Law and Recognition – Towards a Relational Concept of Law

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5.1 Introduction

Law is plural. In all but the simplest situations multiple laws overlap – national laws, subnational laws, supranational laws, non-national laws.

Our jurisprudential accounts of law have mostly not taken this in. When we speak of law, we use the singular. The plurality of laws is, at best an afterthought. This is a mistake. Plurality is built into the very reality of law.

We no longer need a concept of *law*. We need a concept of *laws*.

This chapter cannot yet provide this concept; it can serve only to develop one element. That element is recognition. Recognition is amply discussed in the context of Hart's rule of recognition, but this overlooks that recognition matters elsewhere, too. My suggestion is that we accept not one but two rules of recognition in the concept of law. One, well-known, is the rule of *internal* recognition as developed by H. L. A. Hart – the idea that a developed legal system requires its recognition as law by its officials. The other, much ignored but equally important, is the rule of *external* recognition – the idea that law is law insofar as it is recognised externally by other legal systems. The rule of internal recognition is an example of a secondary rule. The rule of external recognition is of a different type. It is a tertiary rule.¹ Hart suggested that a legal system is

* This is an attempt to explore an idea hinted at earlier: Ralf Michaels, 'Global Legal Pluralism' (2009) 5 *Annual Review of Law and Social Science*, 243–62, 254–55; Ralf Michaels, 'What is Nonstate Law? A Primer', in Michael Helfand (ed.), *Negotiating State and Non-State Law: The Challenges of Global and Local Legal Pluralism* (Cambridge: Cambridge University Press, 2015), pp. 41–58, pp. 55–58. Thanks for helpful comments are due to Matt Adler, Karen Knop, David Nelken and Nicole Roughan, as well as workshop participants at Singapore and Edinburgh.

¹ For a similar use of tertiary rules, see Joel P. Trachtman, 'The Constitutions of the WTO' (2006) 17 *European Journal of International Law*, 623–46, 627; and Joel P. Trachtman, *The Future of International Law: Global Government* (Cambridge: Cambridge University

not complete unless it has, in addition to primary, also secondary rules. My suggestion is that, under conditions of legal pluralism, a legal system is not complete without such tertiary rules.

The emerging concept of laws is a positivist one in a strong sense. It assumes that the definition and the creation of law are themselves operations by the legal system. In this sense, the concept of law is autopoietic. However, in emphasising that legal systems mutually constitute each other, the concept also includes an allopoietic aspect. While the law at large is autopoietic, individual legal systems are not; they mutually constitute each other through mutual recognition. What follows is an attempt to account for this in legal theory.

5.2 Concept of Law and the Challenge from Legal Pluralism

Legal theory has long pondered questions on the nature of law; in fact, such questions may well constitute the discipline's core. It is not surprising that no consensus has emerged. Questions as to the nature of law are never just definitional or ontological questions; they carry with them ideas of legitimacy, they serve a purpose, and they are always colored by the experience of the time and place in which they are proposed.² If we saw, in the second half of the twentieth century, a sharp debate between positivism, natural law, and sociological definitions, then this debate mirrored a political debate over who should make relevant decisions – the legislator, society, or some transcendent entity.

These were mostly Western debates, and they played out within the Western nation state, where the idea that law was essentially the law of a state was hardly challenged. This was less clear in non-Western systems, in which state law was less effective, and in which customary and religious laws, whether or not they were recognised, played a greater role in people's lives. It was largely against these experiences that the modern

Press, 2013), p. 272, pp. 286–87. Relatedly, Thomas Schultz distinguishes two types of “relative legality” (where “relative legality” is defined through a rule of recognition: Thomas Schultz, ‘Secondary Rules of Recognition and Relative Legality in Transnational Regimes’ (2011) *American Journal of Jurisprudence*, 59–88, 83–84, revised in Schultz, *Transnational Legality* (Oxford: Oxford University Press, 2013), pp. 83–84

² See Hermann Kantorowicz, *The Definition of Law* (Cambridge: Cambridge University Press, 1958); Julie Dickson, ‘Towards a Theory of European Union Legal Systems’, in Julie Dickson and Pavlos Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford: Oxford University Press, 2012), pp. 25–53, pp. 26–30.

concept of legal pluralism was first developed.³ Legal pluralism, in a definition that generalises from several definitions, describes a situation in which two or more laws (or legal systems) co-exist in (or are obeyed by) one social field (or a population or an individual).⁴ In other words, three elements characterise a situation of legal pluralism.

1. Not all law is state law: some law does not emerge, directly or indirectly, from the state. Put differently, some non-state normative orders deserve to be called law.
2. There is necessarily a plurality of laws: law is not one, but many.
3. These different laws interact; there are overlaps and conflicts between laws that cannot be resolved through appeals to either hierarchy or objective delimitation.

Legal pluralism presents a dual challenge to legal theory: what counts as law, and how we account for plurality and interaction. Does this require a new concept of law?⁵ Or even different concepts of law?⁶

5.2.1 *The Definition of Law – An Old Question*

Although both of these challenges are challenges to state law positivism, we can immediately see that the first question is in fact not novel for legal philosophy. Whether there is such a thing as non-state law correlates with a core concern in legal theory for millennia – the question of what

³ I speak here of the concept of legal pluralism as it emerges especially from legal anthropology; for a recent overview, see John Griffiths, 'Legal Pluralism', in James Wright (ed.), *International Encyclopedia of the Social & Behavioral Sciences*, 2nd ed., Volume 13 (Amsterdam/Boston: Elsevier, 2015), pp. 757–61. Two other traditions of legal pluralism, developed within and for Western law, are partly different. One is the sociological idea of a law born in society, developed especially in Eugen Ehrlich, *Grundlegung der Soziologie des Rechts* (Duncker & Humblot: Berlin, 1913), English translation 1936; and Georges Gurvitch, *Sociology of Law* (London: Kegan Paul, 1947). Another, focusing on institutions, is Santi Romano's; see Filippo Fontanelli, 'Santi Romano and L'ordinamento giuridico: The Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Legal Relations' (2011) 2 *Transnational Legal Theory*, 67–117.

⁴ Generalised from Sally Engle Merry, 'Legal Pluralism' (1988) 22 *Law & Society Review*, 869–96, 870.

⁵ Cf. Roger Cotterrell, 'Does Global Legal Pluralism Need a Concept of Law?', in Upendra Baxi, Christopher McCrudden, and Abdul Paliwala (eds.), *Law's Ethical, Global and Theoretical Contexts – Essays in Honour of William Twining* (Cambridge: Cambridge University Press, 2015), pp. 303–19.

