important part.<sup>7</sup> Taking the standpoint of a twenty-first century citizen – ‘an inveterate traveller and explorer of new ways of life’, rather than the more familiar perspectives of ‘a legendary judge or a legislator of the world’ – they ask: to what extent is it useful to situate legality in a system, to treat it as inherently systematic?

Culver and Giudice are fully aware of prior challenges to the concept of system – e.g. by Sampford, and by van der Kerchove and Ost – and they focus their inquiry in another way: they ask, ‘Is there anything more to the existence of a legal system than official practice?’ In answering clearly ‘no’ – in part by showing the unwarranted ‘presumption of a kind of unity of practice amongst officials’ – Culver and Giudice seek to bring legal theory down to earth, to make it more sensitive to social realities. This is especially important in trying to develop a legal theory responsive to the transnational or global context, where such unity of practice amongst officials (if we can identify them at all) must surely be even rarer than at the domestic or municipal level.

At the heart of Culver’s and Giudice’s efforts is a call for a change in methodological attitude amongst legal theorists – away from analytical presumptions, and towards constructing concepts (of legality) that reflect social reality. Their chapter is in many ways complementary to Krisch’s: where he diagnoses certain obstacles to paying attention to and evaluating new forms of governance, Culver and Giudice point to one particular obstacle to recognising the diverse forms legality can take. As with

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<sup>7</sup> For others, of course, the difference between speaking of ‘systems’ and ‘orders’ is stark – in other words, that to focus on relations between legal orders is already to de-systematise them somewhat. Arguably, yet a further de-systematisation is achieved by theorising law over time, as in Glenn’s concept of legal tradition, where the emphasis is on the cosmopolitan, mixed, hybrid character of law, rather than its identity or systematicity. See HP Glenn, *Legal Traditions of the World* (Oxford, Oxford University Press, 2004) and Glenn, *The Cosmopolitan State* (Oxford, Oxford University Press, 2013).

Krisch's arguments, theirs clearly connect to the prospects for re-thinking authority in a transnational context: if we presume that legality must be systematic, we will lose the capacity to track the 'dynamic, shifting practices of acceptance and divergence' that characterise transnational authority.

Whereas the opening two chapters of this section seek to move beyond certain conceptual habits in legal theory, the remaining two strike a note of caution. Both Troper and Psarras, though in different ways, ask us to curb our enthusiasm a little.

**Michel Troper** reminds us that authority is not just a concept analysed by philosophers – it is also one utilised by political and legal actors. Accordingly, he describes the uses to which authority – and in particular, one form of the claim to authority, namely sovereignty – has been put. More pointedly, he argues that when legal discourse is considered – and this is done fully acknowledging the undeniable transformations of globalisation or Europeanisation – it will be recognised that concepts of sovereignty are indispensable to contemporary argumentation. Troper works with four types of sovereignty, first proposed by Carré de Malberg. Examining each of them, he finds in relation to all four cases that, far from sovereignty having been lost, it is a condition of and is manifested in any delegation or sharing of certain competences. Troper, then, reminds us of the need to be careful as to what mode of authority is being examined: e.g. authority as a particular kind of power, or as a type of argument deployed in legal practice. If the latter – and if we confine ourselves to argumentation within the state, and thus by state officials – then it will be seen that the discourse of authority-as-sovereignty cannot be underestimated, let alone pronounced extinct.

Like Troper, **Haris Psarras** offers a riposte to claims by transnational legal theorists that what they are considering is altogether novel and requires entirely new theoretical resources. His particular interest is Raz's well-known 'theory of de facto authority' (T DFA), which, in Psarras's formulation, holds that 'the authority of a legal system is a de facto authority that claims to be legitimate', this being an authority 'exercised by the system's institutional actors when they engage in various forms of law-applying'. One point of connection here with Culver's and Giudice's chapter is that Psarras claims that a certain conception of legal system underlies the T DFA, and 'not only survives the test of transnational developments, but can also help us elucidate overlapping jurisdictions'. The conception that Psarras has in mind is the idea of legal systems as (here quoting Raz) 'sets of rules under the jurisdiction of an inter-related set of institutions'. This 'minimalist conception' is useful for transnational legal theory because it acknowledges that the same rule can be

part of more than one legal system, and that there can be ‘fuzzy intertwinement between different legal systems’. Psarras does accept a limit to the utility of this view, namely that it depends on seeing ‘legal actors’ as belonging exclusively to one legal system, and further that it depends on a certain distinction between legal and non-legal (e.g. ‘managerial, arbitrational’) decision-making. Transnational legal theorists might then respond: indeed – and it is precisely the difficulties of identifying ‘legal actors’ and demarcating forms of decision-making neatly as either legal or not that creates problems for even this ‘minimalist’ reading of legal system.

