The Failure of Legal Pluralism

Russell Sandberg
Senior Lecturer in Law, Centre for Law and Religion, Cardiff University

Concerns about legal pluralism, the co-existence of more than one legal system within a state, have become pronounced in recent years, owing to fears about the operation of sharia law in Western societies. At the same time, the concept of legal pluralism has become ubiquitous within legal literature. Paradoxically, the concept is both politically controversial and academically banal. This article contends that a major failing of the concept of legal pluralism has been the inability to distinguish legal norms from other forms of social control. It is suggested that this failure can be overcome by developing the concept of a ‘legal order’ as found in the work of Maleiha Malik and the understanding of law as discourse in the work of the German theorists Niklas Luhmann and Robert Alexy. It is argued that developing these approaches provides a means by which legal norms can be distinguished without adopting either a wholly objective or a completely subjective approach and without focusing exclusively upon the legal norms generated by the state.

Keywords: legal pluralism, definition of law, legal orders, sharia, social control

INTRODUCTION

Making and enforcing rules is a routine activity within human social life. Every social group creates its own norms, which are then adjudicated and enforced. Of course, such norms may be expressed formally or informally, explicitly or implicitly, in writing or orally. They may be general or specific, comprehensive or makeshift, exhaustive or illustrative. However, in all situations rules and norms are made and then refined both by the creation of further rules and also by the application of the rules to factual situations to determine whether the rule in question has been breached. This applies not only to rules created by political communities, such as the state or local forms of governance,
where jurisdiction is defined territorially. It also applies to rules created by communities defined by their adherence to commonly held beliefs. This includes what is often labelled religious law: the norms and rules created internally by religious (and other) communities which are then enforced in a variety of ways ranging from informal social sanctions such as social disapproval to formal decisions by bodies who have been given legal functions, such as courts and tribunals.3

This fact of legal pluralism is often overlooked in twenty-first-century debates concerning the interplay between religious law and state law. Recent years have seen much concern expressed about legal pluralism and the functioning of religious courts in particular.4 This has often been reduced to a base fear of sharia as shown by the hyperbolic reaction to the erudite lecture on ‘Religious and civil law in England: a religious perspective’ given in February 2008 by the then Archbishop of Canterbury, Dr Rowan Williams.5 Concerns about religious courts have arisen in many Western states and with increased frequency, the most recent example being in March 2015 when the Home Secretary, Theresa May, spoke of ‘examples of sharia law being used to discriminate against women’ but then went onto concede that ‘we know we have a problem, but we do not yet know the full extent of the problem’, calling for an independent investigator to be appointed, which is yet to occur.6 Although there has been some academic research into religious courts which has replaced some of the heat with light, it is clear that simply speaking of legal pluralism in relation to religion remains controversial.7

Yet the concept of legal pluralism is almost banal. If legal pluralism is understood as the acceptance that ‘it is normal for more than one “legal” system to co-exist in the same social arena’, then the concept is unobjectionable and even trite, given that numerous systems of norms clearly exist at all times.8

3 The term ‘religious law’ describes both the rules found in sacred texts and also the more practical rules developed by religious groups themselves. For discussion of issues of definition, see R Sandberg, Law and Religion (Cambridge, 2011), ch 9.
4 For a useful account of the debate, see R Grillo, Muslim Families, Politics and the Law (Farnham, 2015).
7 See the ‘Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts’ Research Project at Cardiff University, funded by the AHRC/ESRC Religion and Society Programme, <http://www.law.cf.ac.uk/cr/research/cohesion.html>, accessed 5 February 2016; and studies of specific religious tribunals such as S Shah-Kazemi, Untying the Knot: Muslim women, divorce and the shariah (Nuffield Foundation, 2001), and S Bano, Muslim Women and Shari’ah Councils: transcending the boundaries of community and law (Basingstoke, 2012).
8 B Tamanaha, A General Jurisprudence of Law and Society (Oxford, 2001), 171. A number of different definitions and typologies of ‘legal pluralism’ have been suggested. See, eg, A Griffiths, ‘Legal pluralism’ in R Banakar and M Travers (eds), An Introduction to Law and Social Theory (Oxford, 2002), pp
On an average day (if there is such a thing), a person enters a range of different social environments where different norms and rules apply from the household in which they awake, the transport system in which they travel, their place of work, sites of commerce and spaces where they are entertained. They will encounter household customs and rotas, train tickets, workplace rules of conduct, contracts for the sale of goods and warnings forbidding the recording of cinematic films. In other words, as part of our everyday lives we come across a multitude of norms expressed and enforced in a plethora of ways with differing extents of formality. We may call these norms by different things: rules, guidelines, customs or laws. But all of the time our behaviour is being regulated and decisions are being made about whether we are conforming to the rules and what should happen should those rules be breached. This banality of legal pluralism is increasingly reflected in the academic literature. The presence of differing legal norms within a state is seen as a historical and sociological fact. The only questionable matter is what is meant by ‘legal’. There are two extreme responses to this: a centralist approach and an expansive approach.