⁶ David Nelken, 'Using the Concept of Legal Culture' (2004) 29 *Australian Journal of Legal Philosophy*, 1–26, 2.

constitutes law. Saint Augustine's suggestion that bands of thieves are little kingdoms provided a precursor to our current discussions on legal pluralism. In legal theory, the idea that law does not have to be state law has a long pedigree. It exists in ideas of natural law and, more importantly for the study of legal pluralism, in ideas of customary law. In this sense, Griffith's vigorous plea that legal pluralism is a reality and that non-state legal orders exist regardless of recognition by state law was provocative, but not for legal theory.

One problem with any concept of law that goes beyond state law is that it becomes hard to draw boundaries. One may well end up where Melissaris does, suggesting that law must include clubbers queuing patiently at a bouncer's order.⁷ In such expanded definition, law no longer has any distinctive value. This is one reason why proponents of legal pluralism have downplayed the importance of whether or not a normative order is called law.

If anything, it is almost too easy to accept a concept of law that is independent from the state. Simon Roberts in particular has pointed to the risks in such definitions.⁸ His main argument is that the way we think of law *today* is, knowingly, or unknowingly, influenced by the reality of modern law, which is predominantly state law. As a consequence, we define non-state normative orders as law once they show a certain similarity with state law. Griffith's anti-imperialist project becomes itself imperialist: in defining non-state normative orders as 'law', we downplay their otherness, we impose a name on them that is not necessarily appropriate: 'Law, long so garrulous about itself, is now, in its contemporary enlargement, graciously embracing others in its discourse, seeking to tell those others what they are.'⁹

5.2.2 *Plurality and Interaction as a New Question*

In marked contrast, the second and third challenge from legal pluralism, namely the plurality of, and interaction between, legal systems, were for a long time not truly analyzed. Almost without exception, jurisprudence

⁷ Emmanuel Melissaris, 'The More the Merrier? A New Take on Legal Pluralism' (2004) 13 *Social & Legal Studies*, 57–79, 75.

⁸ Simon Roberts, 'Against Legal Pluralism – Some Reflections on the Contemporary Enlargement of the Legal Domain' (1998) 42 *Journal of Legal Pluralism*, 95–106; and Simon Roberts, 'After Government? On Representing Law Without the State' (2005) 68 *Modern Law Review*, 1–24.

⁹ Roberts, 'Against Legal Pluralism' (n. 8), 98.

has treated law as a singular. The question goes to the nature of 'law' as though there was only one.

True, jurisprudence has long grappled with what can be called an *asymmetric* plurality of normative orders, and with friction between these orders. This concerns the seemingly eternal debate over the relation between law and morality. It also concerns discussion over relations between official law and customary law, with different hierarchies: Hart and Kelsen both viewed customary as imperfect, more primitive versions of state law; Eugen Ehrlich and Lon Fuller, by contrast, suggested that customary law (or what they call, respectively, 'living law' (Ehrlich) or 'implicit law' (Fuller)) is more real than state law.¹⁰ However, all these debates concern the asymmetric relation between 'normal' law (state law) and other normative orders. They are not what we would need – namely, accounts for relations between laws of equal standing, or irrespective of standing.¹¹ A true jurisprudence of plurality is only slowly emerging.

5.2.3 *The Sequencing of the Questions*

We have, then, an old and rich jurisprudence of non-state law, and an emerging jurisprudence of plurality. But both stand in a rather unproductive order of sequencing. The common pluralist argument goes like this: first, we find that there are other normative orders than state law; then, as a consequence, we have to address the challenges arising from the ensuing pluralism. First we define what qualifies as a legal order, then we ask how that order relates to other orders. The plurality of law becomes, in this conception, a mere afterthought to the concept of law. It concerns the way in which laws operate, but not their nature itself.

This sequencing is problematic. Like the liberal view of the primacy of the individual over society, it posits that legal orders exist prior to their interaction with other laws. This seems insufficient to grasp the reality of legal pluralism with its necessarily overlapping legal orders. Such interlegality cannot be an afterthought; it is engrained into the very

¹⁰ Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. W. L. Moll (Cambridge, MA: Harvard University Press, 1936); Lon L. Fuller, *Anatomy of the Law* (New York: Praeger, 1968), p. 67ff; cf. Gerald J. Postema, 'Implicit Law' (1994) 13 *Law & Philosophy*, 361–87. See also Sanne Taekema in this volume, *The Many Uses of Law. Interactional Law as a Bridge between Instrumentalism and Law's Values*.

¹¹ Antony Allott, *The Limits of Law* (London: Butterworths, 1980), pp. 139–60.

nature of legal orders itself. A proper understanding of law today needs to grapple with this very fact. It must work interlegality into the concept of law itself.

This is what I suggest in this chapter. The three challenges from legal pluralism – non-state law, plurality and interaction – are related. In order to assess any one of them, we must consider the other ones as well. We will not get an adequate concept of law beyond the state unless we address inter-relations between legal systems at the same time. These inter-relations are not an afterthought to the concept of law; they are constitutive.

5.3 Two Types of Rules of Recognition

5.3.1 *Non-State Law and the Internal Rule of Recognition*

The idea of a rule of recognition was first proposed by H. L. A. Hart.¹² It emerges from his insight that legal orders do not consist merely of primary rules (commands); they require secondary rules that determine how laws are made and changed, and so forth. Amongst such secondary rules, the rule of recognition may be the most important one, because it determines what does and does not count as law.

Hart's rule of recognition rests on an internal point of view, and for this reason it may make sense to call it a rule of *internal* recognition. For Hart, the rule is a social fact; it describes the practical attitude of officials within the legal system. Other legal theories tend to place such rules within the law itself: for systems theory, secondary rules are those rules with which the legal system itself creates its own continuity and adaptability.

Hart developed his concept against the idea of state law, and it fits here best, even though it is not necessarily so confined.¹³ When Hart discusses customary law, he is more ambivalent. On the one hand, custom could be viewed as a system of rules, though only primary, not secondary rules, a more primitive kind of law.¹⁴ On the other hand, only the addition of secondary rules can 'be considered a step from the pre-legal into the legal world; since each remedy brings with it many elements that permeate law: certainly all three remedies [i.e. a rule of recognition, rules of change,

¹² See H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), especially at pp. 94–95, pp. 100–10 (pp. 97–107 in the 1st ed. 1964).