Be that as it may, Psarras’s main focus is on the TDFA, not the concept of system. He asks: can the TDFA account for situations of ‘overlapping jurisdictions’, i.e. ‘overlaps between areas of competence that belong to different legal systems’? Yes it can, he answers – also at the transnational level. This is because there is nothing in the TDFA that makes it state-centred – ‘it does not consider legal systems exclusively as state systems of rules’. Instead, all it insists on is ‘the role of a legal system’s law-applying actors as definers of its jurisdictional rules’. Authority, on this view, is ‘a limited decision-making power’, based on a ‘rule-based claim to legitimacy’ by the officials of the system. Psarras’s is a tightly-woven, detailed defence, and merits careful, detailed reading. For our purposes, what matters is that it offers a different strategy for dealing with the challenges of the transnational context: it looks back to familiar tools of legal philosophy, and finds resources within them. They are, he insists, more flexible, more adaptable, than is often thought. That, surely, is a salutary reminder.

### III. CONSTITUTIONALISM AND PLURALISM

Two dominant discourses frame the discussion of authority in transnational legal theory: constitutionalism and pluralism. This section presents two of the leading figures in both, Walker on constitutionalism and Berman on pluralism. They are excellent guides to internally complex and varied discourses – as well as to ways in which these interact (e.g. as ‘constitutional pluralism’<sup>8</sup>).

**Neil Walker** confronts the internal diversity of constitutionalism head on: he structures his chapter by identifying four ‘antinomies’ – initially opposites, but progressively tensions – of constitutionalism, and then

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<sup>8</sup> Discussed in Berman’s chapter.



examines each of them in two contexts: state and transnational. This allows him to point to the distinctiveness, but also the fragility, of these two contexts or traditions of constitutionalism. For instance, state constitutionalism has a tendency to purport to ‘monopolise all available resources of legal authority and political imagination’. Attempting to be the ‘only game in town’ raises the stakes, and ‘amplifies the consequences of failure’ (e.g. as in many colonial, imperial contexts). Walker here touches on the (political) imaginary of certain traditions of thinking about authority and their limits and repercussions – a topic returned to by Del Mar in his chapter below. Transnational constitutionalism is vulnerable in other ways: unmoored from political community, it risks free-floating as an empty signifier, nothing but ‘an ideological veneer’. Here, Walker suggests that it is because of the missing publics in the transnational / global context that transnational constitutionalism finds itself relying on the ‘inevitably attenuated legitimacy of original state consent and a bottom-up delegated mandate’ – though, as noted above in the case of Krisch, it is interesting to see how transnational legal and political theorists are attempting to construct forms of legitimacy that are not consent-based or delegatory (tellingly, perhaps, this is under the rubric of pluralism rather than constitutionalism).

There is also a substantive message in Walker’s chapter – indeed, a warning. This centres on how he defines constitutionalism, and relatedly what he sees as valuable about it. His full definition – set out elsewhere – is that constitutionalism is:

... that species of practical reasoning which, in the name of some defensible locus of common interest, concerns itself with the organisation and regulation of those spheres of collective decision-making deemed relevant to the common interest in a manner that is adequately informed by the common interest.<sup>9</sup>

It is no accident that ‘common interest’ appears three times in this definition, for when he comes to articulate in his chapter the aspiration worth preserving in constitutionalism – and worth recalling whenever we speak about authority, state or transnational – it is that of it being the ‘champion of the equality and liberty serving ideal of an ordered system of collective self-rule oriented towards the common interest’. This reminder is of particular significance, Walker notes, in the transnational/

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<sup>9</sup> See N Walker, ‘Beyond the Holistic Constitution?’ in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford, Oxford University Press, 2010) 291–308, 296.

global context, where concern for a ‘common interest’ is often entirely missing from or drowned out by the ‘particular and parochial concerns of a regulatory regime’. Constitutionalism, then, helps push back against the tides of functionalism.