A centralist approach
The ‘legal centralist’ approach seeks to distinguish state law clearly from all other forms of law or social control.10 This approach is epitomised by Hans Kelsen’s ‘pure theory of law’, which stated that ‘law’ could be sharply contrasted with ‘other social orders which pursue in part the same purposes as the law, but by different means’: law can be distinguished from other social or moral rules in that laws are compulsory and result in sanctions if they are broken.11 For Kelsen, legal norms were to be distinguished from religious norms in that, although religious norms are often accompanied by a sanction, that sanction is not socially recognised but is an act of ‘superhuman authority’. This, however, ignores the role of religious law, which provide norms that are accompanied by both superhuman and human (legal or social) sanction. More generally, the legal centralist

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9 See, eg, Douglas-Scott’s assessment that legal pluralism now provides the ‘most convincing and workable theory of law’ that best ‘captures the nature of law in the contemporary era’: S Douglas-Scott, Law after Modernity (Oxford, 2013), p 23.

10 This approach also extends to those who explicitly or implicitly ‘takes state law to represent the epitome of law: Tamanaha, General Jurisprudence, p 178. It includes the work of Jeremy Waldron (eg J Waldron, Law and Disagreement (Oxford, 2001), as discussed by Muñiz-Fraticelli, Structure of Pluralism, p 129.

approach may be criticised in that the pre-eminent status it affords state law is incorrect both historically and sociologically. It also excludes and lumps together all forms of non-state regulation. In this respect, the legal centralist approach suffers, ironically, from the same defect as the expansive approach.

An expansive approach
The ‘expansive’ approach abandons any attempt to distinguish law from other forms of social control. This approach is well shown by the work of ‘sociological jurisprudence’, which sought a label that could cover all forms of social obligations.12 Ehrlich referred to ‘living law’, rules ‘based on social behaviour rather than the compulsive norms of the state’ and that are generated by formal and informal social groupings or ‘social associations’; Gurvitch wrote how every ‘form of sociality’ produced its very own ‘kind of law’ and that law included ‘inter-individual laws’ and ‘social law’, which is based on mutual trust, aid and co-operation; and Petrazycki wrote of ‘intuitive law’, which he defined as ‘those legal experiences which contain no references to outside agencies’.13 The difficulty with such an approach is that the width of the definition makes it difficult to say anything meaningful about law in particular.14 Again, all forms of legal and social regulation of varying degrees of formality are simply lumped together. The only real difference between the two extreme approaches is whether or not state law is thrown into the same pile.

The problems with both approaches has led Tamanaha to argue forcibly that the concept of legal pluralism is ‘fundamentally flawed’, despite the popularity of the term.15 He criticises the legal pluralist literature as a whole on the basis that scholars have tended to hold ‘essentialist assumptions’ about law: they have assumed that law consists of a singular phenomenon which can be defined, but have then failed to agree upon a definition of law, meaning that their work suffers ‘from a persistent inability to distinguish what is legal from what

14 Tamanaha, General Jurisprudence, p 173, argues that an expansive definition of law ‘raises the imminent danger of sliding to the conclusion that all forms of social control are law’. This means that the term ‘law’ ceases to have any distinctive meaning as ‘other forms of normative order, like moral norms, or customs, habits, and even table manners are swallowed up to become law’ (ibid, p 174). For Tamanaha this is counter-productive, in that it actually ‘hinders a more acute analysis of the many different forms of social regulation involved’: see B Tamanaha, ‘Understanding legal pluralism: past to present, local to global’, (2008) 30 Sydney Law Review 375–411 at 393.
15 Tamanaha, General Jurisprudence, p 171.
is social’.16 This has meant that even the founders of modern legal pluralism have seemingly turned their backs on the term.17 John Griffiths has now argued that the word ‘law’ should be ‘abandoned altogether for purposes of theory formation in sociology of law’, with the terms ‘normative pluralism’ or ‘pluralism in social control’ as his preferred candidates to replace ‘legal pluralism’, while Sally Falk Moore has written that distinctions must be made between governmental and non-governmental norms of social control.18 The failure of legal pluralism is that, while it asserts the normality of there being more than one ‘legal’ system co-existing in the same social arena, it does not provide a means whereby such ‘legal’ norms can be identified and distinguished from other forms of social control.

This article explores whether this failure can be corrected. It investigates whether it is possible to develop the understanding of legal pluralism to distinguish between what we may designate as law and what we may refer to as merely social control, without succumbing to legal centralism. The following sections will contend that this can be achieved by developing the concept of a ‘legal order’ and the understanding of law as discourse, and that it is possible to distinguish legal from other norms without relying upon a wholly objective or a completely subjective approach.

LEGAL ORDERS

The first step forward in seeking to distinguish legal norms from other forms of social control is to shift focus from particular rules towards the creators and adjudicators of those rules instead. Determining whether a rule is legal or social depends upon the context, and the categorisation may shift. These difficulties mean that, rather than attempting to label each rule legal or social, the focus should be upon the rule-making body. The question, broadly put, is not whether a norm is a law but whether the norm-making body is a legal order.19

Malik has helpfully explored how a legal order is to be understood as part of her attempt to achieve an understanding that extends beyond state law but excludes ‘normative social orders and social relations’.20 She suggests that, although the term ‘legal order’ ‘could be defined to include both legal norms