¹³ Roberts, 'After Government?' (n. 9), 10. ¹⁴ Hart (n. 13), pp. 91–94.

and adjudication] are enough to convert the régime of primary rules into what is indisputably a legal system.¹⁵ This would suggest that a system of mere primary rules does not constitute law.¹⁶

Hart, however, suggests that so-called primitive legal systems without such secondary rules are exceedingly rare, implying that even customary law can usually qualify as a system of law.¹⁷ Indeed, it has been argued that his criteria can be extended into non-state laws.¹⁸ Insofar as law rests on an internal point of view, such a point of view is not confined to state law – one may even say that it is especially in non-state laws with their weaker enforcement mechanisms that an internal sense of obligation towards the law will frequently be present.¹⁹ Insofar as Hart provides for a special role of officials, such officials need not be state officials – they could also be, as Cotterrell has pointed out, religious priests or tribal chiefs.²⁰ And, most importantly for this purpose, the law-making power of such priests and chiefs may well rest on a rule of recognition, too.

Thus Hart might have had a response to the first of the challenges from legal pluralism elaborated earlier: non-state orders can be law. By contrast, it appears that he would not have accepted the second and third challenge. A plurality of laws is almost completely absent from Hart's theory, and the idea of overlapping interconnected orders is absent as well.²¹ More precisely: although Hart does account for the possibility of normative conflict (e.g. between law and custom), he resolves such conflicts on the basis of a priority of state law.²² Essentially, Hart's system of law

¹⁵ Hart (n. 13), p. 94.

¹⁶ Thus the interpretation by Mehrdad Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart' (2011) 21 *European Journal of International Law*, 967–95, 993.

¹⁷ Hart (n. 13) p. 291, note to p. 91. Allott forcefully emphasised the same point, based on actual experience: Allott (n. 11), pp. 49–67.

¹⁸ See, e.g., Michael Helfand, 'The Persistence of Sovereignty and the Rise of the Legal Subject', in Michael Helfand (ed.), *Negotiating State and Non-State Law: The Challenges of Global and Local Legal Pluralism* (Cambridge: Cambridge University Press, 2015), pp. 307–32; Detlef von Daniels, 'Is Positivism a State-Centered Theory?', in Kenneth Himma (ed.), *Law, Morality, and Legal Positivism: proceedings of the 21st World Congress in Philosophy of Law and Social Philosophy*, Vol. 3 (Stuttgart: Franz Steiner Verlag, 2004), pp. 19ff.

¹⁹ See Helfand (n. 19), pp. 307, p. 321ff.

²⁰ Roger Cotterrell, *Law, Culture and Society* (Aldershot: Ashgate, 2006), p. 37.

²¹ Jeremy Waldron, 'Legal Pluralism and the Contrast between Hart's Jurisprudence and Fuller's', in Peter Cane (ed.), *The Hart-Fuller Debate in the Twenty-First Century* (Oxford: Hart Publishing, 2010), pp. 135–55, p. 145.

²² This aspect is underappreciated, in my view, in Helfand (n. 19), pp. 327–30.

was ordered in a pyramidal fashion, based on one rule of recognition only.²³ Even if customary law can qualify as law, the relation between state law and custom remains, for Hart, asymmetric.²⁴

5.3.2 *Legal Pluralism and the Rule of External Recognition*

With all the (deserved) attention that the rule of recognition has received, one can be excused for overlooking the fact that the idea of recognition does not appear exclusively in the context of the rule of recognition. Hart must have been aware of this. Before introducing the rule of recognition, Hart discusses the importance of recognition in the relation between law and custom:

The first [issue] is whether 'custom as such' is law or not. . . . [C]ustom is law only if it is one of a class of customs which is 'recognized' as law by a particular system. The second issue concerns the meaning of 'legal recognition'. What is it for a custom to be legally recognized?²⁵

Is custom thus non-law until recognised by the state's institutions?²⁶ Or is custom a separate system of law that acquires normative relevance for the state the moment it is recognised, as the quote seems to suggest? There seems to be no need to resolve this issue for Hart because for him not much hinges on it. His model seems to suggest that the recognition of custom is not much different from the normal operation of the rule of recognition. Custom becomes law in one of two ways. Either, custom is treated as fact, and the law creates legal rules that mirror these facts. In this case, we can talk of deference. Or, custom is treated as law that is

²³ Cf. Nick Barber, 'The Rechtsstaat and the Rule of Law' (2003) 53 *University of Toronto Law Journal*, 443–54, 450–51. But see, for a hint of the idea of two different types of recognition (called 'original' and 'derivative') H.L.A. Hart, 'Kelsen's Doctrine of the Unity of Law,' in Hart, *Essays in Jurisprudence and Philosophy* (1983) pp. 309–43, pp. 341–342.

²⁴ See Waldron (n. 23), pp. 141ff. Essentially, this appears to be also the position of Joseph Raz, *Why the State* (in this volume), although he remains ambiguous. On the one hand, the state is said to have a special role vis-à-vis other normative systems based on two factors: (1) an extensive responsibility within its domain, and (2) freedom from external legal constraints. On the other hand, Raz concedes that both factors can be claimed also by non-state laws. As for extensive responsibility within its domain, Raz makes it clear that this is contingent on what the domain is, which makes it possible to think of, for example, religious law as extensively responsible within the domain of members of the religion. As for freedom from external legal constraints, see id. at n. 13.

²⁵ Hart (n. 13), pp. 44–45. ²⁶ Cf. Hart (n. 13), pp. 46–48.

subordinate to state law. In this case, we can talk of delegation.²⁷ In either sense, the recognition that is accorded to custom is necessary to turn custom into fully fledged law. What is important for my purposes, however, is that recognition is distinct from absorption. Custom is not absorbed into the law; it is merely given relevance through recognition. We can call the recognition by a legal order of another existing order external recognition, to distinguish it from internal recognition. Internal recognition describes the relation between officials and the law. External recognition describes a relation between one law and another.

A powerful objection has been made against such a rule of external recognition from the camp of legal pluralists. The idea that custom becomes law only through an act of recognition has been virulently opposed by legal pluralists, most prominently perhaps by John Griffiths.²⁸ Griffiths attacked what he called legal centralism, the idea that only state law is law. Importantly, Griffith's critique extended also to scholars arguing that non-state orders could be law, as long as these scholars subordinate such non-state orders to the state and make it contingent on recognition by the state, as happened especially with religious and customary laws in colonial contexts. Such contingent acceptance of law, Griffiths suggested, creates only 'weak' legal pluralism, which is no true pluralism at all; it is a mere subcategory of legal centralism.²⁹ In this sense, indeed not much hinges on the distinction.

We can see how Griffith's criticism concerns both challenges from legal pluralism discussed earlier. As to the conceptual challenge, he rejects the view that all law must be state law. As to the plurality/interaction challenge, he rejects a definition of law that must ultimately be uniform: 'the very notion of "recognition" and all the doctrinal paraphernalia which it brings with it are typical reflections of the idea that "law" must ultimately depend from a single validating source.'³⁰

The criterion of recognition that Griffiths rejects here is external recognition, the recognition by the state. When he suggests that '[l]egal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion', we see that his rejection is both conceptual/empirical and

²⁷ For delegation and deference, see Ralf Michaels, 'The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism' (2005) 51 *Wayne Law Review*, 1209–59, 1233–35.