If a link between constitutionalism and theorising authority is clear (even if less so at the transnational level), what about pluralism? In what way is pluralism a discourse about authority? For **Paul Schiff Berman**, there is not a shadow of a doubt: ‘At the core of all work on global legal pluralism is the question of authority’. At the same time, pluralism is by no means an innocent starting point – it comes with a commitment to seeing authority as multiple, contested, negotiated, shared, and relative. For some, committed to the opposite way of understanding authority (as necessarily singular or total), this makes little sense. At stake here is one of the fault-lines of transnational legal theory: can authority be re-conceived as not necessarily hierarchical, monistic, and supreme? Many chapters in this volume are sympathetic to a positive answer to this question, identifying obstacles along the way and offering resources for this re-conception. What Berman helpfully provides is a bird’s-eye view of these proposals over the last few decades.

Several key themes emerge in Berman’s analysis of the discourse of global legal pluralism. One is the idea of the reality of shared authority in the transnational context, matched with a normative account of legitimacy according to which such shared authority is only legitimate if it co-operates or co-ordinates with, or tolerates, other authorities.<sup>10</sup> A follow-on theme is that if there are shared authorities, some of these might not be (are likely not to be) state authorities, or even authorities to which states have delegated power. This leads to questions concerning the relationship between state and non-state authorities (or ‘associations’) and the various techniques that are or could be used to negotiate those relations, e.g. conflict of laws principles. For a state-focused monistic theorist, such techniques ought to be restricted to state-to-state relations. For a pluralist, like Berman, they might also be considered for state-to-association relations (and he offers examples). In his other work, Berman has pointed to many such possible techniques and resources that, by enabling accommodation and flexibility, respect and promote legal diversity.<sup>11</sup>

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<sup>10</sup> This is based on N Roughan, *Authorities: Conflicts, Cooperation and Transnational Legal Theory* (Oxford, Oxford University Press, 2013).

<sup>11</sup> See PS Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge, Cambridge University Press, 2012), and PS Berman, ‘Ruth Bader Ginsburg and the Interaction of Legal Systems’ in S Dodson (ed), *The*

Another key theme in Berman's discussion is the relationship between pluralism and liberalism. He argues that although the two are not incompatible, pluralism 'is significantly different from the classic liberal vision'. First, descriptively, one can be a liberal and not be a pluralist. This is so, in particular, where being the latter means paying attention not only (or even not mainly) to how the state views its relations with associations, but also to 'the lived reality of communities and [their members'] day-to-day perceptions of legitimacy and efficacy'. For a pluralist, individuals and groups have agency, and it is in many ways on the basis of their perspectives that a descriptive and normative theory is to be constructed (this echoes Culver's and Giudice's point above, as it does many methodological points made by the chapters in the next two sections). Secondly, normatively, pluralism may result in different emphases and institutional arrangements as compared with liberalism. Pluralism here appears more normatively demanding: e.g., it does not rest with mere tolerance of minority views, but requires institutional forms of hybrid participation. Partly, this stronger normativity comes from the different methodological stance: not one of looking top-down from the state to anything non-state, but from the bottom up, so as to design institutions to balance shared, relative authority.

#### IV. HISTORICISING AUTHORITY

Thinking of authority as multiple, shared, negotiated or contested is not strange for historians – indeed, to think of authority in any other way would surely make most historians uncomfortable. It is no surprise, then, to see that one of the notable features of contemporary transnational legal theory is the turn to history – in particular, histories of colonial authority and of authority in the medieval ages. Calls on theory to be historically aware and informed are hardly new – one of the most important voices of the last few decades in that respect is Glenn. He showed, in many works including his last, *The Cosmopolitan State*,<sup>12</sup> on which he spoke at the 2013 conference, that in fact authority has never been singular, total or supreme, but has always had to negotiate, borrow, adapt; relating with other authorities. For Glenn, it is a mistake (now as much as then) to think of law in terms of stand-alone systems in autonomous control of their identities. Instead, all law has been more or

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*Legacy of Ruth Bader Ginsburg* (New York, Cambridge University Press, 2015) 151–171.

<sup>12</sup> Glenn 2013, above n 7.

less hybrid (its structures of validity always porous), and so what needs to be noticed are the modes and devices, and overall diachronic dynamics, of cross-fertilisation (often not captured by a focus on validity or even jurisdiction).

