9. Transnational legal authority: a socio-legal perspective

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The concept of authority poses many problems. Hannah Arendt declared that ‘authority has vanished from the modern world … The very term has become clouded by controversy and confusion’.¹ Joseph Raz sees it as ‘one of the most controversial concepts’ in legal and political philosophy.² This chapter’s aim is to outline a provisional socio-legal perspective on the ways in which plural forms of authority might be conceptualised and related in the emerging structures of transnational law.

Many attempts by legal scholars are now made to conceptualise the authority that can support transnational regulation. I shall argue here that almost invariably these adopt juristic orientations reflecting the experience of Western state law; but, for reasons that will be explored in this chapter, such orientations seem inappropriate in considering transnational regulatory developments that are not easily subsumed into state law, or into international law treated as a consensual exercise of states’ law-making authority. A better starting point, it will be claimed, is to treat authority generally as a practice and experience to be identified and interpreted sociologically.

Drawing on Max Weber’s analyses of legitimate domination, this chapter identifies a variety of bases of authority on which transnational regulation may rely; it also considers the cultural sources of legitimacy.

for this regulation that can potentially arise in what I call ‘communal networks’. It concludes that, given the complex conditions of existence of transnational legal authority, this authority will be shifting, variable and constantly re-negotiated. It is hard to capture in illuminating ways by means of projects aimed at conceptualising authority as a universal phenomenon, having the same essential character wherever found. Understanding the variety of sources, forms and expressions of authority requires socio-legal study of the kinds of political structures and communal networks in which transnational regulation arises, and in which authority claims are made, recognised and judged.

Conceptualising authority for explanatory, descriptive purposes involves empirical study of practices and experiences associated with such claims. The central question is: which phenomena are to be conceptualised as involving authority? Conceptualising authority normatively, to consider how it might be justified, involves asking for whose benefit justifications are needed, and by whom these justifications are to be accepted. So, in transnational regulatory contexts, attention to context seems especially needed.

I. THE TRANSNATIONAL PROBLEM

It seems that the idea of authority creates much uncertainty even before the task of adapting it to an increasingly complex world of transnational regulation is attempted. In the context of municipal state legal systems, lawyers often avoid difficult questions about authority by talking instead of validity. They test the validity of rules, procedures or decisions as ‘legal’ by tracing their formal derivation from largely settled and accepted sources of legal authority in constitutions, statutes or judicial precedents. Issues of authority become, in everyday legal practice, mainly technical questions about the proper normative interpretation of actions and situations in relation to these sources. For legal philosophers, however, deeper questions about the ultimate meaning and justification of authority remain.

As it becomes necessary to consider the nature of legal authority beyond state law – that is, beyond the context of law established and enforced by agencies of a state having a jurisdiction centred on (what John Austin called) an independent political society – familiar juristic assumptions are fundamentally challenged. Juristic thought, reflecting state law experience, tends to presuppose authority as a matter of settled hierarchy. This can be theorised as ‘chains’ or ‘levels’ of authority such
as those in which secondary rules authorise the production and management of primary rules (Hart), or in which more ‘concrete’ norms are authorised by more abstract or fundamental ones (Kelsen). Typically, the state is seen as the ultimate focus of all governmental authority – exercising, in Austin’s simple image, the sovereign authority of a ‘determinate and common superior’.\(^3\) This conception of authority ties law to the political structures of the state; it could be termed a conception of the political authority of law.

Insofar as this outlook prevails, lawyers in modern advanced societies are comfortable only with a largely monistic view of authority. All legal authority is seen as traceable to a single unifying source, or at least to a strictly limited number of sources existing in adequately settled relation to each other. Federal structures pose no theoretical problems as long as the allocation of powers which federalism makes possible is defined by an effective state constitution. Disputes over the boundaries of federal powers are then usually seen as practical issues of interpretation rather than issues about the very nature of legal authority.

In a state-focused juristic view, the authority of international law need not be problematic either. Seen as grounded in the consent of states it can be subsumed in a monistic approach in which a state’s legal authority is delegated or applied in various jurisdictions – which may be state-wide, or localised to regulate only certain parts or aspects of the political society of the state (intra-state), or governing legal relations in the international sphere which consenting states together agree to regulate (inter-state). Even when ‘an international law above the state’ is advocated, a jurist such as Kelsen could portray the authority of such a law monistically, extending the model of hierarchical (municipal) legal authority into a single, unifying, hierarchical structure of authority of the entire international order.\(^4\)

However, the gradual expansion of the range of types of transnational regulation recognised, in varying degrees by various regulated populations, as legally authoritative disrupts traditional juristic approaches to legal authority – challenging both the idea of hierarchy and that of monism. The well-recognised challenge now is of a ‘collision’ of legal

\(^3\) J Austin, Lectures on Jurisprudence or the Philosophy of Positive Law, 5th edn (London, John Murray, 1885) 220. Italics in the original omitted.

‘discourses’, or an overlapping or confrontation of different regulatory regimes claiming independent jurisdiction over the same legal space (legal pluralism). Any hierarchies existing among these regimes are only partial and incomplete, and may be controversial and readily challenged.

International law itself is increasingly fragmented into diverse, not necessarily cohesive jurisdictions and regimes of regulation, and relations between these international regimes and municipal state law are sometimes contested or unpredictable. European Union law presents its own, perhaps unique, problems of co-ordination and integration, in relation both to international law regimes (such as the international economic law of the WTO) and to the municipal law of member states. And forms of transnational private regulation, often now labelled ‘transnational private law’, are produced ‘bottom-up’ through, for example, the interactions of lawyers organising cross-border transactions, arbitrators processing transnational commercial disputes, the economic networks of transnationally organised industries, the articulation of international financial systems, and the transnational effects of communications technology.

