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Conditional Authority and Democratic Legitimacy in Pluralist Space

Keith Cherry

> Legal pluralism is the key concept in a postmodern view of law. Not the legal pluralism of traditional legal anthropology in which the different legal orders are conceived as separate entities coexisting in the same political space, but rather the conception of different legal spaces superimposed, interpenetrated, and mixed in our minds as much as in our actions . . . We live in a time of porous legality.
>
> \- Boaventura de Sousa Santos[1]

This chapter takes up the theme of "democratic multiplicity" not by attending closely to any one democratic tradition, but rather by attempting to engage seriously with some of the ways in which various traditions intra-act and shape one another. As Santos points out, it is not as if one person is a subject of an Indigenous democracy, while another is a citizen of the state, and another a subject of international law – rather, each of these sites of authority co-exists, layered on top of one another, shaping one another in complex and asymmetrical intra-action. The democratic character of our lives therefore depends not only on multiple sites of governance, but also on the relationships between them.

I am a cis, straight, white, Settler male from L'nu (Mi'Kmaq) territories, subject to the Peace and Friendship Treaties of 1726, 1749, 1752, 1760, 1778, and 1779. I currently write and live on Lekwungen and W̱SÁNEĆ territories, subject to the Doulas Treaties of 1850 and 1852 respectively.
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[1] Boaventura de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law," *Journal of Law and Society* 14, no. 3 (1987): 298–302.

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Yann Allard Tremblay helpfully lays out two broad approaches to these relationships.[2] The modernist view recognizes a plurality of authorities but subordinates them to the state. For modernists, it is the state that determines the authority of all other actors by extending or withholding recognition according to its own logics. Modernist scholarship therefore focuses on the reasons why a state should or should not accommodate various claims. Conversely, the pluralist view – the view embraced in this chapter – sees the state as merely one authority among many. Under this view, the state enjoys no particular claim to manage the overall environment or determine the boundaries of other authorities. As a result, pluralist scholarship focuses on the dynamics of negotiation and contestation between authorities.

From a pluralist perspective, practices of recognition and interaction form an integral part of our legal and political systems.[3] Accordingly, Roughan argues that in order to be legitimate, an authority must not only make justified appeals to its own subjects, but also interact in justified ways with other sources of authority.[4] Likewise, Young argues that legitimate authorities must pursue nondomination both toward their own subjects and in their relations with other authorities.[5] In other words, the question of democracy must be addressed at two levels. We must ask how each tradition enacts democracy internally, but also how it relates to and intra-acts with other sites of collective decision-making. This chapter takes up the second question and focuses on the practices various orders, state and nonstate alike, use to manage, negotiate, and contest the boundaries of their respective claims.

Sometimes, overlapping authorities choose to recognize and accommodate one another's claims by dividing jurisdictions between them either geographically or by subject matter, as in federal arrangements. This allows each authority to act unilaterally in its own domains, thereby minimizing the need for coordination and maximizing the autonomy of each party. Where both parties assert a claim to the same spaces or subjects, overlapping authorities have sometimes embraced practices of co-decision, where representatives of each wield power jointly and seek collaborative consent.[6] This is the case in Northern Ireland, where Irish and Northern Irish authorities share power

[2] Yann Allard-Tremblay, "The Modern and the Political Pluralist Perspectives on Political Authorities," *The Review of Politics* 80, no. 4 (2018): 675–700.

[3] Ralf Michaels, "Law and Recognition – Towards a Relational Concept of Law," in *In Pursuit of Pluralist Jurisprudence*, ed. Nicole Roughan and Andrew Halpin (Cambridge: Cambridge University Press, 2017), 90–115.

[4] Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford: Oxford University Press, 2013).

[5] Iris Marion Young, "Two Concepts of Self-Determination," in *Ethnicity, Nationalism, and Minority Rights*, ed. Stephen May, Tariq Madood, and Judith Squires (Cambridge: Cambridge University Press, 2004), 176–96.

[6] Merrell-Ann Phare et al., *Collaborative Consent and Water in British Columbia: Towards Watershed Co-Governance* (Victoria: POLIS Water Sustainability Project and the Centre for Indigenous Environmental Resources, 2017).

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through consociational arrangements,[7] on Haida Gwaii, where land use decisions are made by a joint council of Haida and Settlers,[8] and in many arrangements between the Maori and New Zealand.[9] While such arrangements lack the autonomy of federal alternatives, they ensure that both parties' views are represented at all times. In other cases, however, multiple authorities continue to wield authority over the same spaces or subjects independently, but in a coordinated fashion. Like federalism, this allows each actor to carry itself differently, rather than committing to a shared compromise, but, like co-decision, it eschews unilateralism. This chapter focuses on the later set of practices, taking up some of the ways overlapping authorities have found to coordinate decision-making without either dividing jurisdiction between them or wielding power jointly though co-decision.

In particular, I focus on practices of conditional authority – sites where an actor accepts competing authority claims, but also subjects those claims to certain conditions. In order to have its claim recognized, an actor must meet standards of their peers. I explore this practice as it appears in two sites: the Northwest coast of Turtle Island,[10] and in the Europe integration project. In both cases, I argue that conditional forms of authority can be a tool of hegemonic rule, but can also be a means of challenging power asymmetries. Most interestingly, practices of conditional authority can offer forms of mutual influence that make the social order responsive to multiple independent standards of democracy at once. In so doing, I contend that they represent one way authorities can attend to the external dimensions of democratic legitimacy.