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16 Ibid, pp 171, 174. See, however, Muñiz-Fraticelli, Structure of Pluralism, pp 135–136. Muñiz-Fraticelli agrees that the legal pluralist tradition has ‘failed to provide criteria either for distinguishing legal from non-legal phenomena or for recommending for or against the recognition of a normative system as law’ (ibid, p 139).
17 Tamanaha ‘Understanding legal pluralism’, p 393.
19 This section draws upon R Sandberg, ‘The impossible compromise’ in R Sandberg (ed), Religion and Legal Pluralism (Farnham, 2015), pp 1–20.
(where an individual can point to distinct norms that regulative normative social order) and legal orders (that indicate mechanism for institutionalised norm enforcement), both should be required.21 It is not only the case that there need to be legal norms that are ‘sufficiently distinct, widespread and concrete to ensure that they are distinguishable from general social relationships’.22 There also needs to be a legal order that is ‘some additional mechanism, for exercising authority through decisions, interpretation and implementation’.23

The weaknesses of objective approaches
Malik’s definition of a legal order is objective not subjective. For her, the term is said to ‘exclude diffuse mechanisms for normative regulation even if their adherents insist that these are “law”’.24 She calls for an ‘objective criterion’ to determine whether the mechanisms are diffuse but it is unclear what criterion would be used; Malik assumes that these conditions are implicit in her definition. Although it is possible to identify such standards, the use of objective standards is questionable given that such conditions are prone to suffer from three defects.25 First, they may be overly conservative, understanding legal mechanisms by precedent so that mechanisms are only seen as legal if they are similar to existing legal mechanisms and so excluding novel or different mechanisms. Second, they may be culturally specific, perpetuating a Westernised notion of law. Third, they may fail to take into account changing...

20 M Malik, Minority Legal Orders in the UK: minorities, pluralism and the law (London, 2012), p 22. Malik has favoured the term ‘minority legal orders’ but the word ‘minority’ here is problematic. She seems to use the term to describe all religious groups, observing that ‘Jews, Christians and Muslims are the three religious groups most commonly assumed to have a legal order’ (ibid, p 16). However, the focus exclusively upon religious minorities is flawed because religious majorities also have their own legal orders and this is also true of non-religious cultural groups (see A Hussain, ‘Legal pluralism, religious conservatism’ in Sandberg, Religion and Legal Pluralism, pp 151–160). It would therefore be preferable simply to refer to ‘legal orders’.

21 Malik, Minority Legal Orders, p 23.
22 Ibid, p 23.
23 Ibid, pp 23–24.
25 An obvious candidate for the objective criterion would be the ‘five basic techniques’ by which law discharges social functions identified by Robert S Summers in ‘The technique element in law’, (1971) 59 Californian Law Review 733–751: it could be said that enforcement by law consists of actions that remedy grievances, prohibit forms of anti-social behaviour, regulate socially desirable activities, regulate the provision of services and provide for the private arranging of affairs. Similarly, Karl Llewellyn’s four ‘law-jobs’ or basic functions of law could be evoked: a legal order could be defined as providing the orderly resolution of disputes, the preventive channelling and reorientation of conduct and expectations to avoid conflict, the allocation of authority in the group and what Llewellyn called the ‘net drive’: that is, the organisation and harmonisation of group activity to provide direction and incentive to group members. See K Llewellyn, ‘The normative, the legal and the law jobs: the problem of juristic method’, (1940) 49 Yale Law Journal 1355–1400. L Murphy, What Makes Law: an introduction to the philosophy of law (New York, 2014), p 168, comments that it is ‘obvious that the various institutional criteria (courts, legislatures, enforcement agencies) … are not helpful’ in terms of distinguishing law.
understandings of what people regard as law. This would include failing to take into account or at least being slow to take into account social change.

It is also unnecessary to exclude ‘diffuse mechanisms’. The difference between norms and orders is simply that between the existence of an obligation and the enforcement of an obligation. Malik is correct to exclude obligations that are not enforced by ‘decisions, interpretation and implementation’. However, there is no reason why such obligations need to be ‘distinct, widespread and concrete’. Malik envisages that ‘whether or not there is a minority legal order will depend on where it falls on a spectrum rather than being a clear issue’. 26 This lack of clarity is likely to aggravate concerns about legal orders. A preferable approach would be to conclude that in order to become a legal order (rather than a mere norm) all that is needed is that norms are enforced. Malik’s understanding of a legal order should be taken further so that it is understood that, wherever there is any mechanism, however informal, for resolving disputes about validity, interpretation and enforcement, then this institutional aspect will ensure that it is a legal order. Malik suggests that the presence of such a mechanism would make it more probable that there is a legal order. 27 A preferred approach would be to consider this definitive, provided that there is a flexible understanding of what constitutes a mechanism.