From a juristic perspective the need is to establish reliable ways of working in a transnational environment in which previously stable anchors of authority (in the hierarchically arranged legal structures of the state and its confident assumptions of monism) often no longer hold. The central juristic challenge is ceasing to be merely to interpret and apply established legal authority; it is increasingly to identify, conceptualise and evaluate authority as it operates in an evolving practice. The fearful prospect of having to recognise legal authority as inherently relative arises. That is to say, lawyers will have the responsibility of assessing the relative weight of the authority claims of different legal orders which

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conflict or compete with each other or even deny one another’s existence as valid, operative law. They will have to judge to what extent and for what purposes (rather than whether or not) particular kinds of regulation can be authoritative as valid law.8

My claim is that neither traditional, state-oriented, juristic experience (however imaginatively re-interpreted) nor the mainstream of contemporary legal philosophy (which has, until very recently, shown little interest in examining the new forms and conditions of regulation) has the resources at present to organise adequately even the main elements of this new transnational world of law. There is a preliminary need for a socio-legal (that is, sociologically-focused) consideration of the way authority is being understood as a practical matter – though often in contested, contradictory and inchoate ways – in its various contemporary regulatory contexts.9 It is necessary to examine authority empirically as a social phenomenon (the practice and the experience of authority) in these changing contexts, recognising that their relations with state law are often unclear, fluid, shifting or evolving.

Given the rapidly changing landscape of authority as practice and experience, and the array of unpredictable regulatory challenges that arise in it, this is a more pressing inquiry than that of asking, as a philosopher might, whether any essential and timelessly ‘true’ justification for authority can be found and how, for example, such a justification might be reconciled with the requirements of autonomy and practical reason.10 And such a socio-legal inquiry might indicate a way of going beyond the important and extensive efforts of forward-looking legal scholars today to explore ‘outwards’ from established legal experience gained in nation state contexts. An eventual need may be for a drawing ‘inwards’ by jurists, into their legal worldview, of material (e.g. principles, institutional forms, normative problems and conceptualisations) from kinds of regulatory experience and practice existing entirely outside the familiar thought-ways of state law.

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8 Such a view of authority as relative emphasises the distinction between this concept and the ‘absolute’ (non-relative) concept of validity, which, as Nils Jansen notes, ‘lacks a dimension of weight’: see Jansen, ‘Informal Authorities in European Private Law’ (2013) 20 Maastricht Journal of European and Comparative Law 482, 492. See also Jansen’s chapter in this book.
9 Sigrid Quack’s chapter in this book provides an excellent window on important parts of this terrain.
II. SOME LIMITS OF JURISTIC APPROACHES

In general, juristic scholars seek to engage with transnational developments by adapting, extending or transforming ideas that are important in Western municipal legal systems, or applying familiar juristic theories\footnote{The literature shows, for example, frequent efforts to apply Hart’s concept of law, a theoretical model that ultimately presupposes a hierarchically ordered, bounded body of rules founded on a unifying rule of recognition. See e.g. D Von Daniels, The Concept of Law from a Transnational Perspective (Farnham, Ashgate, 2010); B Kingsbury, ‘The Concept of “Law” in Global Administrative Law’ (2009) 20 European Journal of International Law 23; A Duval, ‘Lex Sportiva: A Playground for Transnational Law’ (2013) 19 European Law Journal 822.} of law that are themselves grounded in the experience of these systems.

Thus, many important approaches to legal transnationalism in the juristic literature have extended ideas of constitutionalism, and principles underlying constitutional law in advanced Western polities, to the transnational arena.\footnote{See e.g. N Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 Modern Law Review 317.} Other approaches extend various procedural or organisational principles of public law familiar in these polities into a vision of ‘global administrative law’.\footnote{See e.g. Kingsbury 2009, above n 11.} But constitutional approaches tend to search for some sense of ordered hierarchy in the transnational arena by analogy with the constitutional structures of states. Global administrative law, in Benedict Kingsbury’s well-known conception, seeks ‘the attributes, constraints and normative commitments that are immanent in public law’\footnote{Ibid, 30.} and recognises a need to emphasise and build universally ‘the (tempered) requirements of publicness in law’.\footnote{Ibid, 55. For commentary see A Somek, ‘The Concept of “Law” in Global Administrative Law: A Reply to Benedict Kingsbury’ (2009) 20 European Journal of International Law 985, suggesting (at 986) that the point of the GAL project ‘is to emphasize that what used to be the paradigmatic make-up of the modern “regulatory state” is merely a limiting case of how administrative processes have come to be re-enacted on a global scale’.} On such a view, regimes of private ordering (now flourishing widely as effective transnational regulation and much studied by socio-legal researchers) are hard to
recognise as legally authoritative. But it has been claimed that private actors ‘are now at the heart of the production of transnational law’.

As Nico Krisch has emphasised, a focus on constitutionalism is hard to adopt in the transnational arena because, in its dominant modern form (providing the normative foundation for government), constitutional authority has been thought to presuppose some idea of a supporting, legitimising community – ‘the people’ – which hardly seems to exist on a transnational basis. In fact, as this chapter will argue, transnational legal authority does need to be understood in relation to an idea of ‘community’ but this idea must be understood sociologically and examined empirically. It is not productive to try to build on rhetorical appeals to a global ‘international community’ understood as a diffuse demos to provide democratic legitimacy for transnational constitutionalism. Neil Walker notes that constitutional law, which is ‘the framing law of the modern age’, always presents itself ‘as the authoritative voice of the people of a particular place over that same particular place’. Perhaps ‘place’ is not as essential as this suggests, but some kind of particularity of a constitutional community is essential and a sociological perspective is needed to examine empirically what kinds of community exist transnationally to support regulation.