I begin by discussing a range of conditional practices present in the European integration project, and then explore some practices present in parts of Turtle Island. Building on these observations, I present a preliminary typology of conditional practices, and conclude by reflecting on how the observed

[7] For discussion, see John McGarry and Brendan O'Leary, "Consociational Theory, Northern Ireland's Conflict, and Its Agreement. Part 1: What Consociationalists Can Learn from Northern Ireland," *Government and Opposition* 41, no. 1 (2006): 43–63.

[8] Haida Nation and Her Majesty the Queen in Right of the Province of British Columbia, "Kunst'aa Guu–Kunst'aayah Reconciliation Protocol," December 11, 2009, www.llbc.leg.bc.ca/public/pubdocs/bcdocs2010/462194/haida_reconciliation_protocol.pdf. For discussion, see Jeremy Webber, "We Are Still in the Age of Encounter: Section 35 and a Canada Beyond Sovereignty," in *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights*, ed. Patrick Macklem and Douglas Sanderson (Toronto: University of Toronto Press, 2016), 63–99.

[9] For discussion see Roughan, *Authorities*, chap. 13.

[10] The term "Turtle Island" is drawn from the occurrence of the turtle in many Indigenous creation stories, including the Anishinaabe and Haudenosaunee. The term is commonly used to refer to North America while implicitly calling into question the European prerogative to name, govern, and exploit lands which were already occupied, governed, and named when they arrived. Gary Snyder, "The Rediscovery of Turtle Island," in *Deep Ecology for the 21st Century*, ed. George Sessions (Boulder: Shambhala, 1995), 454–62.

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practices of conditional authority can help us to pursue democratic legitimacy in pluralist spaces.

CONDITIONAL AUTHORITY IN EUROPE

Forms of conditional authority are common in Europe. For example, the Union operates through subsidiarity – the principle that action ought to be taken at the European level only when it cannot be effectively taken at the national or regional levels.[11] National governments police the principle and can request control over any matter in which they feel competent.[12] Thus, the Union can make valid authority claims only where lower orders of government have abstained from competing claims. The Union's claim to implement policy is therefore valid only when certain conditions are met to the satisfaction of other authorities. In this way, the principle of subsidiarity uses conditional authority structures as means to keep a potentially overbearing partner from dominating its peers.

Similar practices have also emerged from the bottom up. Consider the relationship between the radically participatory, grassroots, and anti-institutional 15 M movement and a range of would-be electoral partners, mostly notably Podemos.[13] The 15 M activists govern themselves through participatory public assembles in a deliberate rejection of representative structures. Yet 15 M assemblies also sometimes support candidates in local, regional, national, and European elections. In this sense, 15 M and parties like Podemos are 'joining hands' across different conceptions of democracy.[14] This relationship has been fractious, but some in 15 M are experimenting with new ways to make the authority of elected representatives contingent upon the ongoing support of parallel, directly democratic institutions. For example, some activists have proposed that politicians partner with their constituents through public assemblies or online consultative tools where legislation can be drafted, major decisions considered, and proposals developed.[15] Representatives would be required to vote accordingly in the legislature, and could lose 15 M support at any time for failing to satisfy this condition. Thus, politicians can leverage 15 M's considerable grassroots clout, but only if they meet standards of conduct set by

[11] For discussion see Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, 5th ed. (Oxford: Oxford University Press, 2011), 100–5.

[12] Craig and De Burca, *EU Law*, 94–100.

[13] For extended discussions of 15 M and its relationship to Podemos, see Pablo Ouziel, "'*Vamos Lentos Porque Vamos Lejos*': Towards a Dialogical Understanding of Spain's 15Ms" (unpublished PhD thesis, University of Victoria, 2015); Pablo Ouziel, *Democracy Here and Now: The Exemplary Case of Spain* (Toronto: University of Toronto Press, 2022).

[14] Ouziel, "*Vamos Lentos*"; and Ouziel, *Democracy Here and Now*.

[15] See, for example, Jairo Vargas, "Partido X: '*Empecemos por lo más fácil: echémosles de ahí*'," *Público*, October 8, 2013, www.publico.es/actualidad/partido-x-empecemos-mas-facil.html; Aitor Riveiro, "El Movimiento por la democracia dresenta su hoja de ruta para un proceso constituyente," *El Diario*, March 12, 2014, www.eldiario.es/politica/movimiento-democracia-presenta-proceso-constituyente_1_4986189.html.

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the assemblies themselves. Once again, the use of conditional authority works as a means to prevent relations of domination – indeed, to upset the prevailing power imbalance between representatives and constituents in an effort to forge relationships which can be understood as democratic from both participatory and representative perspectives.[16] In both these cases, conditional authority mechanisms work from the bottom up, as a check on actual or potential relationships of domination between the parties.

In other cases, conditions are imposed from the top down and function as means for powerful actors to secure compliance with their preferred norms. For example, Eurozone states are subject to the European Stability and Growth Pact (SGP) and the European Fiscal Compact (EFC), which oblige member states to maintain budget deficits of less than 3 percent of GDP and overall national debt levels under 60 percent of GDP.[17] The European Commission monitors these conditions and countries that violate them risk substantial economic sanctions.[18] In this sense, national spending authority is conditioned upon meeting certain externally determined, substantive macroeconomic outcomes.