The work of Liam Murphy may be instructive here. He has observed that:

While the availability of coercive enforcement cannot be seen as a necessary condition for a normative order counting as a legal order, I do believe that when it is law we are talking about (rather than, say, morality or etiquette), we hold that coercive enforcement is in principle appropriate. 28

In particular, Murphy’s notion of enforcement as being ‘in principle appropriate’ is useful to underpin the argument that we are not talking in terms of a monopoly of legitimate use of physical force. 29 Murphy argues that it is not that ‘status as law requires provision for effective enforcement’ but rather that ‘when it comes to law we would regard it as obviously appropriate for provision to be made within the normative order itself for effective enforcement’. 30 He contends that classifying something as law is ‘not just to say something about enforcement’ but ‘is also to say something about the formal characteristics of

26 Malik, Minority Legal Orders, p 24.
27 Compare ibid, p 23: ‘If there is some mechanism, albeit informal, for resolving disputes about validity, interpretation and enforcement, then this institutional aspect will make it more likely that there is a minority legal order’.
28 Murphy, What Makes Law, p 5.
30 Murphy, What Makes Law, p 163.
the normative order you have in mind as well’.31 In short, this falls back on what he refers to as ‘the commonsense idea that law has got something to do with the exercise of power’.32 To recognise this, it is necessary to modify the definition of a legal order as follows: wherever there is any mechanism in principle, however informal, for resolving disputes about validity, interpretation and/or enforcement, then the appropriateness of this institutional aspect will ensure that it is a legal order.

The weaknesses of subjective approaches
Even with this refinement, however, it remains the case that the understanding of legal orders is not subjective. It matters not whether the adherents define their obligations as ‘law’; a legal order exists where norms exist and are enforced. As Malik notes, this focus on ‘the issue of authority as well as the institutional aspects of law’ invokes the work of Max Weber and H L A Hart.33 The modification of Malik’s definition suggested above coincides with Hart’s distinction between primary and secondary rules.34 For some, this will be objectionable, and a wholly subjective approach will be preferred. This is the approach taken by Tamanaha’s ‘social theory of law’, which recognises that ‘law is a social construction’.35 His ‘methodology of socio-legal positivism’ states that ‘that the activities of private citizens and legal officials (if any) cannot be understood without attention to their internal point of view’ and that: ‘Law is whatever people identify and treat through their social practices as “law” (or droit, recht etc.)’.36 This means that other or new forms of “law” can be said to exist whenever recognised as such by social actors. Thus, what law is, is determined by people in the social arena through their own usages not in advance by the social scientist or theorist.

He asserts that something is considered to be law, ‘if sufficient people with sufficient conviction consider something to be “law”, and act pursuant to this belief, in ways that have an influence in the social arena’.37 Tamanaha’s ‘social theory of law’ has much in common with some approaches to legal pluralism such as Kleinhans and MacDonald’s ‘critical legal pluralism’, which understands legal knowledge as ‘the project of creating and maintaining self-understandings’.

31 Ibid, p 170, emphasis in original.
32 Ibid, p 171.
33 Malik, Minority Legal Orders, p 22.
35 B Tamanaha, Realistic Socio-legal Theory (Oxford, 1997) chs 5 and 6; Tamanaha, General Jurisprudence, p 162.
36 Tamanaha, General Jurisprudence, pp 163, 166.
and Codling’s concept of ‘subjective legal pluralism’, which requires the narrative accounts of people to be captured and analysed.38

The emphasis upon subjectivity by such authors is apt, given that the judiciary have asserted that ‘Freedom of religion protects the subjective belief of an individual’.39 It also alleviates a significant problem with much of the analysis of religious tribunals which focus on the role of the group and of the state without examining the agency of those who use such tribunals.40 A subjective approach can focus on how people use forms of law and legal mechanisms as part of the construction and reconstruction of their identities.41 The problem with a wholly subjective approach, however, is that it perpetuates the failure of legal pluralism: it fails to provide a means by which to distinguish legal norms from social norms.42 If law becomes law when people identify and treat it as such then it becomes impossible to identify law as a phenomenon separate from social control. It follows that wholly subjectivist definitions of legal orders should be rejected. However, rather than taking a purely objective approach, a middle way should be adopted: the notion of law as discourse should be used to distinguish legal norms from other forms of social control.

LAW AS DISCOURSE

In a recent ground-breaking publication, Muñiz-Fraticelli has understood the way in which associations claim and attempt to possess authority over their members as part of a philosophical tradition of ‘political pluralism’, contending that this can be contrasted with and preferred over approaches based on multiculturalism. As part of this work, he proposes ‘the idea of intelligibility as a primary criterion of legality’.43 He asserts that: ‘A normative system is a legal system if it is intelligible to other legal systems as a legal system’. Further, he contends that ‘legality is a matter of mutual recognition’ and that the criteria


41 This is part of the ‘subjective turn’, on which see P Heelas and I Woodhead, The Spiritual Revolution (Malden, MA, and Oxford, 2005), and R Sandberg, Religion, Law and Society (Cambridge, 2014), p 161.

42 This means that Tamanaha’s criticism can be turned back onto itself: his approach ‘does not provide sufficient guidance for distinguishing legal and non-legal phenomena’ (Muñiz-Fraticelli, Structure of Pluralism, p 149).

43 Muñiz-Fraticelli, Structure of Pluralism, p 150.
for such mutual recognition among legal systems ‘are not formal criteria’ but rather are ‘reasons for legal officials in one system to recognise another on the basis of shared characteristics’. His argument that it is legal systems themselves that identify one another as legal systems is an important step forward. The question is whether the definition of law, or at least its distinguishing features, can come from law itself. This would provide a middle way between objective and subjective approaches.