Indeed, ‘a constitutional, hierarchical order seems contrary to the world we inhabit’. Equally, Krisch notes that many juristic approaches that seek to escape ordered hierarchy and adopt a pluralistic approach (emphasising the diversity of distinct, autonomous legal regimes and forms of legal authority in the transnational world) ultimately overlay this pluralist openness and tolerance with some organising, controlling principles. He sees, for example, Mattias Kumm’s ‘cosmopolitan constitutionalism’ as ‘embedded in a thick set of overarching norms, such as subsidiarity, due process, or democracy, that are meant to direct the solution of conflicts’, Mireille Delmas-Marty advocates ‘overarching

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16 Kingsbury 2009, above n 11, 57.
rules, softened by way of margins of appreciation and balancing requirements’, and Paul Schiff Berman’s ideas for managing conflicts in global legal pluralism recall ‘constitutionalist instruments for accommodating diversity’ that reflect devolutionist ideas and models of consociation.21

But Krisch himself is forced to ask which polities ‘deserve respect and tolerance’ in the global legal pluralism that he terms postnational law. He answers that this will depend on how far these polities are ‘based on practices of public autonomy: on social practices that concretize the idea of self-legislation’, on the strength of ‘participatory practices’ supporting them and on how convincingly they try ‘to balance inclusiveness and particularity’.22 These are terms that seem to carry a freight of implicit Western public law principle.

From a quite different perspective, Hans Lindahl insists that all legal orders in the postnational world must be understood as unities with distinct jurisdictional boundaries ‘because boundaries are the necessary condition of legal order’; the possibility of integrating political plurality ‘in a higher order legal unity’ thus depends on legal boundaries being ‘open to reformulation’.23 Juristic thought has often sought normative unity in law, and legal theory has found many ways to conceptualise this.24 But it may be that transnational regulation does not operate – or does not operate only – in terms of bounded regimes, and that the idea of such regimes is a projection of the idea of state territorially-focused jurisdiction that may be waning in transnational conditions in favour of more ‘porous’, graduated, indistinctly delimited spheres of shifting, negotiated authority and jurisdictional reach. For example, the more that law in transnational conditions can be seen as providing guidance (through a variety of normative devices) as well as control (through positive mandatory rules), the more it becomes possible to think of law as contributing to a complex normative web of indefinite and changing shape, rather than as the defining structure of a fixed jurisdictional entity.

In the light of such illustrations of recent juristic work, it would appear that legal scholars seeking ways to manage transnational conflicts of authority tend to be drawn back to prescriptions and principles that in

21 Krisch 2010, above n 18, 74–5; see further, Berman’s chapter in this book.
22 Krisch, ibid, 101.
some way (perhaps inevitably) reflect the juristic techniques, or underlying political principles, of the state legal systems most familiar to them. It may be that juristic thought, insofar as it operates independently of sociological and historical inquiry, lacks the resources, at present, to organise normatively (while respecting the diversity of) global legal pluralism\(^{25}\) – that is, the largely chaotic overlay of (i) municipal (state) jurisdictions including their extraterritorial extensions, (ii) international legal regimes of many kinds, (iii) established transnational systems of (what is usually seen as) ‘private’ legal ordering, and (iv) forms of regulation emerging to govern communal networks that are transnational in scope or effect.

Because all of these types and sources of law (as well as debates and disagreements about the specifically ‘legal’ quality of some of them) are involved, the best term to apply provisionally to the whole unwieldy mass seems to be transnational law, insofar as this regulation addresses, with some kind of claim of legal authority, individual persons (including corporations) across the boundaries of state jurisdiction. Some writers prefer to speak of postnational law\(^ {26}\) but it must be stressed that, in the transnational picture, state and nation have in no way disappeared from view, nor is it foreseeable that they will. They are merely supplemented as sources and sites of law, but the transnational is not a world ‘after’ or ‘outside’ the state or the nation.\(^ {27}\)

There is a tendency in conceptualising legal transnationalism not only to interpret empirical reality through the lens of established juristic thought but also sometimes to apply wishful thinking to it, imagining a global normative realm that is hard to relate to socio-political reality. Harold Berman, for example, writes of an emerging ‘world law’ governing ‘emerging world society’. To speak of the ‘transnational’, he suggests, is to refer back to the ‘national’ and so does not adequately


\(^{26}\) See e.g. Krisch 2010, above n 18, and in his chapter in this book.

\(^{27}\) Shaffer 2012, above n 20, 577–9; see also e.g. P Zumbansen, ‘Neither “Public” Nor “Private”, “National” Nor “International”: Transnational Corporate Governance from a Legal Pluralist Perspective’ (2011) 38 Journal of Law and Society 50.
indicate ‘the new era that all humanity has entered’, one of ‘global interdependence’ in which ‘all inhabitants of Planet Earth share a common destiny’. Other writers herald a world in which rights might be effectively asserted without reference to state power. Cosmopolitans, writes Jean Cohen, ‘construe the expansion and individualization of international criminal law, the proliferation of human rights discourse, and calls for humanitarian and democratic interventions as indicative of an emergent consensus on the basic values of the “international community”; the task is “to order and regulate the world community so as to protect the rights of world citizens”.’ But Cohen insists that this cosmopolitan portrayal of law is no more than a cloak for the self-interested interventionist strategies of some states in relation to others.

Idealised global visions of law (to which not only juristic thought is susceptible) are often dreams of new kinds of monistic authority, or reference points from which an overarching legal order might be created. Yet such general visions of law’s future are hard to support empirically. Similar criticisms can be made of visions of a ‘global legal culture’ as emergent or desirable. These are close relatives of the premature or over-generalised ‘convergence’ claims sometimes propounded by sociologists and political scientists to suggest that polities, societies or cultures are gradually tending towards a practically comprehensive global uniformity.

III. AUTHORITY AND LEGITIMACY IN WEBER

It may be productive to try to set aside, temporarily, all juristic presumptions in considering transnational legal authority and to consider how the issues might be approached by adopting a socio-legal view – one that sees the practices and experiences of authority as empirical social phenomena and considers how they can be observed and interpreted in the varied contexts of transnational regulation. Max Weber noted ‘the generally

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observable need of any power … to justify itself … [H]e who is more favoured feels the never ceasing need to look upon his position as in some way “legitimate” … [T]he continued exercise of every domination … always has the strongest need of self-justification through appealing to the principles of its legitimation’.31 But, in ordinary usage, terms such as power, legitimacy and authority are often imprecise or confused. And many different conceptions appear in the scholarly literature.