²⁸ John Griffiths, 'What Is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law*, 1–55.

²⁹ *Ibid.*, 5–8. ³⁰ *Ibid.*, 8.

normative. Conceptually/empirically, Griffiths suggests that legal pluralism (in the strong sense) is a fact³¹ – in other words, that non-state laws exist independently of recognition. Normatively, the rejection of a requirement of external recognition is based on the rejection of an ideology, namely that of legal centralism and of the superiority of state law over non-state law.

Griffiths's emphasis that the character of law should not depend on recognition by the state has been hugely influential within the literature on legal pluralism. It has gained new support under conditions of globalisation, which brought to the mainstream a general scepticism about the central role of states. Once we realise that the normative and logical primacy of the state is not a given, we also realise that a definition of law that depends on recognition by the state is deeply suspicious. The problem has been what should come in its place. These problems, amongst others, have led even Griffiths himself to give up the emphasis on legal pluralism and to define law now as a mere dimension of continuous variation in the degree of differentiation in social control.³²

5.3.3 *The Reciprocity of External Recognition*

The suggestion that there can be both a rule of internal and a rule of external recognition suggests that two rules of recognition can operate at the same time. In Hart's analysis, the only reason that the external recognition by courts of custom as law is effective is because the courts themselves are empowered through an internal rule of recognition. The same combination can be made to justify the effectivity of other norms than those of custom, for example EU law. For EU law to be valid in the UK, it is necessary first that Parliament was entitled to enact the 1972 European Communities Act – an application of the internal rule of recognition. And then it is necessary that this Act deferred power to EU institutions and thereby turned EU rules into valid law in the UK – an act of external recognition.³³

³¹ Ibid., 4.

³² John Griffiths, 'The Idea of Sociology of Law and its Relation to Law and to Sociology', in Michael Freeman (ed.), *Law and Sociology* (Oxford: Oxford University Press, 2006), pp. 49–68, p. 63f. Similarly, William Twining, 'Normative and Legal Pluralism' (2010) 20 *Duke Journal of Comparative & International Law*, 473–518.

³³ Around the time this chapter was completed, the United Kingdom declared its decision to withdraw from the EU. It is worth noting that the questions discussed here play a role also as to whether this exit is governed by UK law or EU law. See, e.g., Donal Coffey,

There is a problem with this explanation, however. The suggestion that EU law becomes law only if and insofar as it is recognised by UK law appears implausible. It clashes with the self-proclaimed nature of EU law as an autonomous legal order. It clashes with the fact that the EU has several member states, each of which may defer in slightly different ways to the EU. It clashes with the fact that many officials have a practice of complying with EU law directly. And, especially, it clashes with the self-proclaimed superiority of EU law. From the perspective of EU law, it is national law that achieves its effectivity only through deference from EU law.

This problem has been discussed from the perspective of legal theory by Neil MacCormick.³⁴ MacCormick suggests that we should think of not one but two rules of recognition, one for UK law and one for EU law. In this sense, MacCormick responds to the definitional challenge from legal pluralism by generalising Hart's rule of recognition. A legal system remains defined internally. Indeed, he emphasises that it is internal recognition that matters:

No state's constitution is as such validated by that of any other, nor is it validated by Community law. For each state, the internal validity of Community law in the sense mandated by the 'supremacy' doctrine results from the state's amendment of constitutional and sub-constitutional law to the extent required to give direct effect and applicability to Community law. On the other hand, the Community's legal order is neither conditional upon the validity of any particular state's constitution, nor upon the sum of the conditions that the states might impose, for that would be no Community at all. It would amount to no more than a bundle of overlapping laws to the extent that each state chose to acknowledge 'Community' laws and obligations. So relations between states inter se and between states and Community are interactive rather than hierarchical.³⁵

External recognition, thus, is not necessary for a legal system's validity 'as such': 'where systems overlap, neither is necessarily a part of the ultimate reason for the validity of the other, nor do we have to presuppose some common reason for, or ground of, validity external to them both.' Hart had made a similar suggestion earlier: the mere fact that the

Brexit and Art. 50: The Key lies in Luxembourg, <http://verfassungsblog.de/brexit-and-art-50-the-key-lies-in-luxembourg>.

³⁴ Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review*, 1–18.

³⁵ Neil MacCormick, *Questioning Sovereignty* (Oxford: Oxford University Press, 1999), pp. 117–18.

UK would pass a statute that validates Soviet law would merely create a purported validation; from the perspective of Soviet officials, the validity of Soviet law would still derive from an internal rule of recognition.³⁶

However, this seems incomplete. EU law is law in an objective sense, independent of its recognition. However, it is law for UK law only if, and only because, it is recognised by UK law. Similarly, UK law is law in an objective sense, independent of its recognition. However, it is law for EU law only if, and only because, it is recognised by EU law. At least in their inter-relation, recognition therefore matters.

5.3.4 *Remaining Problems*

In some ways MacCormick's argument mirrors Griffiths's argument: non-state law is law independent of its recognition. In this, both Griffiths and MacCormick follow the sequencing critiqued earlier: first they define what counts as a legal system; then they analyze how the legal systems interact. Indeed, MacCormick compares EU law with custom.³⁷

The rejection of a hierarchical relation between state law and other law has two important consequences. First, conflicts between systems become irresolvable, at least in a final and universal way. Once hierarchy is lost, we lose ultimate resolution. MacCormick, in his earlier article, hopes that such conflicts will be rare and can be dealt with, with the consequence that, usually, 'the systems can remain in overlapping relations without any necessary assumption of sub-or superordination of one to the other as a totality.'³⁸ Later he becomes less sure of this situation and suggests instead that 'international law functions as a common ground of validity both of member-state systems and of Community law, neither being therefore a sub-system of the other, but both cohering within a common legal universe governed by the norms of international law.'³⁹

MacCormick calls his solution, in which international law provides the hierarchically superior umbrella organising conflicts between EU law and national law 'pluralism under international law'. He juxtaposes it with what he calls 'radical pluralism', a situation in which no such superior order exists and in which, for him consequently, 'not every legal

³⁶ Hart (n. 23), p. 319. ³⁷ MacCormick (n. 36), 14–15; and MacCormick (n. 37), p. 114.