Loans to indebted countries are another prominent mechanism of conditionality, as transnational credit is often dependent on a package of policy reforms. During the 2008 financial crisis, for example, Greek voters chose a left-wing government committed to kick-starting economic growth through taxation and government spending. The European Central Bank, European Commission, and IMF, however, refused to offer loans unless the government committed to austerity instead.[19] The government put the matter to referendum and voters overwhelmingly rejected the lenders' plan. Nevertheless, the Greek government could not afford the costs of governance without the loan and thus faced the prospect of having to leave the Eurozone or even the EU in order to pursue its preferred policies.[20] Its continuing participation in the EU is thus conditioned upon meeting certain substantive policy outcomes.[21] To the extent that these outcomes are in question, so too is Greece's membership in the bloc.

Though the power dynamics permeating these examples are meaningfully different, all of these cases share a unidirectional structure in that one party is a condition-setter and the other a condition-receiver.

[16] Ouziel, "*Vamos Lentos*," 245, 249.

[17] "The Stability and Growth Pact," European Commission, EU Economic Governance, http://ec.europa.eu/economy_finance/economic_governance/sgp/index_en.htm.

[18] "Six-Pack? Two-Pack? Fiscal Compact? A Short Guide to the New EU Fiscal Governance," European Commission, https://fotavgeia.blogspot.com/2016/04/six-pack-two-pack-fiscal-compact-short.html. McGiffen describes these developments as a "quantum leap of economic surveillance"; Steve McGiffen, Bloodless Coup d'Etat: The European Union's Response to the Eurozone Crisis," Socialism and Democracy 25, no. 2 (2011): 38; See also John Erik Fossum and Augustín José Menéndez, eds., *The European Union in Crises or the European Union as Crises? ARENA Report No* 2 (Oslo: ARENA Centre for European Studies, 2014).

[19] For discussion of the Greek bailout generally, see Yanis Varoufakis, *And the Weak Suffer What They Must?* (New York: Nation Books, 2016).

[20] Ibid., 151. [21] McGiffen, "Bloodless Coup d'Etat," 41.

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Constitutional Pluralism

Perhaps the most interesting practices of conditional authority in Europe come from the interaction between EU and National courts, where each actor is both condition-setter and condition-receiver at the same time. The European Court of Justice (hereafter ECJ) has moved to place conditions on national law-making by proclaiming the supremacy of EU law over conflicting national legislation,[22] and even over national constitutions.[23] As a result, national legislators are constrained to exercise their discretion within the parameters of EU law, as interpreted by the ECJ. National courts, however, have contested the ECJ's claims of supremacy.[24] In a now famous pair of cases, the *Solange* decisions, the German Constitutional Court first ruled that because the EU did not provide human rights protections, it was incumbent upon German courts to review EU laws for compatibility with the German constitution.[25] In this way, EU supremacy was subjected to certain limits – Union measures which violated basic rights would not be applied. This represented a clear challenge to the authority of the ECJ. Rather than confront the German court directly, the ECJ busily developed a human rights jurisprudence based on the constitutions of its member states and the European Convention on Human Rights, to which Germany was a signatory. In *Solange* 2, the German Constitutional Court responded to this development, finding that the EU system now provided internal protections essentially equivalent to those in German Law.[26] As a result, German courts would no longer review EU laws on human rights grounds unless evidence could be presented that the EU system as a whole no longer provides equivalent human rights protection. These decisions have been euphemistically referred to as the *So-long-as* decisions: so long as the EU does not systematically violate the German constitution, it will be considered supreme.[27] So-long-as German legislators act within EU law, their acts will be upheld by the ECJ. In short, each actor receives the support of the other in exchange for satisfying certain conditions.

The so-long-as approach has since spread to other courts around the continent, most of whom now place conditions of some sort on EU supremacy in exchange for their acceptance of ECJ supremacy. This ad-hoc arrangement is significant because it effectively makes conditionality

[22] Case 6/64, *Costa* v. *ENEL* [1964] ECR 585.

[23] Case 11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

[24] For discussion, see Paul Craig, "The ECJ, National Courts and the Supremacy of Community Law" in *The European Constitution in the Making*, ed. Ingolf Pernice and Roberto Miccu (Baden-Baden: Nomos, 2004), 35–52; Miguel Poiares Maduro, "Contrapunctual Law" in *Sovereignty in Transition*, ed. Neil Walker (Portland: Hart Publishing, 2003).

[25] *Solange I*, BVerfGE Case 37/271, [1974] 14 CMLR 540 (German Constitutional Court).

[26] *Solange II*, BVerfGE Case 73/339, [1987] 3 CMLR 225 (German Constitutional Court).

[27] For discussion, see Mattias Kumm, "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty," *European Law Journal* 11, no. 3 (2005): 262–307.

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multilateral: both the ECJ and its national interlocutors are condition-setters, but also condition-receivers. Each actor polices the other, such that each actor must satisfy multiple standards at once.

In fact, in *Celmer*, the ECJ made this system of conditional acceptance and mutual policing horizontal, as well as vertical, ruling that Ireland does not have to honor extradition requests made by another member state if that state's justice system is systematically deficient.[28] Thus, the acceptance of extradition requests between states is conditional: it turns on the extraditing party's assessment of the requesting party's legal system. This creates a system of peer-review between national courts, with each monitoring the others and cooperating only on a conditional basis. In essence, each court has to accommodate the concerns of the others in order to have its own claims accommodated in turn. Importantly, each actor retains the ability to contest the system unilaterally, limited only by its need for the cooperation of others.