One of the modes and devices that Glenn wrote about was the common law's notion of persuasive authorities.<sup>13</sup> Contemporary legal theorists are prone to focus exclusively on the binding quality of law – but as Glenn noted, such a focus obscures what is arguably, in the everyday practice of law, more important. Detailed observation shows how this practice relies on degrees of persuasiveness.<sup>14</sup> Under the rubric of persuasiveness, authorities not necessarily having formal imprimatur are sought wherever they may be found, some being considered (by the community of officials) more reliable or helpful than others. It is precisely this interest in 'informal authorities' that animates **Nils Jansen's** chapter in this volume. For this notion, he argues, helps in accurately depicting not only the history of European private law but also recent developments in that field.

One key example here is the authority of Roman legal texts and learned literature, for instance in sixteenth and seventeenth century Europe. There was, on the one hand, a 'belief in the extraordinary legal quality of Roman law' and, on the other, an 'expectation that other jurists' would also treat it as authoritative. The authority here came in degrees, depending on which text was being considered – it thus had a dimension of weight (which, for instance, the concept of validity lacks). What might seem like an outdated set of attitudes is, says Jansen, in fact strongly present in more recent legal practice. A good example, discussed by him at length, is found in the use of jurists' writings in Germany in the twentieth century. As anyone familiar with German legal practice will confirm, arguments not already adopted in the standard commentaries of jurists are only very exceptionally heard in court. And yet, these

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<sup>13</sup> See P Glenn, 'Persuasive Authority' (1987) 32(2) *McGill Law Journal* 261–298.

<sup>14</sup> John Bell might have meant something similar when he spoke of degrees of the 'acceptability' of arguments – see J Bell, 'The Acceptability of Legal Arguments' in N MacCormick and P Birks (eds), *The Legal Mind: Essays for Tony Honoré* (Oxford, Oxford University Press, 1986, 45–66). Persuasiveness and acceptability are concepts that have much importance for transnational legal theory, in particular for current debates over the use of so-called 'foreign sources' in domestic courts. For example, see S Berteau and C Sarra, 'Foreign Precedents in Judicial Argument: A Theoretical Account' (2014) 7(2) *European Journal of Legal Studies* 140–179.

commentaries do not tend to be identified formally or explicitly as sources of German law.

Jansen finds parallels between attitudes to Roman law in the sixteenth and seventeenth century, the treatment of jurists' writings in twentieth century Germany, and the recent history of transnational private law in Europe. Thus, the various non-legislative codifications in this area – e.g. the PECL and UNIDROIT Principles – have acquired a (high, says Jansen) degree of informal authority. National legislatures, for instance, regard these as 'reference texts' to which they ought to 'align their laws'. The authority of these principles may be even higher in the case of international arbitration. And yet, none of this will make much sense if one is focusing exclusively on formal (Krisch might say 'solid') binding rules of validity. Indeed, part of Jansen's point is to show how the common presence of these informal authorities in legal practice is a headache for much orthodox twentieth century legal theory which, with concepts such as the Rule of Recognition or the Basic Norm, marginalises or denies the existence of informal authorities and their uses.

History, then, offers a solvent of certain ways of looking. It is, indeed, ways of looking – though in another sense – that interest **Maksymilian Del Mar** in his chapter. Theories of authority have often relied on images of particular kinds of relations, especially that of parent and child (most typically, father and son) but also doctor and patient, teacher and student, officer and soldier, and captain and sailors/passengers. One way of explaining differences in theories of authority is to identify different images relied on, and compare the effects of those images. These differences come more clearly into view when looked at over time: so, a means of thinking about authority historically is to examine the history of images of authority – how they have passed down the ages, how they have been varied, and how they have been challenged.

Del Mar develops this focus in the context of a broader way of thinking about authority historically, as part of an 'archaeology of disagreement'. The idea is that understanding any concept – including authority – will benefit from exploring why theorists have disagreed about it over time – beginning with disagreements in particular contexts of debate, and then comparing those causes of disagreement across contexts. Comparing different kinds of causes of disagreements may also bring to light unnoticed assumptions made in particular contexts of debate by showing their absence in other contexts.