The notion of law as discourse could prove useful here. This can be developed by reference to two different but in some respects complementary analyses by two German theorists: namely the social systems theory developed by Niklas Luhmann, and Robert Alexy’s theory of legal argumentation. A number of writers have suggested the merits of social systems theory in furthering accounts of legal pluralism. And it has also been suggested that theories of legal argumentation and legal reasoning ‘challenge the formalist, legal positive (statist) concept of law’ and ‘open up a broader, more liberal, more pluralist notion of legal experience’. However, in addition to their respective merits, the two theories provide related answers to the question of how law itself can distinguish legal from social norms. Both Luhmann and Alexy emphasise the role of legal reasoning as a linguistic activity. They show how law defines and distinguishes itself.

**Systems theory**

Put briefly, Luhmann’s social systems theory states that modern society is functionally differentiated into autonomous social systems such as law, religion, politics, science and the media. Luhmann sees these social systems as reproducing themselves by communication, rather than following the classic social theory of Durkheim and Weber that sees them as being the product of

44 Ibid 153.


labour divisions or social action.\textsuperscript{49} For Luhmann, social systems are self-referential: he came to refer to them as ‘autopoietic’ systems on the grounds that they produce and reproduce their own unity.\textsuperscript{50} Social systems therefore define themselves based on self-description: as systems reproduce themselves, they also define themselves by distinguishing themselves from other social systems. Law is one social system and, like other social systems, it reproduces itself by communication. It is ‘neither structure nor function’ that defines what law is.\textsuperscript{51} Neither ‘law’ nor ‘the legal system’ is defined by institutions, the status of individuals or ‘organized legal practice’.\textsuperscript{52} The legal system defines and distinguishes itself. This shifts the focus from debates on the ‘true nature of law’ towards asking how law defines its own boundaries and where they are drawn.\textsuperscript{53} It also means that other systems accept law’s decisions as ‘social facts’.\textsuperscript{54} This approach has the benefit of being able to keep in line with social change without having to resort to either an external objective definition with set criteria or a wholly subjective approach that allows individuals to define what law is on a case-by-case basis.

So, how then does law distinguish itself? For Luhmann, although social systems (law, religion, politics, science, etc) develops links with one another, they become autonomous by developing their own functional specification. Each social system becomes differentiated by having its own function and its own binary code.\textsuperscript{55} These provide the means by which each system will self-define and therefore perpetuate itself. Law’s function is the ‘stabilisation of normative expectations’ in the face of disappointment, and its binary code is legal/illegal.\textsuperscript{56} As Teubner notes, this means that ‘law’ includes any phenomenon which is communicated using the distinction legal/illegal that has the function of the stabilisation of normative expectations.\textsuperscript{57} Any communication that has this function and uses the legal/illegal code becomes part of the social system of law. A systems approach to law does not see law as being simply state law.\textsuperscript{58} Any

\textsuperscript{49} M King and C Thornhill, \textit{Niklas Luhmann’s Theory of Politics and Law} (Basingstoke, 2003), p 11.

\textsuperscript{50} Luhmann, \textit{Sociological Theory of Law}, p 281. Social systems are operationally closed because they are self-referential; their individual operations ‘are identified as such by themselves’: Luhmann, \textit{Law as a Social System}, p 86. However, they are ‘cognitively open’ in that they require ‘the exchange of information between system and environment’: N Luhmann, \textit{Essays on Self-Reference} (New York, 1990), p 229.


\textsuperscript{52} King and Thornhill, \textit{Niklas Luhmann’s Theory of Politics and Law}, p 35.

\textsuperscript{53} Ibid, p 42.

\textsuperscript{54} Ibid, p 38.

\textsuperscript{55} That is, ‘a guiding distinction by which a system identifies itself and its own relationship to the world’: N Luhmann, \textit{A Systems Theory of Religion}, trans D Brenner and A Hermann (Stanford, CA, 2013), p 45. For Moeller, a code is ‘the basic distinction that a social system applies in order to communicate’: H Moeller, \textit{Luhmann Explained: from souls to systems} (New York, 2006), p 216.


\textsuperscript{57} Teubner, ‘Two faces of Janus’, p 1451.

\textsuperscript{58} Several critics, however, point out that Luhmann’s concept of law is ‘openly parasitic upon the state law model’ given that the operation of the binary code rests upon common legal centralist ideas about
social system that distinguishes itself in the same manner as law is regarded as law. Religious and other tribunals (and indeed other norm-making, decision-making and adjudication bodies) produce both legal and other (most notably religious) communications but whenever they produce legal communications (that is, communications that uses the legal/illegal code and fulfil the function of law) then that, according to systems theory, is law. Legal orders can therefore be seen as autopoietic systems in their own right.

A systems theory approach means that social norms can be distinguished from legal norms; it provides a means by which to distinguish law from other social systems. Luhmann’s great contribution in this context is therefore to show that we can recognise legal pluralism but yet still distinguish law from social norms. Social systems theory demonstrates that this distinguishing does not need to be by the application of an external objective test or decided each time on a wholly subjective basis. Rather, we can take a step back from individual actions to see how law develops as a system. As law defines itself through its own communications, law as a social system perpetuates itself. As Nobles and Schiff observe, this provides ‘the possibility of what pluralist motivation has not yet produced – a common theoretical endeavour, not based on a common conception of law, but a sociologically informed understanding’.