Victor Muñiz-Fraticelli writes that ‘only by making a claim to legitimacy does the exercise of power become authoritative’.32 Susan Marks sees legitimation as ‘the process by which authority comes to seem valid and appropriate’.33 In other formulations, legitimacy is ‘the right to rule and the recognition by the ruled of that right’;34 it ‘is generally defined as the reasons why citizens accept power’ entailing ‘a voluntary subjection to a claim to authority’.35 A socio-legal approach does not need conclusive, timeless definitions of authority and legitimacy but only ways of understanding these ideas that can help in provisionally identifying relevant social practices. It might be tempting, then, to think of authority as something primarily claimed in support of power by its holders, and legitimacy as something primarily conferred on power by those subject to it or who observe it; that is, legitimacy indicates an acceptance of the claim of authority as successfully made. Some such rough distinction could be useful in recognising authority and legitimacy as social phenomena despite much variation in usage of these terms.

It has been suggested that legitimacy, seen in such a way, ‘must be projected by someone’;36 there ‘must be some social group that judges the legitimacy of an actor or action based on the common standards

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34 J Jackson et al., ‘Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions’ (2012) 52 *British Journal of Criminology* 1051, 1051 (Italics added).
35 Devaux 2013, above n 17, 845.
acknowledged by this group’.37 ‘Legitimacy is generated in a social sense through the creation of communities of practice’.38 This suggests the importance of studying social groups and networks that may confer legitimacy on the authorities that purport to address them; that is, the importance of studying the various regulated populations over whom authority is claimed. It has been noted that the same authority claims may be legitimised by different communities39 applying different standards of recognition.40 At the same time there may be conflicts between these standards.

Once it is recognised that networks of communal relations on which the legitimacy of regulation may depend can exist intra-nationally, nationally or transnationally, the situation becomes potentially very complex. The authority of transnational regulation might rely on many different social sources of legitimacy. These sources (communal networks) may support the authority of many different kinds of regulation. Equally, the values, interests, allegiances and established practices of these networks may conflict so that different networks favour different kinds of authority and reject others.

In stable political societies, conflicts between different social sources of legitimacy for legal authority do not usually seem very significant. Politico-legal structures of state power are typically sufficiently firmly established as authoritative. The situation may, however, be far more complex when the question of legal authority beyond state borders is to be considered. Then it may be necessary to ask what kinds of authority claims can realistically be made and where support for them can be found.

How far can transnational regulatory authority be successfully claimed by extending – or developing analogies with – the established ‘official’ authority of law embedded in the political structures of the state? Alternatively, how far must it be traced to the different kinds of communal networks that exist transnationally? These networks are likely to foster their own kinds of authority to support the regulation they create for themselves reflecting their own cultural characteristics (that is, the


38 Thomas 2013, above n 36, 20.

39 As explained more fully below, I prefer to call these ‘communal networks’ or ‘networks of community’ to avoid the now often unrealistic idea of communities as distinct, bounded and perhaps somewhat static entities. See also, R Cotterrell, ‘Rethinking “Embeddedness”: Law, Economy, Community’ (2013) 40 *Journal of Law and Society* 49, 54–6.

40 Thomas 2013, above n 36, 22.
shared values, beliefs, interests, traditions, history and allegiances of their members). A socio-legal approach to transnational law has to ask how far and in what ways available political or ‘official’ authority for this law (reflecting and extending that of state law) can interact with what can be called the cultural authority produced directly in communal networks; that is, authority arising from their own internal needs for regulation.

Max Weber’s influential analyses of ‘legitimate domination’ offer a useful means to consider claims of authority made for state law (and perhaps the extension of these claims into the transnational arena) in a far broader manner than is often done in juristic writing. Famously, Weber identified three pure types of authority in terms of the fundamentally different kinds of legitimacy that can support them. Legal-rational authority relies on an appeal to rational rules that are seen to confer such authority, and Weber notes that today ‘the most common form of legitimacy is the belief in legality’. It is easy to see that much juristic thought assumes this as its model of legitimate authority. The idea of legal-rational authority signals the importance of the clarity, rationality, hierarchical structure, consistent application and practical effectiveness of rules conferring authority on officials of the state legal system. It suggests the central importance of constitutionalism and the rule of law.

But it is very important (particularly if something beyond established juristic thinking is required in studying transnational regulation) to remember the two other pure types of authority in Weber’s analytical scheme. He sees traditional authority, based on reverence for ‘that which is customary and has always been so’, as declining in importance in the modern world. Certainly, it may have limited relevance to the rapidly changing transnational arena. The third Weberian type, charismatic authority, deserves careful consideration.

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42 Ibid, 37.
43 Ibid, 954.
44 Maksymilian Del Mar has rightly pointed out to me that, in principle, it is certainly not impossible for this type of authority to exist transnationally: regulatory customs and conventions may become established over time and allow transnational authority claims to be accepted solely on the traditional basis of long familiarity with their sources; these coming to be seen as self-evidently ‘natural’ parts of the regulatory environment. At present, however, the sheer pace of development of transnational regulatory systems and institutions surely seems to make this, at best, a limited and exceptional basis of legitimacy for transnational regulatory authority in general.
It is authority founded on belief, held by a leader’s followers, in that leader’s (real or imagined) exceptional personal qualities, such as invincibility, heroism, capability, foresight, wisdom, infallibility, saintliness or rhetorical skill. Charisma can be a property attributed not only to individual leaders but to regimes, institutions and offices which are thought to deserve special respect and deference because of some extraordinary quality they are seen (rightly or wrongly) to possess. Unlike the legal-rational and traditional types, charismatic authority is inherently unstable since it exists only as long as the followers’ faith is sustained. So it tends in modern conditions to be routinised gradually into the more enduring form of legal-rational authority. In the sociological literature the concept of charismatic authority has uncertain status, often being seen as a catch-all category for diverse kinds of authority that are hard to envisage in terms of the other two types.