One such cause of disagreement is precisely imagery. Given how important images are in theorising a concept, one way of revising/re-conceptualising a concept is to change the imagery relied on. Consider, for instance, the effect of changing the image of parent-child to that

of parents-children. Although this retains a sense in which authority is hierarchical – as between the parents and the children – it does introduce a heterarchical element, as between the two parents. We can now theorise authority as – at least in part – negotiated and shared, rather than singular and absolute. It may be that in the transnational context we need to go even further: drawing on images without any inherent hierarchical dimension (though still infused with variable power dynamics), which in turn may help to capture a blurring of subject and object of regulation in the transnational.

One might say, then, that there is a need for a new imaginary of authority in the transnational context – or so Del Mar claims, in part by way of describing a disagreement over the viability of the concept of ‘constitutional pluralism’. This disagreement – between Martin Loughlin and the late Neil MacCormick – arguably depends on what image of authority is being used. If the imagery (in the context of international relations) is that of enemy-friend, as Loughlin’s is, then the term ‘constitutional pluralism’ may not seem to make much sense. On other hand, if the imagery is loosened (e.g. imagining the identity of a community as always hybrid, always ‘mongrel’ as has been said of the Scottish legal tradition), then it may seem possible to stretch the associations of certain concepts (such as constitutionalism, or authority). For Del Mar, then, some of the most intractable disagreements about concepts – including about authority – may have their origin at the level of images, for these orient descriptive and normative proclivities particularly powerfully. More positively, awareness of the power of images in theory can lead to recognising the benefits of working with a richer imaginary – leading on to a richer conceptual vocabulary.

## V. METHODS: NORMATIVE, SOCIOLOGICAL, AND ANTHROPOLOGICAL

Some of the chapters in previous sections suggest that established resources in juristic thought or constitutional theory or legal philosophy can be reworked in various ways to meet – at least, perhaps, to some significant degree – the challenges that transnational developments pose for the identification and analysis of authority. However, most chapters, exploring these challenges, seem to point to a need for new methods of inquiry and analysis. They suggest or imply the need for attention, at least, to bodies of literature and forms of scholarship that are often neglected or ignored in traditional forms of juristic inquiry. Thus, Jansen presents legal historical inquiry as a means of understanding the legal

present, and Del Mar urges attention to images that inform conceptualisation. Krisch, Culver and Giudice, and Berman all recognise the extremely complex regulatory reality in which questions of authority now arise in transnational contexts. Explicitly or by implication, their approaches inspire the argument that legal theory needs resources from the various social sciences that can not only observe and describe this regulatory landscape but also be expected to provide conceptualisations and classifications of their own to help in organising analysis of it.

To understand what, if anything, authority can refer to as a unified idea in this new landscape, it is necessary to understand how transnational power and influence are actually established and exerted and how far and under what conditions they are recognised as appropriate, justified, needed or valued and thus accepted as legitimate. Much of this new field of inquiry implies the importance of serious sociological inquiry, taking 'sociological' in a broad sense not necessarily tied to any particular academic discipline but indicating a general sensitivity to the need for systematic, empirical study of the diversity of social relations that might be thought to be, in some sense, relations of authority. At the same time, any such sociological approach has to be linked to the normative concerns that have preoccupied many students of authority. Transnational authority as a topic seems to demand an ultimate close linking of juristic, sociological and perhaps legal philosophical perspectives – each must draw on the insights of the others if the concept of authority is to be both intellectually and normatively coherent and relevant to contemporary social experience.

**Roger Cotterrell's** chapter which opens this section asks what resources the sociological tradition might provide for the task of conceptualising authority. This goes beyond recognising the phenomena that Krisch associates with liquid authority and towards asking how the diversity of these phenomena might be theoretically understood. Cotterrell argues that they can be analysed as diverse social practices (of claiming authority) and experiences (of accepting such claims as legitimate). Max Weber's schema of pure types of legitimate domination is particularly helpful here, and not just for his well-known concept of legal domination which usefully characterises the familiar forms of state law. It is especially valuable in the transnational context for another of the Weberian types – that of charismatic domination – which can be used to analyse a range of types of expert authority (for example, transnational standard-setting and transnational judicial influence) that are either distinct from or supplementary to the authority of state law and its international extensions.

A socio-legal approach, drawing on conceptual resources from classic social theory, can open up new possibilities, so this chapter argues, for analysing systematically the range of extremely diverse claims of authority that are made to support transnational regulation of many different kinds and the conditions under which those claims are accepted or rejected. Here, legitimacy (treated as something conferred by the regulated on those who claim to regulate them) appears as a key issue, just as it does, in different ways, in earlier chapters.