The overall legal environment in Europe is thus shaped not only by the copresence of EU and national law, but also by their interaction. The claims of each are shaped by interaction with the other, such that European legality can only be understood as an inter-legality – a hybrid made of components which are themselves hybrid. Maduro describes the resulting system as "constitutional pluralism," while Sabel and Gerstenberg call it "coordinate constitutionalism." These authors stress that each court's legitimacy and authority is constituted at least in part on the recognition of other courts.[29] This creates a system of autonomous but closely coordinated action, as each court maneuvers to make claims that are true to its own internal interests and ideologies, while also acceptable to its peers. In comparison to other forms of conditional authority, then, the relationship between European courts is reciprocal, with each actor constrained by the claims of the other.

CONDITIONAL AUTHORITY ON THE NORTHWEST COAST OF TURTLE ISLAND

As in Europe, practices of conditional authority are common on the parts of Turtle Island sometimes called Canada. Treaties signed in the most recent phase of treaty-making, the so-called Modern treaties, for example, often feature equivalence provisions, allowing First Nations to legislate freely, but only provided that they meet or exceed federal and provincial standards.[30] Paramountcy provisions are

[28] Case 216/18, *Minister for Justice and Equality* v. *LM* [2018] ECLI:EU:C:2018:586.

[29] Maduro, "Contrapunctual Law," 520–522 especially. Charles F. Sabel and Oliver Gerstenberg, "Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order," *European Law Journal* 16, no. 5 (2010), 545, 550 especially.

[30] The following references take the Tsawwassen agreement as an illustrative example, but the same is true of the modern treaty process generally. See, for example, Tsawwassen First Nation, Government of British Columbia, Government of Canada, "Tsawwassen Final Agreement," December 6, 2007, chap. 1, sections 23, 24, 25.

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also common – First Nations' jurisdiction is valid, unless it conflicts with federal or provincial law.[31] Even in areas where First Nations' jurisdiction is paramount, it must operate within the confines of the Canadian Charter.[32] In all these ways, the authority that modern treaties grant is premised on certain conditions. Where those conditions are not met, Settler courts will withhold their recognition and support.

Section 35 of the Canadian constitution also creates conditional forms of authority. For example, Aboriginal rights are constitutionally protected – but only if they are compatible with crown sovereignty.[33] Aboriginal title allows a group to "choose the uses to which land is put,"[34] but title land cannot be used for purposes incompatible with Settler courts' understanding of Aboriginal connection to the land, and it cannot be alienated except to the crown.[35] As a result, First Nations rights are only recognized when they meet certain conditions.[36] In all these cases, dominant Settler authorities use practices of conditional authority to impose their standards on subaltern nations, such that conditions act as a form of neocolonialism.[37]

In other cases, conditional practices have emerged from the bottom up, as a means to prevent or disrupt relations of domination. For example, when Coastal Gas Link (hereafter CGL) began construction of a pipeline on Wet'suwet'en territory in Northern BC, the Unist'ot'en House group, whose traditional territory the pipeline crosses, asserted their title by establishing a healing camp in the path of the pipeline and preventing access to the territory by pipeline workers. As the Unist'ot'en camp cultivated relationships with extensive networks of supporters, they laid down broad protocols for their allies – conditions which solidarity actions must meet.[38] In this sense, supporters can take autonomous action in the name of the Wet'suwet'en, but only subject to certain conditions. Allies accept these constraints as a deliberate means to upset prevailing power imbalances between Settler and Indigenous communities. Swain and Henderson's chapters in this volume (13 and 14), each in their own way, shed further light on this dynamic.

[31] Ibid., chap. 1, section 19. [32] Ibid., chap. 2, section 9,

[33] *Mitchell* v. *M.N.R.* [2001] 1 SCR 911.

[34] *Tsilhqot'in Nation* v. *British Columbia* [2014] 2 SCR 256. [35] Ibid., 74.

[36] The Crown is also subject to conditions under this regime – it cannot infringe Aboriginal rights or title without passing a self-imposed justificatory test. *R.* v. *Sparrow* [1990] 1 SCR 1075, [1990] 70 DLR (4th) 385. However, this test constitutes an auto-limitation, rather than an interaction between systems.

[37] For extended discussion see Kwame Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (London: Thomas Nelson & Sons, 1965).

[38] See, for example, the "fundraising protocols" and the protocols contained in the "supporter toolkit," as well as the process to seek approval for proposed solidarity actions. "Fundraising Protocols," Unist'ot'en Camp, http://unistoten.camp/fundraiserprotocols; "Supporter Toolkit," Unist'ot'en Camp, http://unistoten.camp/supportertoolkit2020.

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As in Europe, unidirectional forms of condition setting can function either to entrench or to disrupt prevailing power relationships.