Systems theory approaches have been criticised on grounds that they are anti-human. It is incorrect to say, however, that systems theory denies individual agency. Criticisms of the anti-humanist nature of Luhmann’s work are misplaced in that systems are the result of the actions of people. Systems become recognisable through the historical aggregate of repeated patterns of behaviour. Focusing on systems allows us to see how the actions of people over time have reached an understanding that has become so entrenched that it is now perpetuated by the system. This can be illustrated by looking briefly at a criticism levelled at the greatest English legal historian of all time by the greatest English legal historian of the twentieth century. S F C Milsom, as part of his ‘pious heresy’ questioning some of the assumptions of F W Maitland’s

the notion of law: Tamanaha, General Jurisprudence, p 103. See also Kleinhans and Macdonald, ‘What is a critical legal pluralism?’, p 39.
59 For Luhmann’s work on religion, see Luhmann, Systems Theory of Religion.
60 Nobles and Schiff, Observing Law Through Systems Theory, p 130. It is difficult to disagree with their conclusion that ‘the approach of systems theory, which concentrates on coding, has more potential to extend the study of what is legal beyond a focus on formal sources than does an approach that identifies as “law” only what a significant number of participants, if questioned, would describe as “law”: Nobles and Schiff, ‘Using systems theory’, pp 275–276.
account of the origins of the common law through the development of the writ system during the reign of Henry II (1154–1189), suggested that:

The common law writs came to be seen as somehow basic, almost like the Ten Commandments or the Twelve tables, the date from which the law itself was derived. And since the mechanism of change within the common law had been to allow one writ to do the work formerly done by another, the whole process came to be seen as an irrational interplay between “the forms of action”. It was not. It was the product of men thinking.

Here Milsom was making a false choice. By analysing the ‘irrational interplay’ between the forms of action, we do not need to deny that this was also the product of human thinking. It was human thinking that created the writ system and it was human thinking that enabled the writ system to evolve as litigants came to prefer certain writs over others. However, rather than looking at each individual act of litigation, it is preferable to examine the historical aggregate of repeated patterns of behaviour at the system level. This reveals how the writ system took on a life of its own, perpetuating itself by becoming the vehicle which the majority of litigants used. A systems theory approach, like Maitland’s account of the forms of action, does not deny that the law is the product of human agency. It simply focuses not on the individual acts of agency but rather on collective changes embodied in the system. A systems-level analysis does not deny that law is the product of human agency. The notion that it is possible to analyse the workings of law as a system should therefore be uncontroversial.

The work of Luhmann fully recognised that systems are shaped by their environments. It is fully compatible, therefore, with accounts that emphasise the role
of human agency in the development of legal systems, such as that offered by Watkin. For Watkin, ‘social groups are formed to promote the survival of their members’. Law advances the ‘twin purposes’ of promoting the survival and social coherence of groups ‘by preventing disputes which endanger these goals from arising, and by providing a form of resolving those disputes which actually do arise and threaten to disrupt the community’. He argues that law ‘emerges for the first time within the social group’ as a result of ‘the need to solve disputes while maintaining peace’. Before that point, ‘the community can be said to have rules of conduct, etiquette or even of morality, but not legal rules’. This account, stressing that legal systems are human products, is fully compatible with Luhmann’s social systems theory that law becomes differentiated from other social systems once it begins discharging its unique function.

Indeed, Watkin’s account can be used to develop Luhmann’s theory in two ways. First, it can support our previous proposition that systems can be analysed in the abstract, without denying that such systems are human-made. Drawing upon the work of the psychiatrist R D Laing, Watkin argued that law, like other systems generated by social groups, is a ‘social phantasy system’: ‘social in that they are shared, and phantastic in that they exist in the mind and not in the real world’, though ‘those who share the phantasy seldom realise that what they are doing is phantastic; there is a collusion to pretend that it is real and to the extent it is real as far as the participants are concerned’. This approach demonstrates that we can analyse phantastic systems by studying them within their own terms and seeing how they grow and reproduce themselves, while recognising that such systems are a human construct and so, although they may appear to have a life of their own, they are always subject to external influence.

Second, and perhaps more importantly, Watkin’s account of how legal systems originate provides an illustration of how law perpetuates itself as a social system. By reference to comparative examples, including the development of the English common law, Watkin theorises that the development of law as the ‘effective solution of disputes by means of go-betweens to the satisfaction of the parties and without breaking the peace of the community’ gave rise to two