Explicitly adopting a socio-legal approach (treated here as synonymous with a sociological one), Cotterrell's chapter does not address the problem of integrating sociological approaches with those building on existing juristic analyses; nor does it seek to make links with theories of authority developed in legal philosophy. It adopts the view that an effort to build a general juristic theory of authority to provide universal normative guidance in this area would be premature at the present time. Juristic thought, Cotterrell suggests, does not have the resources to create such a general theory and tends to fall back on concepts and assumptions too closely tied to state-law thinking or to Western politico-legal experience. A much richer empirical understanding of the immensely complex social world of transnational regulation is a pre-requisite for theory-building, and a necessary first step is to analyse the social character and conditions of authority claims and the ways in which legitimacy is conferred on them by regulated populations. This does not mean that jurists cannot function in the transnational arena; it merely mandates modesty as to how far generalisation is possible, and an awareness that negotiating conflicts of authority and co-ordinating jurisdictions can only be done piecemeal, and experimentally, as transnational regulation proliferates in ever new forms.

**Nicole Roughan** is more optimistic about the prospects for creating an overall normative framework in which the relations of co-existing, sometimes competing and sometimes co-operating, 'authorities' can be organised in the transnational arena. Her book *Authorities*<sup>15</sup> is an impressive, pioneer attempt to rethink legal philosophical normative approaches to authority to fit them better for envisaging some such framework. In her chapter here, she argues strongly that these normative approaches must ally themselves with sociological ones. But the latter are no less in need of the former: 'there can be no "division of labour" between work on the sociological and normative conceptions of authority'; normative (philosophical) accounts, on the one hand, and socio-logical accounts, on the other, are in a relation of 'mutual dependence'.

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<sup>15</sup> Roughan 2013, above n 10.



For Roughan, understanding authority in a transnational context requires an account of both its normativity ('its reason-giving and reason-dependent character') and its sociality ('its dependence upon the fact of people accepting, trusting, or at least recognising actual authorities'). She argues that these are inescapably interdependent inquiries; the latter locates authority as a phenomenon in a social world, while the former is needed to explore what is distinctive about authority, separating it from other phenomena such as coercion or persuasion. These seemingly contrasting research orientations are needed to support each other. Normative inquiries organise the focus of sociological ones but, correspondingly, the latter are needed to judge and justify the significance of conceptual distinctions drawn by the former. And too sociological an approach might merely dissolve authority away as a concept – as Roughan thinks Krisch's idea of liquid authority tends to do ('if authority is everywhere, it cannot be anywhere').

As in many previous chapters, it is a focus, of some kind, on 'assessments surrounding legitimacy' that is seen as a key to maintaining the idea of authority's distinct identity. Roughan suggests that in the context of transnational regulation it is realistic to see legitimacy as often dependent on relations between different putative authorities, so that it is, at least for certain purposes and in certain respects, shared between these. Authority itself can therefore be relative in the sense of being interdependent as between putative authorities rather than self-standing. But she argues that authority cannot merely be observed practice and experience. Any authority must be justified or normatively 'needed'; supported by adequate reasons for its existence. She doubts that many of 'the contenders for having authority in the transnational context' clearly meet 'some justified need for authority'. It is often important to ask whether some public authority is actually normatively required in a particular field, or whether private regulation is to be judged appropriate. Ultimately, then, it seems that, for Roughan, *some* overarching normative judgment controls juristic entry to the sociologically observed terrain of interacting putative authorities.

Leaving aside the ongoing difficulties of specifying the exact relationship between the normative and the sociological, but certainly implying the presence of the normative as a key part of the picture presented by social science, **Sally Falk Moore** offers, in the final chapter of this section, a further contribution to the observation of authority as practice and experience. Her chapter, the work of one of legal anthropology's most celebrated pioneers and exponents, shows the virtue of sharp ethnographic description and interpretation as a means of teaching complex lessons about the organisation and problems of human societies

– a teaching done, indeed, in part according to the proven effective pedagogic method of ‘show not tell’. Falk Moore presents her facts in a deceptively simple, descriptive manner. She focuses on three diverse but mutually instructive cases of exercises of authority involving a complex array of national, transnational and international jurisdictions. The method leaves most theory-building to the reader, presenting instead a carefully assembled, artfully arranged set of observations – thought-provoking pictures from life caught by the ethnographer’s eye.