The Potlache System

As in Europe, there are also some examples where conditions operate multilaterally, such that each actor is at once a condition-giver and a condition-receiver. One particularly advanced example comes from the Northwest coast Potlache system, one version of which is discussed thoughtfully by Webber in Chapter 15 of this volume. According to Trosper, Indigenous governance on the Northwest coast is generally conducted through linked groups of Houses.[39] Each house selects its own leadership, but leadership claims have to be validated through Potlaches: in order to claim a title, the contender must host a ritual feast, inviting the title holders of neighbouring houses.[40] Once assembled, neighbouring dignitaries observe rites designed to demonstrate that the claimant is qualified. They also receive gifts, which serve both as a recognition of their titles and as proof that the claimant is able to manage the claimed territory well and produce wealth from it. If they are satisfied, they affirm the claimant's title. If they refuse or express only qualified support, the claimant's authority is to that degree undermined. In this sense, one's claim to authority is contingent on the support of other title holders. Where neighbouring title holders refuse to validate a claim or course of action, members of the House have to consider whether to hold their course and sacrifice the cooperation of their neighbours, change course, or even select a new title holder in order to maintain the benefits of conviviality.[41]

Once installed, both authority and title to land remain contingent on several duties, notably a duty to take care of the claimed land and preserve its productive capacity for future generations, and a duty to redistribute a portion of wealth generated within the territory to other Houses.[42] Once again, these duties are monitored through regular Potlaches. Because hosting a Potlache involves distributing significant wealth, it requires efforts on behalf of the entire House. As a result, the ability to Potlache serves as proof that a) the territory is still productive, b) the members of a house are satisfied and willing to contribute materially to seeing the current title holder maintain their position, and c) the title holder recognizes and respects the authority claims of other Houses by extending invitations to them.[43]

If, at any point, neighbouring title holders feel that a given official is not taking care of their responsibilities, they can refuse to validate their authority claim and withhold invitations to their own Potlaches. Likewise, members of a given house could refuse to contribute to a Potlache, thereby throwing their

[39] Ronald Trosper, *Resilience, Reciprocity and Ecological Economics* (London: Routledge, 2011).
[40] Ibid., 22. [41] See Webber, Chapter 15, this volume.
[42] Trosper, *Resilience*, especially chap. 5. [43] Ibid., 22, 67.

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title holders' position into question. Each title holder therefore had an incentive to cultivate the active support of their own House, and of neighbouring Houses as well. Trosper calls this system "contingent proprietorship" because valid title claims are contingent upon meeting certain external and internal conditions. In this system, multidirectional conditions make each House a condition-setter and a condition-receiver, making the overall relationship an object of dialogue and negotiation over time.[44]

A PRELIMINARY TYPOLOGY OF CONDITIONAL AUTHORITY

Both on Turtle Island and in Europe, practices of conditional authority provide a window into one way that different traditions of collective decision-making are braided together in practice, co-structuring the political.

As we have seen, unidirectional forms of condition setting often arise in contexts of profound power asymmetry, where dominant actors impose conditions on subaltern actors unilaterally. We might call these instances 'imperial condition setting'. The IMF, for example, offers conditional loans to structurally impoverished countries who have little choice but to accept them. As a result, the IMF's conditions are often experienced as an undemocratic imposition. In these contexts, conditions work as a form of indirect rule which allows one party to control the other without taking on the administrative, political, and military costs of colonizing them directly. The current Greek government, for example, exercises authority within the conditions laid down by its lenders. Likewise, the modern treaty process in BC offers First Nations forms of autonomous authority within the parameters laid out by the federal and provincial governments. These relationships are inherently asymmetrical. The condition-setter has robust autonomy, and also enjoys the power to impose conditions. The condition-receiver enjoys only a constrained form of autonomy, and often has little ability to influence the condition-setter.[45]

[44] The multilateral relationship between hereditary house leaders also takes place in a context where elected band councils, created by the Canadian government, make competing claims to authority. Relations between elected councils and house-based governance systems are fraught and complex, and at least some members feel that hereditary chiefs do not consult widely enough to claim broad democratic mandates in the manner Trosper describes. Assessing the democratic quality of Wet'suwet'en house governance is, however, both beyond the scope of this chapter and inappropriate for me as a Settler with a deeply limited understanding of traditional governance systems and local political conditions. It is, however, noteworthy that elected and traditional governments each adjust their claims in light of one another, as they move toward their own conceptions of inter-political space. For an oral discussion, see John Borrows, "The Great Way of Decision Making: Constituting Indigenous Law with John Borrows," April 21, 2020, in *RAVEN (De)Briefs*, produced by Susan Smitten and RAVEN Trust, podcast.

[45] For an illuminating study of this dynamic as it relates to debt, see Maurizio Lazzarato, *The Making of the Indebted Man: An Essay on the Neoliberal Condition* (Los Angeles: Semiotext(e), 2012), 33, 72 especially.

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However, unidirectional condition setting can also be used to deliberately upset power imbalances. The Unist'ot'en Camp's use of "supporter protocols", for example, allows subaltern actors to exert influence over their socially privileged supporters. Likewise, the structure of 15 M/Podemos connections seek to make ordinarily privileged officials subject to constraints from normally marginal citizens. In both cases, unidirectional condition setting functions as a form of tactical asymmetry to prevent or contest relations of domination. In these ways, unidirectional condition setting practices can be 'counter-imperial' as well, working to destabilize, rather than entrench, existing power dynamics.

Perhaps the most interesting forms of conditional authority, however, are those where conditions are mutual, such that each actor is both a condition-receiver and a condition-setter at the same time. We might call these instances 'reciprocal condition setting'. In the Potlache system, or the relationship between European courts, for example, every actor is, to some extent, dependent on the support of its peers. This makes each tradition of collective decision-making responsive to several different standards of legitimacy simultaneously: their own standards, and those of other actors. In this way, each actor is both constrained by and able to exercise agency though its relationship with every other actor.