This Weberian schema allows a breakout beyond most juristic thinking about authority. First, authority need not be wholly demarcated by rules. For example, the charismatic authority of the ‘great’ common law judge, who develops the law in new ways not imagined by others (and perhaps at first considered bizarre and eccentric) but recognised ex post facto as valuable, is a personal authority grounded in a perceived ‘extraordinary’ wisdom, foresight and imagination. In effect, it is an authority superimposed on, or supplementary to, the ‘routine’ legal-rational authority that defines the judge’s office and jurisdiction.

Second, charismatic authority makes a direct appeal to the regulated population to acclaim acts done in the population’s name or for its benefit. And such acts may include declaring policies or issuing guidance, no less than creating legal rules. For example, a belief in a regime’s

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48 Turner 2003, above n 46.
49 It is important to see this as rooted in perceptions of those (lawyers) who observe and interpret the judge’s acts, rather than in actual special qualities of the judge (though these special qualities may well exist). On charisma as residing solely in the perceptions of followers see Joosse 2014, above n 47, 276.
50 Hence it can sometimes lift a judge’s reputation significantly above that of many others holding formally superior judicial office. A well-known historical example is that of the American judge Learned Hand. See I Dilliard, ‘Introduction’ to L Hand, The Spirit of Liberty: Papers and Addresses, 3rd edn (Chicago, University of Chicago Press, 1960) v–xxvii, vi, xxvi.
unfailing ability to provide economic prosperity can support its legitimacy. Charisma, as legitimate authority, can support any kind of governmental act aimed at the welfare of the communal network that sustains it. Hence it is not confined by the orthodox parameters of constitutionalism. To emphasise its significance is to recognise realistically the diverse ways in which regulatory authority is actually used in social life, but also to highlight many potentially authoritarian, instrumentally-justified forms of rule.

Finally, it seems reasonable to see the authority of expertise\(^\text{51}\) as a kind of charismatic authority. This is important in relation to many forms of transnational organisation where standard-setting bodies exist to regulate communal networks, such as those of transnational industries, cross-border trade and finance, information technologists, sports authorities, and transnational professions. These standard setters sometimes shelter under the authority of state or international law but often rely for their authority on their claim to special expertise in their field and on the support of those they regulate who believe the regulators’ work to be useful for the well-being of the communal network. The rulings of such ‘expert’ bodies are often much more than guidance; they are intended to be followed. In some cases, indeed, the line between guidance and prescription is likely to become blurred, when membership in communal networks depends to a significant extent on conformity to the governing norms of the network but, equally, members’ participation in the network may be more productive for them insofar as regulatory standards are treated as best practice and a valuable guide to success.

For Weber, democratic processes involving the popular acclamation of rulers can be a way of legitimating charismatic authority.\(^\text{52}\) However, voting in periodic routine elections can probably best be seen as an exercise of legal-rational authority (to select representatives through formal electoral processes) by citizens. Standard-setting agencies are rarely democratically created but they rely on recognition\(^\text{53}\) by the regulated, often on the basis of assumed expertise.

It can be said that the idea of charismatic authority indicates kinds of supplementary and transformative authority that play a major role (as expert authority) in those emerging structures of transnational regulation that are entirely independent of the established political structures of states. It might further be suggested that charismatic authority is the

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\(^{51}\) See Quack’s chapter in this book.


\(^{53}\) See Devaux 2013, above n 17.
presently essential means by which transnational legal authority is projected ‘outwards’ beyond state legal authority (and its extension through the consent of states as international legal authority). For example, many writers have noted the emergence of transnational communal networks of judges, as a consequence of which courts sometimes influence each other’s practices across national boundaries and recognise the purely persuasive (that is, expert) authority of their fellows beyond their own jurisdictions.

Expert authority as charismatic authority is a vehicle both for (i) sharing a kind of (persuasive) legal authority ‘horizontally’ between state-centred constitutional structures and (ii) for building new ‘vertical’ hierarchies of authority (through standard-setting) outside these structures in the ‘no-man’s land’ of transnational interactions not effectively governed by states or international jurisdictions.

IV. THE PRACTICAL AUTHORITY OF STATES AS LAWMAKERS

Today, political authority (the authority of states and their agencies, and the extension of this authority into the transnational realm through

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56 Because of this location, expert authority has attracted understandable juristic criticism (e.g. Devaux 2013, above n 17). Yet to some extent this criticism fails to recognise an established socio-legal reality to which it will surely be necessary to adapt.
international law) is largely Weber’s legal-rational authority, but supplemented with elements of charismatic and traditional authority. Weber thought that legal-rational authority in modern conditions was largely self-sustaining (legitimacy being produced through legality) but it is not clear that this is so. It relies ultimately on cultural sources of legitimacy (grounded in the interests, beliefs, values, allegiances and traditions of the regulated population), even if in normal circumstances in stable independent political societies these can typically be taken for granted.

This chapter treats authority as a social phenomenon – a matter of practice and experience. Seeing it in that way, we can ask how far law’s political authority – its political frameworks seen as legitimate – is changing. How great is the capacity of states to supply political authority to support transnational law? If this question can be answered, it may become easier to see how and in what ways legitimacy for this law needs to be found elsewhere, in the cultural conditions of transnational communal networks themselves – that is, inside transnational law’s diverse regulated populations.

Clearly it is not possible to generalise far about the practical legal authority of contemporary states because this varies greatly. While legal philosophy might describe state authority normatively in universal theoretical terms, a socio-legal approach has to recognise many factors that affect a state’s capacity successfully to claim authority over its citizens and attract legitimacy to the exercise of its governmental power through the use of law.