³⁸ Ibid, 8. ³⁹ MacCormick (n. 37), pp. 116–17.

problem can be solved legally. The problem in principle is not that of an absence of legal answers to given problems, but of a superfluity of legal answers.⁴⁰

This juxtaposition between 'pluralism under international law' and 'radical pluralism' replicates Griffiths's juxtaposition, discussed earlier, between 'weak' and 'strong' legal pluralism. This means, also, that MacCormick's solution would not qualify, under Griffiths's analysis, as true pluralism in a meaningful sense – it would be a kind of legal centralism. MacCormick, by characterising his solution as one of legal monism, seems to concede as much. However, the solution of a 'pluralism under international law' may very well be just wishful thinking. In the *Kadi* case,⁴¹ decided by the European Court of Justice not long after MacCormick developed his solution, it turned out that international law did not provide a very helpful basis to resolve conflicts between EU law and national law. The reason was, essentially, that the same problem of mutual interaction reappeared on a higher sphere: EU law and international law both claimed supremacy.⁴²

A second consequence is that, on MacCormick's account, the nature of external recognition becomes unclear. If we define legal orders prior to their interaction with other legal orders, then external recognition is no longer a constitutive but an accommodating operation – an operation to regulate the inter-relations between legal systems. Remarkably, in MacCormick's later account, the recognition accorded by UK law to EU law, or that accorded by EU law to UK law, so central to the early development of his theory, have become all but irrelevant. In reality, the recognition between legal systems is now governed by a higher system, namely international law.

However, even in a system of strong legal pluralism, the rule of external recognition is weakened. As long as the rule of external recognition remains within each legal system, this creates a decentralised system: UK law determines its interactions with EU law from its own perspective; EU law determines its interactions with UK law from its

⁴⁰ Ibid., 119.

⁴¹ European Court of Justice (Grand Chamber), *Yassin Abdullah Kadi and Al Barakaat International Finance v. Council of the European Union* joined cases C-402/05P and C-415/05P, Judgment, 3 September 2008.

⁴² For good discussions, see Gráinne de Búrca, 'The EU, the European Court of Justice and the International Legal Order after Kadi' (2010) 51 *Harvard International Law Journal*, 1–49; Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010), pp. 176–87.

own perspective. Nico Krisch has called rules like this ‘interface norms’.⁴³ For him, recognition (or ‘conditional’ recognition) is only one of several such interface norms—another example is a ‘taking into account’ norm and the European Court of Human Right’s approach of equivalence. Paul Berman has listed a whole number of such techniques.⁴⁴ These remain techniques, however; they do not go to the essence of legal theory, and they do not go to the nature of law itself.

Detlef von Daniels has attempted to give a more legal-theoretical account of the phenomenon, but has thereby run into new troubles. What Krisch called interface norms is, for von Daniels, dealt with by so-called linkage rules.⁴⁵ He helpfully suggests that such rules are neither primary nor secondary rules in a Hartian sense but instead constitute a third set of rules,⁴⁶ though not of lesser importance than those others.⁴⁷ For von Daniels, such rules are not a necessary but a contingent (and indeed frequent) element of the law;⁴⁸ and indeed ‘the concept of linkage rules is an indispensable component of any descriptive theory that is more than a mere interpretation of one particular practice and has overcome Kelsen’s epistemological limits [of monism].’⁴⁹ However, von Daniels describes these linkage rules as ‘ambiguous.’ Some of them, he suggests (like Krisch) form part of the internal point of view of a particular legal system.⁵⁰ Others, however, can be viewed only from an external point, because it is not up to one legal system to determine how another legal system responds to its acts of recognition. Von Daniels suggests that linkage rules are ‘Janus-faced’: they concern both the treatment of foreign law and the treatment by foreign law. Here, the juxtaposition between an internal and an external point of view reflects that between strong and weak legal pluralism.⁵¹

5.4 The Rule of External Recognition Explored

Both problems are not just problems of theory; they are also problems of practice. The first problem, the irresolvability of conflicts, is a problem

⁴³ Krisch (n. 42), pp. 285–96.

⁴⁴ Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: Cambridge University Press, 2012), pp. 152ff.

⁴⁵ Detlef von Daniels, *The Concept of Law from a Transnational Perspective* (Burlington, VT/Farnham: Ashgate Publishing, 2010), pp. 158–66.

⁴⁶ Ibid., p. 160f. ⁴⁷ Ibid., p. 156. ⁴⁸ Ibid., p. 165. ⁴⁹ Ibid., p. 161.

⁵⁰ Ibid., p. 164.

⁵¹ It must remain for a different project to discuss how the concept of laws proposed here transcends the difference between an internal and an external position.

of private international law; and I want to largely ignore it here. The second problem, the unclear nature of recognition, closely parallels a problem of public international law, in particular in the definition of states. Given that states remain the most important subjects in international law, this definitional problem is quite central. And given that the recognition of a state comes with the recognition of sovereignty, and therefore lawmaking power, the requirements for being a state and the requirements for law run parallel structures (which is not to say that they need at all have the same criteria). This suggests that an excursion into the public international law of statehood could be beneficial.

5.4.1 *Recognition of States in International Law*

The definition of a state has substantive criteria and a contested formal criterion. As substantive criteria, the Montevideo Convention on the Rights and Duties of States 1933, in its Article 1, formulated four: a territory, a population, a structure of government, and the ability to enter into relations with other states.⁵² These criteria are still often named, though they have become more doubtful. Of more interest for my purposes is whether these criteria alone already make a state, or whether, in addition, an act of recognition by other states or by the community of states is required.⁵³ Depending on the answer to this question, a declaration of recognition is either merely declaratory or actually constitutive. If recognition is merely declaratory, recognition is simply a prelude to the establishment of relations, but if it is constitutive, then the question of a duty becomes more acute.⁵⁴

Lassa Oppenheim summed up the cleanest version of the constitutive theory: 'A State is, and becomes an International Person through recognition only and exclusively.'⁵⁵ This theory has practical and normative

⁵² 165 LNTS 19.

⁵³ I do not here discuss the related issue of recognition of governments, especially where there is dispute as to which of several self-proclaimed governments is the legitimate one. That question bears obvious parallels to Hart's discussion of revolution and the passing of authority from Rex 1 to Rex 2, suggesting that a comparison between the recognition of governments and the rule of internal recognition would be fruitful.

⁵⁴ It is suggested that the theories are of limited help: Ian Brownlie, 'Recognition in Theory and Practice' (1982) 53 *British Yearbook of International Law*, 197–211. By contrast, it seems arguable that the practice has the advantage of highlighting elements of the theories.

⁵⁵ Lassa Oppenheim, *International Law* §§ 71, Hersch Lauterpacht (ed.), 8th ed. (London: Longmans, Green and Co Ltd, 1955), p. 125.

shortcomings, however. Practically, it could lead to what can be called limping statehood: an entity might be a state vis-à-vis some states (namely those that recognised it) and not vis-à-vis others (those that do not). Normatively, it subordinates new emerging states to the recognition of old established states – a problem of postcolonial states mirroring the problem of customary laws taken up by Griffiths.