The resulting relationships are capable of holding complex tensions. Relations are both cooperative, in that actors rely on one another's support, and also competitive, in that each is seeking to shape the environment according to its own needs and interests.[46] As with the imperial and counter-imperial types above, power dynamics remain central. Yet, where counter-imperial conditions work as a tactical corrective that presumes a broader set of hegemon–subaltern relations, reciprocal condition setting is non-imperial, in that it can proceed absent relations of domination. In fact, in an argument that resonates with Young's account of legitimacy in pluralist settings,[47] Angelbeck posits that reciprocal condition setting is part of a complex set of practices on the Northwest Coast which work together to prevent the emergence of any dominant political actor.[48] Their goal is not therefore to unsettle an existing imperialism, but rather to prevent a state of imperialism from coming into being. Put differently, their goal is to build and maintain a state of relational nondomination. In this way, practices of reciprocal condition setting in particular may represent an important means to pursue legitimate relations between overlapping authorities, thus attending to the relational aspects of democratic legitimacy.

[46] Donna Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (Durham, NC: Duke University Press, 2016), 60, 62.

[47] Young, "Self-Determination."

[48] William O. Angelbeck, "'They Recognize No Superior Chief': Power, Practice, Anarchism and Warfare in the Coast Salish Past" (unpublished PhD thesis, University of British Columbia, 2009); see also Brian Thom, "The Anathema of Aggregation: Towards 21st Century Self-Government in the Coast Salish World," *Anthropologica* 52, no. 1 (2010): 33–48.

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THEORIZING DEMOCRATIC LEGITIMACY IN PLURALIST SPACE

Having explored a range of practices of conditional authority being enacted in two diverse settings, it is now worth reflecting on what these practices mean for democratic theory and, in particular, how they can help us think about democratic legitimacy.

In her account of 'relative authority', Roughan argues that legitimate authorities must not only make justified appeals to their own subjects, but also interact in justified ways with other sources of authority. To assess this second feature, Roughan introduces the 'relative authority test':

(i) The relationship between the authorities must improve or at least not diminish the prospects of conformity to reason[49] for [the subjects of each authority] . . .
(ii) The relationship must be consistent with the values protected by the procedures conferring standing upon each authority . . .
(iii) There must be no overriding undefeated reasons against having that relationship.[50]

Without endorsing it as the only or even the best way to assess democratic legitimacy in pluralist contexts, I nevertheless contend that such a test allows us to explore the extent to which practices of reciprocal condition setting might allow overlapping authorities to attend to the relational or pluralist dimensions of their legitimacy.

First, because each authority retains distinct decision-making processes, each is able to freely follow the internal logic or 'reason' of their tradition. The need to meet the conditions of other authorities does compromise the ability to freely follow the logic of one's own tradition to some extent, in that this logic is no longer the only factor weighing upon a decision. Rather, actors are bound to take

[49] While Roughan's emphasis on "reason" might be taken to imply a universal standard of conduct, Roughan seems to accept that each community will have its own version of reason, according to its own ontological and epistemological foundations. I therefore take her to mean not that pluralist arrangements must facilitate universal reason, but rather than they must facilitate each group living according to its own distinct conception of reason. In other words, the criteria require that pluralist arrangements be comprehensible and justifiable within the logic of each participating tradition. To avoid any confusion with universal concepts of reason, I have generally used "logic" rather than reason in this chapter. See Roughan, *Authorities*, chap. 8.

[50] Roughan, *Authorities*, 237. In chapter 8, Roughan offers another formulation of the test, whereby a legitimate interaction is one that:

"(a) improves or at least does not diminish the prospects of conformity to reason for subjects of either authority; (b) is consistent with the values protected by the justified procedures that confer standing upon either authority; (c) is consistent with the balance of governance reasons applying in the circumstances; and (d) is consistent with side-effect reasons generated by the overlap or interaction."

This version breaks the "no undefeated reasons against the relationship" criteria in two, considering governance and side-effect factors separately. For reasons of space, simplicity, and clarity of argument, I have chosen to engage with the less detailed formulation.

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into account one another's logics as well. However, the decision of *how* to respond to the conditions of others remains subject to the logic of each tradition. Moreover, any loss of reasoning autonomy is compensated for by the fact that other authorities must also take your logics into account, thereby preventing their decisions from seriously impeding your ability to live according to that logic. Thus, authorities trade some degree of decision-making autonomy for some degree of influence over their peers. While internal decisions are somewhat less strictly dictated by an authority's internal logic, the decisions of others are made responsive to this logic. Whether this trade-off increases or decreases the overall ability of the subjects of any given authority to live according to their own logics will therefore depend on how seriously subjects of that authority are impacted by the decisions of other authorities. In cases where these impacts are significant, reciprocal condition setting will likely improve the overall ability for subjects to live in accordance with their own logics.

Regarding the second criteria, condition setting is not necessarily equal, as we have seen. Conditions can be unilateral, or some parties might set more extensive or more stringent conditions than others. Thus, where subjects confer equal standings on each of the authorities in question – for example, where both claim an exclusive right to governance, or where both claim the right to negotiate with other authorities – both parties can set conditions equally (reciprocally) and be acting in accordance with the level of authority conferred on each by its subjects. Where the authority conferred on one party by its subjects is lesser than the authority conferred by another by its subjects – for example, where one party claims comprehensive governance rights and the other claims only minor forms of self-determination – condition-setting practices can provide ways to recognize this asymmetry. Thus, reciprocal condition setting can often be compatible with the authority conferred upon each party by its subjects, whether these are equal or not.