It is important to recognise that even in many strong, stable, representative democracies this political authority is weakened in ways that seem often invisible to juristic thought. For example, corruption can break ties of official allegiance, distorting the hierarchical flow of legal-rational authority and undermining the acceptance and exercise of it. External private forces (powerful corporate interests, mass media...
pressure) sometimes affect the practical exercise of authority.\textsuperscript{61} Tax evasion and avoidance, and misuse of public finances, can diminish financial resources available to make the exercise of state authority effective.\textsuperscript{62} Where ideologies that consistently favour the ‘private’ over the ‘public’ and attach little significance to ideas of ‘public interest’ and the ‘common good’ become dominant,\textsuperscript{63} they may eventually demoralise public officials and representatives and affect their projects and policies, perhaps leading to a general decline in their quality.\textsuperscript{64} And resources of expertise available to parts of the ‘private sector’ are often superior to


\textsuperscript{61} See e.g. AE Wilmarth, ‘Turning a Blind Eye: Why Washington Keeps Giving In to Wall Street’ (2013) 81 University of Cincinnati Law Review 1283 (financial industry undermining or deterring government regulation).


\textsuperscript{64} For a general discussion of determinants of authority and effectiveness in government, see S Ringen, Nation of Devils: Democratic Leadership and the Problem of Obedience (New Haven, Yale University Press, 2013).
those on which public regulatory agencies can draw. The costs of regulating or of enforcing regulation sometimes seem too great to incur, so that a situation of impunity is seen by the regulated to exist.

Practical political authority for law also varies with the relative strength of states to each other. Globalisation pressures limit freedom of action for all but the most powerful states, often directly affecting the content of legislation, for example in areas of economic policy. Official or unofficial extraterritorial law enforcement by some states affects the practical legal authority of others over their citizens. Extradition provisions can sometimes have similar effects, appearing in effect to hand over the exercise of legal authority in particular cases to another state. Some states are able even to exercise punitive force in others without permission, including the power (e.g. through clandestine raids or use of remote technology) to execute or seize residents of weaker states in the territory of those states. In this way they undermine weaker states’ capacity to assert their own authority within their borders. Disparities of power between states are reflected in the shape, use and effects of international law, so that its legitimacy as an extension of the political authority of states, founded on their consent as an international community, is often doubted. And competition between even powerful states may limit their regulatory capacity.

Conditions such as these, where they exist, do not usually directly affect judgments about the validity of legal rules and decisions insofar as this validity can still be traced in juristic analysis to formal sources of

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66 Cotterrell 2015, above n 58, 12.
67 See e.g. C Heyns, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. UN General Assembly, 68th Session, A/68/382 (2015), stating that the ‘use of drones by states to exercise essentially a global policing function to counter potential threats presents a danger to the protection of life, because the tools of domestic policing (such as capture) are not available, and the more permissive targeting framework of the laws of war is often used instead’ (para 103).
69 See e.g. T Rixen, ‘Why Reregulation after the Crisis is Feeble: Shadow Banking, Offshore Financial Centers, and Jurisdictional Competition’ (2013) 7 Regulation & Governance 435.
legal-rational authority in statutes, precedents, administrative orders, constitutional provisions, treaties, etc. But they may eventually affect the extent to which authority claims are popularly accepted. Respect for law has been shown in empirical socio-legal research to be affected by perceptions of the fairness, consistency and reliability of legal procedures.70 Hence, uncertainties about the nature and effectiveness of political authority and the variables that determine how and when it is legally used can unsettle the legitimacy of law.

All of these matters could be discussed at great length. They are listed here only indicatively and schematically to preface an argument that questions about legal authority should be considered beyond the usual parameters of juristic analysis focused on the essentially legal-rational structures of authority in political societies governed by state law. Equally, to introduce such matters is a means of suggesting that an inquiry into transnational legal authority cannot limit itself to examining efforts to project into the transnational arena the diverse conditions of legitimacy that surround municipal law. These conditions may be themselves shaped to a significant extent (for example through the globalisation pressures mentioned earlier) by transnational developments. So it is necessary to consider transnational legal authority in a socio-legal perspective that focuses directly on the social nature of the transnational world which emerging structures of transnational law seek to address.

V. POLITICAL AUTHORITY AND COMMUNAL LEGITIMACY

Recent social scientific literature has developed the idea of transnational communities and sought to identify such communities and study their forms of governance.71 Transnational communities are said to be more than merely instrumental (often contractually structured) networks, markets or hierarchies; community is said to imply a common culture of

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71 Especially, M-L Djelic and S Quack (eds), Transnational Communities: Shaping Global Economic Governance (Cambridge, Cambridge University Press, 2010).
some kind and its members’ sense of belonging together in it.\textsuperscript{72} Thus, transnational communities have regulatory needs and may create regulation for themselves through the interactions of their members. It is very easy to envisage some such communities – for example, religious, ethnic, linguistic, regional, scientific or economic.

However, it is also easy to see the limitations of thinking of communities in this way. The concept suggests bounded entities – organisations or social groups that could be called communities. But it is clear that the transnational arena cannot be wholly or even mainly described in terms of these.\textsuperscript{73} The idea of communities as distinct, bounded, perhaps somewhat static entities seems to have only limited relevance today. Few exist. Social relations (especially those that concern transnational law) tend to flourish and decay, contract and expand, assume varying forms and transmute in complex, intersecting, overlapping patterns. But one can envisage these relations as having a communal character when they have some (even if temporary) degree of stability and endurance and when they are built on mutual trust between the participants.

The bonds of community can lie in the common or convergent projects of the participants (as long as these projects last), in their shared beliefs and ultimate values, in emotional bonds of common allegiance, or simply in the fact that the participants must (for the time being) share some common environment and relate to it collectively. People can potentially be linked in relations of community in any or all of these ways, briefly or for some considerable time, so that the patterns of these linkages could be very complex. We can then speak of communal networks, or networks of community, in which probably one or more of these types of bonds will dominate but not exclusively. Instead, a web of communal relations exists. So, ‘community’ is not a thing but a quality of social relations.