68 Ibid, p 88.
69 Ibid, p 117.
70 That is, the ‘stabilisation of normative expectations’.
71 Watkin, p 6.
72 As Nobles and Schiff, ‘Using systems theory’, pp 266–267, note, this means that: ‘Its hermeneutics are rooted not in the intentions of human actors, but in the meanings generated by those actors through their participation as communicators within subsystems of communication such as law, the economy, science, politics, and education.’
consequences. The first was that ‘certain people were recognized as successful go-betweens and these probably became the community’s first judges’; the second was ‘the idea that a dispute must have a solution if only such could be found’. While the first consequence gave rise to judges and courts, the second led to ‘the idea that rules existed to guide the satisfactory determination of disputes, and these rules mark the emergence of law’. Watkin further states that this development of rules would lead to a next step which involved ‘the realization that if a solution has solved one dispute satisfactorily, it will solve identical disputes also and probably similar ones as well’, and that this would give rise to ‘the idea or custom of settling disputes according to well-tried methods of which have a proven record of success’. From this, ‘once a body of isolated decisions can be seen to be dealing with a certain topic, those decisions can be read like an orchestra score . . . so as to establish the correct principle for solving such disputes’. This account of the birth of the legal system explains how the system can seemingly take on a life of its own. To adopt Watkin’s metaphor, it is the refinement and extension of the ‘orchestra score’ which allows the legal system to reproduce itself. To a degree, the ‘orchestra score’ limits the amount of innovation that can take place. Unless the ‘orchestra score’ is abandoned – and that always remains an option – the music of law must be played, though the tune may change and the orchestra instruments may play new and differently sized contributions. This allows innovation and growth but within prescribed parameters.

Watkin’s account, with its determination that theory must be kept ‘in touch with the social realities’, can be usefully used to support and develop the social system theory approach of Luhmann. His focus on human agency, stressing how developments result from the survival mechanisms of social groups, does not mean that the development of law as a phantastic system cannot also be studied in its own terms. This shows how systems theory analysis is compatible with accounts that focus on human agency. The next section will attempt to take the argument further again by looking at the potential contribution that could be made by theories of legal argumentation. These, to return to Watkin’s metaphor, enable us to see how the orchestra score is written and how it develops.

73 Watkin, Nature of Law, p 123.
74 Ibid, p 124. In the English common law this development occurred when the creation of new writs was prevented by the Provisions of Oxford 1258, meaning that only identical claims would be dealt with, as amended by chapter 24 of the Statute of Westminster II 1285, which allowed new writs to be created that were ‘very similar’ (in consimili casu) to existing writs, which created the system of precedent. See, further, T Watkin, ‘The significance of “in consimili casu”’, (1979) 23 American Journal of Legal History 283–311.
75 Watkin, Nature of Law, p 124.
Legal argumentation theory

Theories of legal argumentation suggest that ‘law consists, in the main, of argumentative and interpretative activities which take place at different levels and are carried out by different subjects’. They regard legal reasoning as a definitional attribute of law. This is not to say that legal reasoning is utterly separate from non-legal reasoning. Alexy regards legal argumentation as a specialisation, or ‘special case’, of general practical discourse, on the basis that legal discussions are concerned with the practical questions of ‘what should or may be done or not done’ and because these questions are discussed under ‘the claim of correctness’. This ‘claim of correctness’ is similar to Luhmann’s binary code and, indeed, Hart’s rule of recognition. Alexy’s ‘special case’ thesis contends that legal discourse differs from general discourse in just two respects: first, the claim to correctness in legal discourse is limited to showing that the normative statement in question can be ‘rationally justified within the framework of the validly prevailing legal order’, rather than being rational per se; second, in the context of legal argumentation, ‘not all questions are open to debate’.

Alexy’s argument is that, although legal discourse takes place ‘in special forms, according to special rules, and under special conditions’, it is ‘always dependent on general practical reasoning’. Like Luhmann, he explains how law is both attached and detached from the rest of society. Moreover, and again like Luhmann, Alexy develops an understanding of law as discourse, which means that the concept is not limited to state law. Rather, legal reasoning is ‘a linguistic activity which occurs in many different situations from courtroom to classroom’.

78 According to legal argumentation theory, ‘legal reasoning too (and not just the rules) can be argued to contribute significantly to shaping the contents, structures and boundaries of legal orders. This is to say that reasoning, in addition to affecting specific stages in the development of a legal system, impacts incisively on the features of law as a whole’ (ibid).
79 T Gordon, The Pleadings Game (Dordrecht, 1995), p 53; Alexy, Theory of Legal Argumentation, pp 212–213. For Alexy, this ‘inextricable link of legal to general practical discourse’ has four aspects: (1) the need for legal discourse in view of the nature of general practical discourse, (2) the partial correspondence in the claim to correctness, (3) the structural correspondence between rules and forms of legal discourse and those of general practical discourse, and (4) the need for general practical reasoning in the framework of legal reasoning’ (ibid, p 287).
80 Hart, Concept of Law, p 100.
81 Alexy, Theory of Legal Argumentation, pp 214, 220.
82 As Alexy noted, ‘legal reasoning is characterized by its relationship with valid law, however this is to be determined’ (ibid, p 212).
83 Ibid, p 292. This is shown by his listing of six groups of argument forms: interpretation; dogmatic argumentation (that is, legal science in the narrower and proper sense); the use of precedents; general practical reasoning; empirical reasoning; and the so-called special legal argument forms (that is those particular argument forms dealt with in legal methodology such as analogy): ibid, pp 231–232, 250, 279.
(legislation, adjudication, legal advice, legal doctrine) as all being ‘forms of deliberative reasoning’. 85

In his later work, Alexy arrives at a definition of law as:

a system of norms that (i) lays claim to correctness, (2) consists of the totality of norms that belong to a constitution by and large socially efficacious and that are not themselves unjust in the extreme, as well as the totality of norms that are issued in accordance with this constitution, norms that manifest a minimum social efficacy or prospect of social efficacy and that are not themselves unjust in the extreme, and, finally, (3) comprises the principles and other normative arguments on which the process or procedure of law application is and/or must be based in order to satisfy the claim to correctness. 86

