Interauthority Relationships

Author : Michael Green

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Timothy Endicott, Comity among Authorities, 68 **Current Legal Problems** 1 (2015).

For too long the focus in philosophy of law has been the national legal system. As some have already observed, this ignores public international law. But it also ignores *private* international law, or (as Americans would call it) the conflict of laws. Private international law is less about creating laws and judgments that bind nations than it is about coordinating nations' existing laws and judgments. Philosophers of law also tend to ignore similar coordination *within* a national legal order. Not much is said about federalism, subsidiarity, and administrative law.

The focus on the unitary national legal system extends to how philosophers of law use the concept of authority. As Joseph Raz has argued, an authority provides a service: those subject to the authority are better able to comply with their reasons for action by doing what the authority says than by considering the reasons directly. For example, a doctor will be an authority for me if I am better able to do the right thing medically by following the doctor's orders than by acting on my own reasoning about medical matters. Simply because lawmakers are considered to be authorities does not mean they are. But because lawmakers *claim* authority, even if they may not have it, authority is considered essential to understanding the law. Because of the focus on the unitary national legal order, however, philosophers have concentrated on the relationship between a single authority and its subjects—how the authority mediates between its subjects and their reasons for action.

In this article, Timothy Endicott considers the question of coordination between authorities. When should an authority go along with the decision of another authority, even when it thinks that decision is in error? Here is one of his examples: "A mother arrives at the school football game to find her son fighting with another small boy, and the other boy's father is trying to exert his authority to solve the problem." (P. 1.) The goal is to use general lessons drawn from such situations to illuminate areas of the law that concern the coordination of authorities, like private international law and administrative law. (My focus will be the former.)

These general lessons, Endicott repeatedly emphasizes, are very modest. Too much depends upon the particulars. Nevertheless, he is able to put important concepts in private international law in a new light.

An example is jurisdiction, both adjudicative (that is, the power to issue a judgment binding on the parties to a concrete dispute) and prescriptive (the power to create laws that prospectively regulate transactions). In private international law, jurisdiction tends to be read territorially. Under Endicott's reading, this can be explained by the fact that French officials are probably better (and certainly no worse) at exercising the service of authority concerning persons, property, and events within France than American officials are. The point is not that this is the actual reason for the territorial nature of the positive law of jurisdiction. That may be based in the extent of the sovereign's capacity to coerce. Rather, this is a reading of jurisdiction in the light of the law's claim to authority.

But the biggest payoff is Endicott's interpretation of the fuzzy and contested concept of comity. Assume that a French court issues a judgment in favor of a French plaintiff against an American defendant concerning a French business transaction. The French plaintiff then sues in an American court, asking that the defendant's American assets be seized to satisfy the French judgment. The reason for the American court to give effect to the French judgment, it is sometimes said, is comity.

But theorizing about comity seems to vacillate between two unsatisfying poles. On the one hand, comity is understood

as mere courtesy or reciprocity between sovereigns. That makes it sound too weak and discretionary. On the other hand, comity is understood as a duty of one sovereign to another. That makes it sound too strong and unyielding.

Endicott argues that we cannot understand comity by considering only the relationship between the authorities. We must think of their relationship to the people they serve. To the extent that the American court should go along with the French court's decision (whether or not French courts would do the same were the situation reversed), this is because it would serve the parties subject to the authority of the American court. If the American court unjustifiably ignores the French court's decision, the wrong would be to the parties, not to France.

Notice that it does not follow that an authority should always go along with the prior decision of another authority within its jurisdiction, even when one throws in independent justifications, like the benefits of finality. The service the second authority provides is likely to be different from the first's. As Endicott emphasizes, there are too many relevant considerations to come up with hard and fast rules. But, out of concern for those subject to its authority, the second authority should act, whenever possible, with respect for the legitimate authority of the first.

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