The transnational arena – the world regulated by transnational law – is thus best seen as made up of networks of communal relations continually changing in character and shape – communal networks. These can consist of individuals, groups, or corporations. Their essential character is that, on the one hand, they are not strictly bounded and their scope may be poorly defined, debatable and variable, so that they do not necessarily create the basis for sharply delineated jurisdictions of the kind familiar to lawyers. On the other hand, they seek and require collective regulation to express and support the bonds of community that give them some

\textsuperscript{72} M-L Djelic and S Quack, ‘Transnational Communities and Their Impact on the Governance of Business and Economic Activity’ in Djelic and Quack 2010, above n 71, 377–413, 384–6.
\textsuperscript{73} Michaels 2009, above n 25, 252.
stability. This stability depends on mutual trust between participants insofar as they wish to remain members of the network, on attitudes that support this trust and, where necessary, on regulation that reinforces and facilitates it. Communal networks are not necessarily democratically structured. Members may rarely participate in them on a footing of equality. In fact, in many, perhaps most, such networks they may have very unequal power.\footnote{A circumstance influencing how and by whom claims to general regulatory authority in networks are made.}

This notion of communal networks has been analysed elsewhere.\footnote{Cotterrell 2013, above n 39; see also Cotterrell, \textit{Law, Culture and Society: Legal Ideas in the Mirror of Social Theory} (Farnham, Ashgate, 2008) 161–5. For convenience I sometimes use the word community, in line with common usage, to refer to groups or population categories, but this is always intended as a reference to communal networks in the sense outlined in the above text.} It is introduced here as a way of talking about sources of legitimacy for transnational legal authority. Transnational communal networks (for example, transnational business and financial networks, networks of religious believers, etc.) may produce more or less organised forms of regulation to govern themselves. Within those networks this regulation may certainly possess authority. It may be possible to observe agencies operating in them creating, interpreting and applying law-like doctrine – that is to say, rules, principles and normative concepts, as well as common ways of reasoning with these. So, to varying extents in communal networks, normative doctrine may be institutionalised with agencies set in place to develop and manage it. As they do this, doctrine may seem to take on the characteristics of ‘law’ – at least it may become hard to say why it should not be recognised as law unless one falls back on assumptions, based on the experience of state law, about the characteristics that all law must have.\footnote{On law as ‘institutionalised doctrine’ see R Cotterrell, ‘What is Transnational Law?’ (2012) \textit{37 Law & Social Inquiry} 500, especially 506–8; Cotterrell, ‘A Concept of Law for Global Legal Pluralism?’ in SP Donlan and LH Urscheler (eds), \textit{Concepts of Law: Comparative, Jurisprudential and Social Science Perspectives} (Farnham, Ashgate, 2014) 193–208, 204–6.}

Any communal network may therefore create its own law, with legitimate authority derived directly from the cultural conditions of the network itself (from the common interests of its members, from its unifying beliefs or values, from its traditions, collective allegiances, etc.). Emerging patterns of transnational legal authority can be seen, in part, as relying on this kind of self-generated authority of transnational networks. Much of what is now widely called transnational private law surely relies
significantly on such a ‘bottom-up’ production of legitimate authority. But this is far from being adequate to conceptualise transnational legal authority for several reasons.

First, as noted earlier, much reliance is made in developing transnational law on the political authority of states as creators and guarantors of law. And insofar as much transnational law is being developed out of international law, it relies also on the traditional sources of legitimate authority for international law. So its claims to legitimate authority are linked to the established ways in which the authority of states is extended into the international arena through the general principle of the ‘consent’ of states, expressed in treaties and conventions and especially in the setting up of international agencies on the basis of these ‘consensual’ instruments.

The fragility of such ideas of consent, as well as the uncertainty or variability of states’ political authority when viewed in terms of the empirical conditions surrounding it, was noted earlier. We could visualise the political authority available to transnational law as an extremely thin, fragile arm stretched out from states over a vast transnational realm. This extended, state-derived political authority surely has little connection with the collective life conditions (the cultural experience) of most of the communal networks that make up the regulated population of transnational law.

Consider, for example, the international economic law of the World Trade Organization which certainly affects the economic and other circumstances of the members of many global communal networks. We could visualise this law as suspended far above them, engulfed in clouds of international diplomacy, its remote political authority hardly visible from below. It surely gains such legitimate authority as it has not from the global populations of economic actors it affects, but from the overstretched scaffolding of the notional agreement of states applying their own political authority, an authority itself mainly appealing to some democratic validation by their citizenry.\textsuperscript{77}

What guarantees these fragile structures of political authority supporting transnational law is, above all, the influence of particular dominant states or groups of states. Just as configurations of power in international relations affect the practice and experience of authority in international

\textsuperscript{77} See J Bacchus, ‘A Few Thoughts on Legitimacy, Democracy, and the WTO’ (2004) 7 Journal of International Economic Law 667 (defending WTO legitimacy as an extension of the democratic legitimacy of nation states, but recognising the WTO’s remoteness from the knowledge and understanding of those it regulates).
law, so they will do so for transnational law insofar as international law and international legal agencies contribute to its development. But the use of this ‘great power’ influence, itself gradually evolving and changing shape, cannot in itself produce legitimacy for transnational law. It would only do so to the extent that a centralised sovereign power was accepted to direct transnational legal development. Then transnational law could be unified as a monistic, hierarchical structure, no doubt involving structures of delegation, federalism, complementarity and subsidiarity infinitely more complex and elaborate than anything yet experienced.

In such conditions John Austin’s theory of law, centred on a single, common and determinate law-making sovereign habitually obeyed, the delegation from it of law-making powers of command, and the universal association of law with sanctioning processes might come into its own again. But these conditions are presently inconceivable. No world state is in process of forming to provide reliable universal political authority for transnational law.

But a conception of legitimate authority for transnational law as being produced ‘from below’ is also inadequate because of the nature of transnational legal pluralism. While communal networks might produce regulation for themselves that enjoys legitimate authority, they cannot produce regulation that can adequately govern their relations with other networks by this means. This might seem to throw the inquiry back towards the juristic approaches, mentioned earlier, that invoke ‘overarching’ principles to co-ordinate different regimes of transnational regulation. But at this stage in the development of transnational regulation, when its overall shape and scope is still unclear and its development continues rapidly and to some extent unpredictably, it would be a mistake (and perhaps fruitless) to follow such approaches.