These reasons are amongst those for which today the declaratory theory is preferred. Under this theory, expressed already in Article 3 of the Montevideo Convention, states are states independent of recognition once they fulfil substantive criteria. This has its own problems, however. First, recognition may be necessary as the best available evidence that the criteria have been met. Second, in effect a state will not be able to properly exercise its rights unless and until it has been recognised.⁵⁶ In reality, recognition still plays an important role. Without it, entities that would otherwise qualify as states find it impossible to truly act as states in the international realm.

5.4.2 *Translation to the Concept of Law*

These different approaches to statehood nicely translate to the question of what constitutes law. The declaratory theory in international law translates to the idea that we must decide first what constitutes law before we inquire into its relation with other laws. The sequencing of questions is thus that introduced in the introduction. Whether or not one law recognises another law is insofar irrelevant for the definition of law. A question is only whether there is a duty to do so arising from international law – MacCormick's 'pluralism under international law' – or not.

This makes the constitutive theory particularly interesting. Under this theory, translated into legal theory, recognition is constitutive for the identity of law as law. This resembles the idea, attacked by Griffiths, that a normative order becomes law only once it is (externally) recognised. In fact, Griffith's concerns about an ideology of (Western) state

⁵⁶ Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947), p. 55: '[T]he full international personality of rising communities ... cannot be automatic ... [A]s its ascertainment requires the prior determination of difficult circumstances of fact and law, there must be someone to perform that task. In the absence of a preferable solution, such as the setting up of an impartial international organ to perform that function, the latter must be fulfilled by States already existing. The valid objection is not against the fact of their discharging it, but against their carrying it out as a matter of arbitrary policy as distinguished from legal duty.'

centrality mirror closely the concerns of those who advocated against a constitutive theory in international law – the idea, namely, that it should be up to the established Western state to determine what counts or does not count as a state. This is an important concern, and I address its normative implications later in this chapter. For now, it should be pointed out that international law reminds us of something that we already know from discussions in legal pluralism: Effectively, recognition matters, even if normatively we should wish that it did not. Effectively, a state cannot operate as a state in the community of states unless it is recognised by other states. And effectively a legal system cannot operate vis-à-vis other legal systems unless it is recognized by those other legal systems.

In this context, Lauterpacht's combined theory of state recognition becomes attractive for legal theory. For Lauterpacht, recognition was 'declaratory of facts and constitutive of rights'.⁵⁷ Under this approach, the substantive criteria for a state are met independently of recognition, but for a state to actually exercise the rights arising from being a state, it needs to be recognised. This has an attractive parallel in the area of the concept of law, because it helps us put an internal recognition and a rule of external recognition in their respective places. The internal recognition is one of many ways of determining the facts necessary to determine that an order is a law. Insofar, Griffiths's criticism could be responded to in part: the definition of law as a fact would remain independent of recognition by other states. Moreover, recognition would create a law on equal footing; it would not lead to subordination. But the response is only partial: without recognition by other legal systems, such a legal system would not have an effective status externally.

5.4.3 *Assessment*

The comparison with the public international law of states has shown not just that a parallel discussion exists. It has also demonstrated additional elements that can help in a legal theory of legal pluralism.

A first such additional element is the realisation that substantive criteria and recognition are not necessarily independent from each other, nor are they necessarily sequenced. Under the constitutive theory, recognition by other states is a constitutive act, and even under the

⁵⁷ *Ibid.*, p. 75.

declaratory theory, recognition plays a role. An entity is not a full state until it is recognised by other states.

A second such additional element is the insight that recognition need not lead to a subordinate status. Once a state is recognised, it stands on equal status with the state that has recognised it.

A third element, finally, and this may be the most important one, is that statehood is not necessarily a universal status. It is universal if an entity is recognised by all states. It is a relational status, by contrast, if the entity is recognised only by some, not all states.

These three additional elements should help get back to the legal theory debate.

5.5 Towards a Relational Concept of Law

5.5.1 *The Constitutive Role of External Recognition*

In a world of largely independent legal systems, it would be possible, but also sufficient, to define a legal order prior to its interaction with other legal systems. We could determine whether a rule of internal recognition, or some other criterion, exists, and consider that sufficient. The rare inter-relations with other legal systems could be considered no more than an afterthought. More precisely, they could be thought of as purely operational issues, dealt with through rules of private international law and other doctrines. Such rules would be independent from the concept of law: whether a certain law is applied or not would have nothing to do with whether it is or is not law.

This is very much the traditional image of law as it emerges from Western legal theory. It made sense for a concept of laws that was largely based on Western states, leaving out both the laws of suzerain states and the laws of colonies. It worked for a world in which it was possible to consider customary laws in colonies as non-laws, requiring for their elevation to the status of law recognition by the coloniser and its law. That world is no longer our world. Studies of legal pluralism in colonial and postcolonial settings provided only the first challenge to this concept. The realisation of global legal pluralism generalised the challenge and carried it into the Western world as well. This was a challenge not just to the state-based concept of law, but also to the idea that inter-relations were only an afterthought.

A concept of laws, appropriate for a situation of global legal pluralism, must take these challenges seriously. It should accept the challenge that

non-state law can be law. It should reject, however, the claim that non-state law must be viewed as law irrespective of recognition. Instead, it should generalise this recognition requirement and turn it into a general requirement of law – a requirement that exists not just for non-state law, but for state law as well. A legal order, in this definition, requires not two but three kinds of rules. It requires primary rules as its content. It requires secondary rules for its operation. And it requires tertiary rules to establish its relation with other legal orders, whether they are called interface norms, linkage rules or something else.⁵⁸ In fact, the suggestion that such tertiary rules are a necessary element of legal systems should not be so provocative. For example, Julie Dickson (without using the terminology) has made a similar point to distinguish legal systems (that have such norms) from mere subsystems (that do not).⁵⁹

At this point, von Daniels's suggestion that linkage rules are Janus-faced deserves attention again. Recall that von Daniels suggests that linkage rules are 'Janus-faced:' they concern both the way in which a legal system treats a foreign law and the way in which that foreign law treats the legal system. However, it seems wrong to think that there is some objective law that transcends relations between systems and provides the source for such linkage rules. Public international law could provide such rules if it (a) could qualify as an objective superior law, and (b) contained such rules. Thus was MacCormick's hope. But public international law does not contain such rules, so we need not even discuss whether it could qualify as an objective superior law or whether its relation to domestic laws remains one of mutual recognition, too.