Falk Moore’s measured detailing of the three cases – two involving trial processes with important transnational or international elements, the other focusing on extended lines of legal authority operating transnationally and nationally – highlights and illustrates key issues for the study of transnational authority. The analysis of each case focuses on both local and more global contexts. In the first, the central problem is that of securing legitimacy for a court that is powerfully sponsored internationally but must operate locally; in the second, bitter conflicts of authority at various levels are prominent, as well as tensions and interactions between claims of authority and instances of crude coercion. The third case illustrates starkly the sociological issue of what legal authority means in practice when those who claim juristically to set it in place are far remote (politically, culturally and in terms of economic conditions) from those entrusted with realising its effects in its local contexts of application.

The conclusion Falk Moore reaches is that while all three cases were ‘examples of state action and requested multinational legal intervention’, only the first of them, a Sierra Leone war crimes trial, was successful, in the sense that the judicial proceedings were carried as envisaged to their conclusion. In the other cases, she suggests, ‘failures of formal interventions’ were ‘probably attributable to the power of semi-autonomous social fields on the political domain’. One might say that socio-political conditions for attracting legitimacy to various purported claims of authority were often highly problematic. But Falk Moore notes that, even in the Sierra Leone case, ‘the trial could not have taken place without UN sponsorship’ and important elements inside Sierra Leone ‘did not accept the government’s legal authority’. So, here again, the issue of how, and by whom, legitimacy is to be conferred on authority claims seems crucial.

## VI. PRIVATISATION AND EXPERTISE

The introduction of social scientific methods, alongside juristic ones, into the study of authority in transnational contexts indicates, amongst other

things, that a broader view has to be taken both of the range of contexts in which authority may be asserted and of the types of actions that can be seen as exercises of authority. Roughan emphasises the need to distinguish authority from coercion, on the one hand, and persuasion on the other. A broadly sociological perspective may show, however, that the line between these phenomena is not easy (or perhaps not even useful) to draw in some situations; that, for example, the authority of forms of standard-setting expertise (not merely judicial or legal expertise, but many other kinds) may not only be powerful but may sometimes blur prescription with persuasion (e.g. shading between setting out 'required practice' and formulating 'best practice').

Similarly, sharp lines between the public and the private may become hard to maintain in the developing world of transnational authority. A great deal of 'authority' of some kind, at least, is exercised in regulatory environments that – from familiar, orthodox juristic perspectives – are typically characterised as private rather than public. If authority is something that, for the purposes of analysing transnational regulation, is not to be seen as wholly (or even perhaps predominantly) located in state structures, but is actually dispersed around numerous international, transnational and intra-national arenas and structures, a line between the public and the private might not be the most useful line to draw. Indeed 'public/private' might sometimes come to seem an unreal or unstable distinction in this context. The focus on law's relation to the state, which underpins the legal concept of the 'public' and the idea of public law, ceases to have its old clarity when transnational regulation is in issue.

One step towards taking account of this shift of perspective might be to consider opening up the analysis of authority beyond its usual public law orientation to look at the resources that a study of the transnational evolution of *private* law could provide. In this way the public/private divide would not necessarily be discarded but would also not be seen as limiting the scope of inquiry. **Horatia Muir Watt's** chapter examines such private law resources by considering how far conflict of laws or private international law (PIL) doctrine and scholarship has been able to contribute to conceptualising transnational authority and how far it might do so in future. In general, she suggests that the traditions of modern conflict of laws have militated against such a contribution. The background assumption of PIL has been 'that of a state monopoly on law-making (or at least state endorsement of spontaneous ordering)', so that no 'real' law is produced other than '(directly, or through endorsement) in the name of state sovereignty' and transnational authority, like transnational law, 'is a contradiction in terms'. The privately acting forces producing much transnational regulation are outside this range of vision

unless interpreted as state law delegation (or incorporation) or non-normative matters of fact. The approach has been to ‘turn the blind eye of law towards the multiple non-state actors and norms that support the expansion of [globalised economic and financial] informal empire’ which ‘now threatens to overwhelm’ the states that have been complicit in its growth.