They involve trying to apply established juristic ideas to a world that cannot be confined within such ideas, because the forces shaping it are only partly informed by typical Western juristic assumptions and preconceptions as to what makes regulation authoritative and legitimate.

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78 Which is certainly not to say that international law has no reciprocal influence on these relations: see e.g. C Reus-Smit, ‘The Politics of International Law’ in Reus-Smit (ed), The Politics of International Law (Cambridge, Cambridge University Press, 2004) 14–44.


80 Austin 1885, above n 3, Lectures V and VI.
VI. COPING WITH LEGAL PLURALISM

The problem comes down to a choice of strategies to address the problems of legal pluralism – that is, to navigate normatively in a realm consisting not only of inconsistent regulatory regimes but also of regimes founded on differing and sometimes incompatible principles of authority and legitimacy. These differences and incompatibilities reflect the different cultures of communal networks, and the different kinds of authority (such as those conceptualised by Weber in terms of their bases of legitimacy) that can be claimed and accepted.\(^{81}\) There may be at least four such distinct strategies.\(^{82}\)

- First, a broadly *monistic* approach may not try to organise all transnational law into a single system, which most jurists now see as impossible; it may rather invoke ‘overarching’ procedures or principles to police the limits of plurality. As suggested above, this approach is premature because of the impossibility of justifying any particular ‘overarching’ devices except by stipulation.

- A second approach is *agnostic* about the nature of transnational law, and avoids specifying any criterion of legitimate transnational law in general. It merely recognises what counts as authoritative regulation for a particular regime in a particular context. This surely represents much current practice in transnational law. Regulation in particular spheres exists in indeterminate relation with other kinds of regulation; their relative authority is left to be decided pragmatically only when conflicts arise.

- A third, *statist*, approach judges as ‘law’ regulatory regimes beyond the reach of the political authority of the state on the basis of criteria modelled on those applied to recognise state law, or insofar as these regulatory regimes can be seen as alternatives to or extensions of state law. But this approach is surely unsatisfactory as

\(^{81}\) Perhaps, for Weber, authority *claims*, as such, are all of a uniform character; what differs is the basis on which legitimacy may be conferred on such claims. I am grateful to Maksymilian Del Mar for this point. In the transnational regulatory context, however, it may be useful to assume, as an analytical strategy, the possibility of different types of authority claims being made and accepted. The characteristics of charismatic authority discussed earlier in this chapter suggest that it can embrace a variety of ways of addressing the regulated.

long as it remains tied to the model of state law and confines the
imagination in this way, deterring it from recognising that trans-
national law (while it contains much state law and state-derived
law) also contains entirely new ideas of what might be legally
significant.

- A final approach would accept a genuine legal pluralism – perhaps,
in a sense, a supra-juristic legal pluralism. This does not mean that
it is a juristically irrelevant approach but merely that it searches for
different modes of analysis beyond established Western forms of
juristic thought. It will focus most sharply on identifying and
studying socio-legally the full extent of regulatory authority as
practised and experienced in the transnational realm.

This fourth approach recognises that the practice and experience of
authority can take very different forms in different contexts (in different
communal networks and their cultures), that it is useful to think of a
continuum or scale of legality (regulation might be more or less legal
judged against different criteria adopted in different contexts), and that no
uniform principles can decide where legitimate authority lies in many
cases of conflict between different transnational regulatory regimes (there
cannot be comprehensive, general principles of transnational conflicts of
laws). Even seemingly established structures of legal authority governing
the relations of state law, intra-state law and international law may seem
disturbed when the full range of criteria and conditions of legitimacy is
examined in socio-legal perspective.

This may seem to suggest only hopelessly negative conclusions: that
the question of transnational legal authority cannot be addressed, that the
situation is too chaotic with too many variables in play, and that too
much uncertainty exists both about the present and the future. But it
should not be concluded that progress is impossible. New methods are
necessary and, for the moment, these should be methods of empirical
socio-legal inquiry – but methods that aim at finding ways back towards
addressing practical juristic questions.

First, existing hierarchies of transnational legal authority created by
state and international law need to be examined, in terms of the
socio-legal conditions that guarantee or undermine these hierarchies. This
is necessary to make a realistic assessment of the shape, quality and
forms of political authority that are available to shape a transnational
legal order.

Second, the conditions in which regulation is developed, enforced and
seen as authoritative in communal networks need further study beyond
the extensive existing literature on ‘living law’, social norms, private
legal systems, transnational private law, and transnational standard-setting. This is necessary to examine potential sources of social legitimacy for the various kinds of transnational regulation taking shape.

Third, further work can be done on processes of negotiation and conflict-resolution between communal networks, and on the conditions for effective communication between legal cultures. This is necessary to explore the possibilities for creating institutional frameworks for managing the co-existence of transnational regulatory regimes.

Finally, the idea of ‘law’ needs to be shorn of definitional criteria that tie it permanently to state law forms and prevent the possibility of finding phenomena that might usefully be recognised for various purposes as legal regulation existing entirely outside the scope of municipal or international law. Some minimal provisional working model of law as institutionalised doctrine – normative doctrine created, applied or enforced (to some extent) by distinct agencies (of some kind) – might be enough to enable ongoing negotiations of potential transnational legal authority to take place.

In some respects, progress in establishing transnational legal authority will surely come through the slow building of reliable hierarchies of coercive authority (voluntas) for transnational law through efforts to strengthen the political authority supporting international law and the legitimacy of the independent authority of states. In other respects, it will come by building processes of communication, negotiation and reasoning across transnational communal networks to develop bodies of legal principle that, if not uniform between these networks, can at least become increasingly intelligible across and between them. By this means something that could be recognised as the ratio (reason and principle) of transnational law may also be slowly developed. As in all law,83 the reliable combination of voluntas and ratio will be what finally creates a convincingly legitimate authority for transnational law.