Analyzed closely, von Daniels's 'Janus-faced rule' contains two different rules. System A has its own linkage rules that determine whether and how it recognises System B. System B has its own linkage rules that determine whether and how it recognises System A. Both rules can but need not overlap. Although they concern the same relation, they each concern one direction of this relation only. Only one set of these rules belongs to each system in the sense that it is created within this system

⁵⁸ Tertiary rules are not hierarchically superior to secondary rules in the way secondary rules are hierarchically superior to primary rules. Where System A and System B mutually constitute each other, System A's rule of external recognition is contingent on System A's rule of internal recognition. At the same time, System B's rule of external recognition is superior to System A's rule of internal recognition because it is necessary to create system A-vis-à-vis System B. That no ultimate hierarchy emerges is not a weakness of the theory; it is a consequence of the lack of hierarchy in global legal pluralism.

⁵⁹ Dickson (n. 3), p. 46.

Nonetheless, von Daniels is right to emphasise that both rules hang together. System A can only determine whether and how it recognises System B and insofar be constitutive for System B. It cannot determine whether and how system B recognises System A. That latter question is, however, what is constitutive of System A. In a world of inter-related laws, the nature of System A as a system of law depends on its recognition by other legal systems. But System A has no way of bringing about such recognition on its own.⁶⁰ All it can do is offer itself for such recognition, and perhaps offer reciprocal recognition as an incentive.

5.5.2 *Relativity and Relationality of Law*

The debate as MacCormick introduced it seemed to present only two possibilities to conceive of relations between legal systems. One was to develop meta-rules in a higher body of law to resolve conflicts between legal systems. The other was to resort to extra-legal means for such resolution.

This alternative permeates the debate on global legal pluralism. The first solution is endorsed by scholars like Mireille Delmas-Marty who favours an 'ordered legal pluralism' on the basis of higher principle, or proponents of a constitutional pluralism⁶¹. The second solution is endorsed by scholars like Maduro who advocates dialogue between legal systems (or their actors, in particular courts), and Krisch, who actually sees value in ensuing conflicts. The alternative would thus be between a legal solution (with the relevant laws found in a superior system) and a non-legal solution.

The analysis here has suggested that this alternative is incomplete. The absence of a superior legal system does not imply the absence of legal rules. Rather, such rules are found within each individual legal system. They are tertiary rules, rules of external recognition. Recognition is not the only content of such rules. Instead, tertiary rules concern the relations

⁶⁰ Nicole Roughan suggests that such mutual recognition can be negotiated. Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford: Oxford University Press, 2013). Ch. 8–9, esp. pp. 161–63. But such negotiation is not, it appears, a legal operation. Moreover, such negotiation can fail. Ultimately, negotiation is thus not a substitute. In the related area of jurisdiction, Paul Berman once suggested the concept of jurisprudence for this operation; although he seems to have given up on the term, it seems a useful description. Paul Schiff Berman, 'From International Law to Law and Globalization' (2005) 43 *Columbia Journal of Transnational Law*, 485–556, 533–38; cf. Michaels (n. 22), 1241–44.

⁶¹ Matej Avbelj and Jan Komarek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing, 2012).

between legal systems more generally. They include the entire system of conflict of laws (which is typically a set of rules in each legal system, not a hierarchically superior set of rules).

The result is not the same as shared authority, such as proposed by Roughan.⁶² External recognition does not describe the situation that legal orders negotiate which of them regulates which section of the legal realm, although this is possible. External recognition describes the prior situation that different legal orders recognise each other as laws, so as to make shared authority possible.

The constitutive role of external recognition, however, comes with a price. The price is that there no longer is an independent position from which to determine the nature of law. Instead, there are separate legal orders, each of which determines what counts as law for itself (through a rule of internal recognition) and for other orders (through a rule of external recognition).

Because such rules operate between legal systems only, they lead to a relational concept of law. The nature of law is no longer determined in an absolute fashion but only relative to other legal systems. Something can be a legal order vis-à-vis one other legal system, but not vis-à-vis another legal system. The nature of a legal system exists in relation to another legal system.

This relationality and relativity of a concept of law is the necessary consequence of global legal pluralism. We no longer have an Archimedean point from which we can determine whether something is or is not law. If we accept that the definition of law is itself the fruit of the operation of legal rules, then we have to find these rules in the law. And if laws are inter-related, then we can find these rules not merely within each legal system, but must instead look within other legal systems, too.

5.6 Objections

The concept of laws developed here needs further refinement, but it seems appropriate to address a number of possible objections. Some of these are conceptual, others are normative, and some combine both.

5.6.1 Possibility

A first objection goes against the possibility of limping status as law. The possibility that a normative order is law for one and not for another

⁶² Roughan, *supra* n. 60.

law may appear both conceptually and normatively unattractive. It is conceptually unattractive because it holds compossible incompatible normative statements. It is normatively unattractive because it disappoints our hopes of integrity in law.

The logical problem has been addressed recently by Michael Giudice.⁶³ Giudice argues that a system with no ultimate hierarchy leads to logically incompatible statements, such as that EU law, at the same time, both is and is not hierarchically superior to member state law. But this is a logical impossibility only if we think of both statements as belonging to the same legal system. As it is, the claim that EU law is superior is a claim made by, and in relation to, EU law, while the claim that it is not superior is a claim made by, and in relation to, the law of a member state.⁶⁴

Giudice would probably not accept this except in some cases. He might accept that an English court proclaiming that a contract requires consideration would not make this as a universal claim. It would be a claim only for English law, even if the court did not say this. But the situation here, he might say, is different. The Court of Justice, when it proclaims the superiority of EU law, does not express this as a statement only with regard to the EU legal order itself but instead proclaims this also vis-à-vis member state law. It proclaims to speak for both orders, just as a national court would proclaim to speak for both orders. This, then would be where the conflict lies.

But the argument of incompatibility still fails. Even if a court proclaims to speak about its relation to a foreign legal system, effectively it can only speak to that relation as a part of its own legal system. Systems theory would speak of a re-entry of the difference between two legal systems into each legal system. The Court of Justice, in speaking to the relation between EU law and UK law, speaks to this relation as a part of EU law. It speaks with regard to the rule of external recognition within EU law. The UK court, speaking to the relation between UK law and EU law, speaks to this relation as a part of UK law. It speaks with regard to the rule of external recognition within UK law. Each, then, speaks about a different rule, and within a different system. Because each is an institution only of its own legal system, they cannot reach the point above both systems at which alone such conflict would be possible.

⁶³ Michael Giudice, *Understanding the Nature of Law: A Case for Constructive Conceptual Analysis* (Cheltenham: Edward Elgar, 2015), pp. 144ff.

⁶⁴ For a similar argument, see H. L. A. Hart (n. 23).