Nevertheless, Muir Watt sees ‘cracks in the system’, possibilities and indications of change in recent approaches in PIL, and some drifting away from fixations with state sovereignty. In its ‘application of the laws of non-recognised states’ and in other respects, PIL sometimes shows ‘private law values’ such as fairness to the parties and legitimate expectations being ‘preferred to compliance with the theoretical framework of sovereignty’. Perhaps precisely because it looks to the transnational arrangement of private interests typically expressed in private law, it has developed concepts that suggest less focus on sovereignty structures for the future, and more focus on a ‘bricolage’ or ‘jigsaw puzzle’ of principles and doctrines derived from ‘selected national materials’ to structure transnational legal relations. And, since one of the most important sources of transnational authority is in networks of private transnational relations, PIL’s privatised view of legal development across borders has potentially a particular appropriateness. It might be suggested, however, that large questions remain. What ultimately can count as ‘law’ in the transnational realm and can PIL really imaginatively fly entirely free of its modern statist traditions? And the public–private divide still remains a key structuring dichotomy for PIL despite the fact that the political foundations of this dichotomy are surely displaced to an uncertain extent transnationally. In any case this rich chapter provides much food for thought.

Leaving aside these difficult juristic conceptual issues, the final chapter here, by **Sigrid Quack**, focuses on modes of regulation which juristically could be categorised as ‘private’ processes and are often associated with Muir Watt’s ‘informal empire’ of private organisations and relations. Here they are dealt with – as we think they need to be at the present time – sociologically through observation and interpretation of practices and experiences associated with various ideas of authority and kinds of authority. The topic of ‘expertise’ as a kind of authority or a basis for claims of authority was noted by Krisch in his survey of ‘liquid’ authority and discussed more specifically in Cotterrell’s chapter, being associated there particularly with Weberian charismatic domination. Quack’s focus is on competition and struggle between groups in establishing and challenging ‘knowledge-based claims for authority’. She asks how knowledge becomes socially constituted as ‘expertise’, how it makes claims to

authoritativeness and how it seeks and obtains acceptance as legitimate from the audiences and publics it targets. What strategies are used to establish and maintain epistemic authority, and how does the authority of expertise interact with state or governmental authority especially in global contexts? How do transnational governance regimes compete for regulatory effectiveness and authoritative reach and what part do claims of and competition around epistemic authority play in this?

After exploring such issues in general terms by reference to the extensive social science literature, to which she and her collaborators have made important contributions, Quack considers two contrasting empirical examples of the use of strategies for gaining epistemic authority. She shows how these strategies were deployed and contested by professional and interest groups in two very different regulatory fields – the evolution of transnational accounting standards before and after the 2007–08 financial crisis, and the development of and conflicts around transnational intellectual property regulation and standardisation. In the former case, the authority of professional accountants was challenged by state regulators and international organisations. Public actors were able to ‘claim back some say in a regulatory field which was initially dominated by accountants and their technical expertise’. However, in the international copyright regime, ‘civil society actors’ and especially ‘an epistemic community of critical IP lawyers’ promoted a unified Creative Commons licence and ‘questioned the authority of a small group of industrialised nations and the influence of their intellectual property rights industries’. In these areas, struggles around epistemic authority were, Quack argues, central to emerging regulatory patterns and assumptions, and evidence showed that expertise can sometimes be wielded effectively by groups otherwise lacking access to formal legal authority.

## CONCLUSION

To conclude this Introduction we can certainly suggest that as the concept of authority leaves its safe harbour in obviously ‘public’ state structures and their extensions, large questions arise as to how it can operate in the flourishing fields of transnational regulation that combine the public and the private in a complex interweaving. Equally, how should analysis proceed where there appear to be powerful forms of authority entirely ‘privately’ organised in industrial and corporate groups, in spheres of professional interaction, in trading or other economic relations, and generally in communal networks of many kinds? Public international law now increasingly reaches through the medium of the

states and political authorities that it typically addresses to influence or control the activities of 'private' individuals, for example in matters of human rights or international criminal liability. And private international law may be moving, to some extent, out of the shadow of state sovereignty towards doctrines that emphasise the need to co-ordinate private actors' relations transnationally by whatever suitable private law resources are available, and guided only by the legitimate needs, expectations and interests of those actors. Meanwhile the state remains crucially significant as a source and centre of legal authority in the contemporary transnational arena. Our reason for drawing together these essays is to emphasise the complexity and diversity of authority's expressions and to signal many new questions for legal theory to address as it explores the relations of authority to law in the ever-widening and proliferating fields of transnational regulation.