Finally, there must be no overriding reasons against the relationship. Roughan mentions necessity in particular: where "necessary" actions would be prevented or impaired, reciprocal condition setting may not be appropriate.[51] However, both the remarkable success of judicial dialogue in the EU and the millennia-long success of Potlache systems suggest that practices of reciprocal condition setting are capable of successfully managing relationships over time without preventing either actor from taking necessary actions. Indeed, the capacity of each actor to take such steps as it deems necessary is a defining feature of the reciprocal condition setting dynamic – should either party feel that truly necessary goals are being frustrated, they would simply act autonomously and sacrifice the cooperation of the other party.[52]

[51] Roughan, *Authorities*, 340–41.

[52] For example, Maduro argues that the fact that either level of court has the capacity to take actions not approved by the others is actually essential to Europe's system of Constitutional

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Thus, under certain conditions, reciprocal condition setting provides one way for each party to engage with its peers in ways that can be plausibly justified, thereby attending to the pluralist dimensions of democratic legitimacy. Even if Roughan's test is not definitive, the primae facie case for the utility of conditional authority is strong. In fact, compared to federal arrangements or co-decision mechanisms, reciprocal condition setting offers a distinct way of seeking pluralist or relative legitimacy.

In federal contexts, each authority rules unilaterally within its jurisdictions and is powerless beyond them. Thus, we might say that the authority of each party is deep, but not broad. This allows each party to act according to its own logics and its logics alone – within its jurisdictions. However, it also means that actions outside of its jurisdiction are unlikely to reflect its logics at all. Such arrangements therefore involve a trade-off. Where each party prioritizes control over different aspects of governance, this trade-off may allow each party to relate in ways that maximize their ability to act according to their own logics, at least where those logics matter most.

Conversely, co-decision mechanisms allow each party to share decision-making on a potentially expansive set of shared concerns. This guarantees that every issue of concern to either party will be responsive to that party's logics – but only alongside and in conversation with the logics of others. In comparison with federalism, such arrangements offer each party a form of authority that is broad, but not deep. Once again, a trade-off is involved. Where comprehensive input is more important to the parties than particular areas of autonomy, co-decision may allow each party to inter-relate in ways that further their ability to live according to their own logics.

Reciprocal condition-setting practices offer a distinct set of trade-offs. Here, each party retains its own distinct institutions operating according to their own logics, thus offering a deeper form of autonomy than co-decision mechanisms. However, each party is also able to exert influence on a broad range of topics, offering a broader sort of authority than federal arrangements. We might say that the authority of a party is as broad as it needs to be in order to protect its interests, and as deep as it can be without adversely affecting other interests. Where the concerns of the parties overlap too much to divide jurisdictions in a federal manner, yet the parties value maintaining distinct institutions without collapsing them into a shared, compromise body, reciprocal condition setting may represent a preferable way for overlapping authorities to legitimize their interactions.

In comparison to federal and co-decision structures, practices of conditional authority are also distinct in that they need not be fully articulated or structured in advance. Instead, conditions can be articulated gradually over time, in response to real problems and in dialogue with other authorities. Indeed, the

pluralism. Maduro, "Contrapunctual Law." Webber makes a similar point in his exploration of the Gitxsan feast system.

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German Constitutional Court continues to elaborate, clarify, and adjust the conditions it places on EU authority even now, sixty years after those standards were originally imagined. Rather than relying on a priori standards capable of meeting any hypothetical concern, the court is able to articulate concrete standards in relation to particular concerns as they arise, and to modify those standards as the EU adjusts its conduct. Likewise, as Webber shows, the Gitxsan have been adjusting the substance and form of their relations since time immemorial. This makes practices of reciprocal condition setting flexible and responsive, and also allows them to proceed in cases where agreeing on the shape of federal or co-decision structures would be challenging or impossible.

In an almost functionalist manner, practices of reciprocal condition setting and the dialogues they create can also facilitate the gradual emergence of imperfectly shared inter-societal norms.[53] As each party articulates its logics in conversation with others, a shared body of transnational precedent begins to emerge, allowing parties to deepen their mutual understanding and cooperation over time. In this way, the dialogues created through reciprocal condition setting can be especially appropriate where trust and mutual understanding cannot be taken for granted but, rather, need to be cultivated over time.

Last, because condition setting is driven by real concerns, the dialogue it creates does not take place in the abstract, but is instead constitutively situated in lived experiences and the unequal power relations that structure them.[54] Thus, reciprocal condition setting provides a means to call existing power imbalances and the de-democratizing practices[55] that sustain them into question over time.