The normative challenge can be developed on the basis of an argument made by Pavlos Eleftheriadis.⁶⁵ Eleftheriadis suggests that a pluralist concept of laws, as proposed here, fails to fulfil the need for integrity of the law. Instead, he suggests, different legal orders should endorse a sophisticated view of their own limits. Essentially, he suggests that if no hierarchy exists between legal systems, then no system can be the ultimate arbiter of any conflictual question. Rather, systems should, though in a decentralised way, treat each other as equal.

It may not be a sufficiently satisfactory answer that even treatment as equal may not avoid all conflicts in a decentralised system. But it seems to me that the argument itself ignores that the absence of hierarchy does not disable the possibility of an ultimate decision. Rather, the decision each order takes from its own perspective is ultimate, though only with regard to that system. If EU law decides on its priority over national law, that is an ultimate decision for EU law. If UK law decides on its own priority over EU law, that is an ultimate decision for UK law. Both systems are equal in that both can decide with ultimate force for their own context. Eleftheriadis's plea for integrity begs the question. Integrity makes sense only once we think of law as an entire whole. In a plural setting, in which no ultimate arbiter exists and in which no one coherent system is there, such a plea for integrity has no place.

5.6.2 *Contingency*

Another objection concerns contingency. One might object that recognition by other legal systems cannot be a necessary requirement because the requirement is itself contingent upon two further requirements: first, that more than one legal system exists; and second, that they interact. If either of these requirements is not met, then external recognition would not only not be necessary, it would not even be possible.

The second part of these objections is easier to respond to. A tribe in the Brazilian jungle may have its own legal order without any tertiary rules because it has never interacted with the rest of the world and therefore does not know that other legal systems exist. That does not mean, however, that no tertiary rules exist. To the extent that we know of the tribe and its system, our decision to leave it alone is its own type of recognition. The question would arise, therefore, only for a legal system

⁶⁵ Pavlos Eleftheriadis, 'Pluralism and Integrity' (2010) 23 *Ratio Juris*, 365–89.

that is as of yet unknown and would be discovered. It is not clear that legal theory must deal with theoretically possible normative orders that are, however, unknown. Once the system is discovered, however, the establishment of rules of external recognition will kick in. Before discovery, we can then say, the system was indeed complete without such external rule. But this is then only because the system did not take part in our current constellation of global legal pluralism.

The first part of the objection is, at first sight, harder to answer. Granted, if there were only one legal system in the world, the issue would not arise, but that is not the world we live in. More precisely, it would be the world we live in only if we could conceive, in a monist interpretation, of all legal systems as really only subparts of one legal system. I have assumed, for this argument here, that we have a situation of global legal pluralism however, and in this situation such monism is not plausible.

But the objection may be thought to have a stronger point. If a legal system's existence is contingent on the recognition by another legal system, then a legal system must already exist. That legal system, in turn, must have been recognised by another legal system. How then did the first legal system come into existence?

If this is a problem, it is not a problem that is specific to the idea of a rule of external recognition. The question when and how law comes into being is a general problem for any theory of law. As to the development of secondary rules, we have proposals in the literature. As to the development of tertiary rules, it makes sense to think of them as co-emergent, as can be seen in the discussion on the relation between national law and EU law.

In the end, both parts of the objection find the same response: the proposed necessity of rules of external recognition is contingent on a situation of inter-related legal systems, in other words a situation of legal pluralism. In a different situation, such rules would be unnecessary. But that does not seem to be a strong objection. It seems plausible to assume that our current situation is one of such global legal pluralism, and what we need from a concept of laws is that it is adequate for the time and place for which it is formulated.

5.6.3 *State Centrisism*

A third objection, this one between conceptual and normative, emerges from Griffiths's critique of weak legal pluralism. Does the concept of relational law not re-establish legal centralism, with its preferred role for

state law? After all, there is no question in the model that state law is a legal order. It remains to non-state legal systems to demonstrate that they share that characteristic.

As a pure conceptual point I think this has little strength. It is true that in most analyses the only rules of external recognition that are discussed are those formulated by the state. (The discussion in EU law and international law is a rare and partial exception.) But conceptually, other non-state laws can be expected to have such rules, too. And empirically, chances are they will be found. A good example is religious laws, which do indeed contain such rules of external recognition.⁶⁶ Christianity, famously, leaves secular matters to the state (give to Caesar what is Caesar's). Jewish law recognises state law as superior, except for religious matters (*dina d'malkuta dina*; the law of the state is the law).⁶⁷ Islamic law is less deferential; it claims superiority over state law but allows for contractual subordination under the law of a non-Islamic state.⁶⁸ Religious fundamentalism of any kind does not recognise state law as equal. We should expect that other non-state legal orders develop similar rules.

This realisation – that non-state orders also have rules of external recognition – takes away some of the normative bite of Griffiths's criticism. External recognition, under the conception proposed here, is not a one-way street. In all but the rarest cases, we will be faced with external recognition from both sides. The way to overcome the criticism of external recognition as a requirement for the quality of law is therefore not, as Griffiths had proposed, to dispense of it, but instead to universalise it.

This does not resolve a bigger normative concern that underlies Griffiths's criticism, namely the fear of hegemony and power imbalance. Even though conceptually different legal orders are put on an equal footing, effectively some such orders will remain more powerful than others. One could well criticise that a theory that emphasises the formal equality of legal systems is blind to such effective inequalities – just like international law with its emphasis on formal equality between states has been criticised as blind to the effective remaining inequality between

⁶⁶ See Ralf Michaels, 'Postsäkulare Rechtsvergleichung', in Reinhard Zimmermann (ed.), *Zukunftsfragen der Rechtsvergleichung* (Tübingen: Mohr/Siebeck 2016), pp. 39–102, 94ff.

⁶⁷ J. D. M. Lew, 'Jewish Law – Its Development and Co-Existence in the Non-Jewish World' (1976) 40 *RabelsZ*, 101–22.

⁶⁸ Mathias Rohe, 'Sharia and the Muslim Diaspora', in Peri Bearman and Rudolph Peters (eds.), *The Ashgate Research Companion to Islamic Law* (Burlington, VT/Farnham: Ashgate Publishing, 2014), p. 261ff.

states. Indeed, others have suggested that theories of legal pluralism tend to be blind to issues of power.⁶⁹ But this is a separate problem.

5.7 Conclusion

The suggested introduction of tertiary rules, and of mutual contingency of legal systems, has important implications for legal theory. It enables us to conceptualise that different legal orders are not completely separate from each other but instead are mutually constitutive. It enables us to find a concept of law that is not confined to the state and not dependent merely on the self-ascription of legal character. It enables us to think of law as one and plural at the same time. It paves the way towards a concept not of law but of laws.

⁶⁹ Gad Barzilai, 'Beyond Relativism: Where Is Political Power in Legal Pluralism?' (2008) 9 *Theoretical Inquiries in Law*, 395–416.