Practices of conditional authority, and of reciprocal condition setting in particular, therefore constitute a useful set of tools that overlapping authorities can bring to bear in attempts to legitimize their pluralist relations. In the context of complex relationships, actors may even choose to draw on several approaches in concert. In the EU, for example, some powers rest at the national level and others at the European level, as in federal structures. In most matters of EU jurisdiction, the European Parliament (representing the people of Europe as a demos of its own) and the Council of Ministers (representing each state as a distinct demos) engage in legislative co-decision. European courts, however, engage in practices of reciprocal condition setting. Europe therefore strives toward relative or pluralist legitimacy by operationalizing a number of practices of interrelation at once. As Lord and Magnette argue, the EU has iteratively developed "political systems that are not configured for the

[53] For an account how transnational norms develop in contexts of persisting asymmetry and contestation, see, for example, Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples," *Osgoode Hall Law Journal* 33, no.4 (1995): 624–55.

[54] For an excellent discussion, see Monika Kirloskar-Steinbach, ed., *Dialogue and Decolonization* (Bloomington, IN: Indiana University Press, forthcoming).

[55] See Nelems, Chapter 9, this volume.

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articulation of any one view of legitimacy but for the mediation of relationships between several."[56]

Likewise, on Turtle Island, early-contact treaty practices often divided jurisdiction either territorially or personally, but also established a norm of co-decision for subjects of shared concern.[57] Treaty terms can also be seen as laying out a series of conditions that Settlers must meet in order to exercise legitimate authority on Indigenous lands: for example, providing certain medical or educational services, setting aside certain lands, or guaranteeing certain rights. In this way, treaty-diplomacy could involve aspects of federal, co-decision, and conditional authority practices all used in concert to pursue pluralist or relative legitimacy. Indeed, oral accounts of treaty-making from both Settler and Indigenous histories stress that treaty-making was as much about sharing authority as it was about securing mutual independence.[58]

More recently, patterns of interaction between Settler and Indigenous authorities have, of course, become dramatically lopsided and unjust. As discussed, the division of jurisdiction through modern treaties has been paired with paramountcy and equivalence provisions which leave Settler authorities autonomous in their own jurisdictions while subjecting Indigenous authorities to imposed conditions, thereby skewing the relationship in favor of Settler authorities. Likewise, most practices of co-decision have become relationships of co-management instead, wherein shared bodies play advisory roles subordinated to dominant Settler institutions.[59] Similarly, condition-setting practices have become predominantly unilateral, especially through insistence that the Canadian *Charter of Rights* applies to First Nations governments.[60]

[56] Christopher Lord and Paul Magnette, "E Pluribus Unum? Creative Disagreement about Legitimacy in the EU," *Journal of Common Market Studies* 42, no. 1 (2004), 184 especially.

[57] For discussion, see Keith Cherry, *Practices of Pluralism: A Comparative Analysis of Trans-Systemic Relationships in Europe and on Turtle Island* (unpublished PhD thesis, University of Victoria, 2020), 30–32, 67–70 especially.

[58] See, for example, Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014), chap. 7 especially. See also Michael Asch, "Confederation Treaties and Reconciliation: Stepping Back into the Future," in *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings*, ed. James Tully, Michael Asch, and John Borrows (Toronto: University of Toronto Press, 2018), 35–39; Neil Vallance, "Sharing the Land: The Formation of the Vancouver Island (or 'Douglas') Treaties of 1850–1854 in Historical, Legal and Comparative Context" (unpublished PhD thesis, University of Victoria, 2015); Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2013), generally and especially at 14–16.

[59] For discussion see Phare et al., *Collaborative Consent*, 15.

[60] For discussion, see Bill Rafoss, *The Application of the Canadian Charter of Rights and Freedoms to First Nation's Jurisdiction: An Analysis of the Debate* (unpublished MA thesis, University of Saskatchewan, 2005).

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While the literature on treaty federalism[61] focuses on realigning the relationship between Settler and Indigenous authorities by adjusting jurisdictional boundaries and (re)creating co-decision forums, making condition-setting practices reciprocal could complement this approach. For example, future treaties could not only subject First Nations to the *Charter* as interpreted by Canadian courts, but also subject federal and provincial governments to standards set by each Nation and articulated, policed, and adjusted by independent Indigenous legal institutions. Federal, provincial, and Indigenous bodies would all be able to govern within their negotiated jurisdictions, but each would have to respect the fundamental standards of the others. Each would have its own institutional voice and, thus, an iterative dialogue between Indigenous and Canadian law could begin.

In all these ways, practices of reciprocal condition setting may have something to offer to overlapping authorities that are interested in democratizing their relationships and thereby attending to the relative dimensions of their legitimacy.

CONCLUSIONS

In sum, conditional forms of authority require the condition-receiver to meet multiple standards of legitimacy at once in order to receive the support of its peers. As we have seen, this practice can be unilateral, either as a way for dominant powers to enforce standards on subaltern counterparts, or as a way to tactically upset prevailing power imbalances, creating space for subaltern voices in relations of persisting asymmetry. When practices of conditionality are reciprocal, however, both partners are constrained not only by their own internal standards of legitimacy, but also by those of their interlocutors. This allows actors to co-articulate social regulation in a way that can be justified to all participants without requiring them to either divide jurisdictions between them or converge around a shared decision-making structure. Thus, reciprocal condition setting represents a novel way that overlapping authorities can attend to the relational components of their legitimacy. In so doing, these practices furnish one way pursue democratic legitimacy in pluralist space.

[61] For discussion, see James Youngblood Henderson, "Empowering Treaty Federalism," *Saskatchewan Law Review* 58, no. 1 (1994): 241–329; Joshua Nichols and Amy Swiffen, eds., "Special issue on Treaty Federalism," *The Review* 24, no. 1 (2019).

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