Although this definition has been criticised, 87 it begins to redefine law as an argumentative practice. 88 It underscores that the claim to correctness is a definitional attribute of law: ‘A system of norms that neither explicitly nor implicitly makes this claim is not a legal system.’ 89 It also underlines that law is not limited to state law: the use of the term ‘constitution’ should not be seen as referring exclusively to a state constitution; all social groups which develop norms will develop basic ideas that operate either explicitly or implicitly as a constitution. Similarly, law is not to be limited to rules but includes all linguistic activity that is concerned with ‘the correctness of normative statements’. This is furthered by the way in which the definition insists that fairness and a degree of socially efficaciousness is required. 90 This provides an important way in which law can be defined and distinguished.

Alexy’s work as a whole has been interpreted as providing a ‘procedural model’ for legal validity: a legal decision is to be considered to be correct ‘so long as the procedural rules have been obeyed’ and provided that ‘there is no

87 For Bertea, ‘Legal argumentation theory’, pp 224–225, this attempt does not go far enough in that it fails ‘to break with traditional jurisprudence and so fall[s] short of paying the attention due to the thesis that argumentation is central to legal practice’. He calls instead for ‘an idea of law as a slippery activity, as it were, which consists in evaluating reasons and confronting arguments’. Under such an approach ‘law is a dynamic interplay of reasons, a set of reconstructive activities by which theorists and practitioners jointly determine contents and applicative scope of norms’.
88 It is not the only such attempt. Bertea (ibid, 223) also mentions the work of Dworkin and his statement that ‘Law’s empire is defined by attitude, not territory or power or process . . . It is an interpretive, self-reflective attitude addressed to politics in the broadest sense’: R Dworkin, Law’s Empire (Oxford, 1986), p 413.
89 Alexy, Argument from Injustice, p 36.
90 This invokes Watkin’s notion of law as promoting the survival and social coherence of groups: Watkin, Nature of Law, p 117.
reason to believe that the procedure by which it was reached was not fair’.91 This reference to fairness means that argumentation theory goes further than traditional positivist accounts. Under legal argumentation, a law is only valid if it is ‘rationally arguable from the legal system as a whole’.92 In other words, ‘the validity of rules depends not only on the rules’ authoritative enactment and social efficacy, but also on their reasonableness, or rational acceptability’. As Alexy puts it, to be law, legal discourses need to be ‘rationally justifiable’.93 This requirement can be used to define and distinguish legal discourses: wherever there is reasoning (general practical discourse) which lays claims to correctness in terms of being rationally justified within the framework of the existing legal order then that reasoning becomes part of legal discourse provided that it possesses a degree of socially efficaciousness. This is very similar to the notion of coding and function in Luhmann’s theory.

Legal argumentation theory can build upon social systems theory, however, in two ways. First, it can demonstrate why law takes on a dynamic, fluid nature. Bertea argues that seeing law as the product of legal arguments means that ‘law is not a product – something clearly marked off from non-law and independent of the reasoning by which we come to be aware of what the law is – but rather a practice, a stream of activities’.94 In other words, legal argumentation is regarded as ‘a reconstructive activity’:

When the decision-making powers argue for or against a case, they transform the pre-existing law. It is precisely because legal argumentation is not entirely deductive and descriptive of rules that it should be considered an autonomous defining feature of law, separate from the body of norms making up the system.95

Second, argumentation theory improves upon systems theory by showing clearly that, although law reproduces itself through discourse, it is also shaped and re-shaped by external stimuli. As Bertea puts it, ‘the system of laws is to be understood as a dynamic ordering rich in potentialities, an order constantly in process and open to external influences, a set of premises to be developed by

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93 Alexy, *Theory of Legal Argumentation*, p 16. This does not mean that the statement must include a claim to the effect that the speaker him or herself is capable of giving a justification. It is quite sufficient for the speaker to refer to some other determinate or determinable person as capable of justifying what has been said’ (ibid, pp 191–192).
94 Law becomes ‘the outcome of reasoning, as an argumentative social practice aimed at finding reasonable solutions to legal cases in a number of ways and not necessarily only by following posited rules that are general and abstract’, meaning that ‘it is a flux of reconstructive processes by which we manipulate, transform and determine the contents, reciprocal relationships, and applicative scope of norms’: Bertea, ‘Legal argumentation theory’, p 220.
95 Ibid, p 221.
argumentation’. 96 Like systems theory, argumentation theory provides a means to identify law without reverting to a wholly subjective approach. Alexy stresses that, although value judgements play a role in legal discourse, this does not mean that ‘those applying the law can give free rein to their own subjective moral convictions’. 97 This is because ‘a claim to correctness is always implicated in any judgment of a value or obligation’. 98 What matters is not whether the person considers that they are identifying, dealing or interpreting to be law, but rather that their discourse is a legal one.

Argumentation theory can therefore be used to build upon Luhmann’s social systems theory. Indeed, it overcomes many of the (generally unfair) criticisms made of social systems theory. Taken together, these theories provide a means by which legal discourses can be distinguished which furthers Muñiz-Fraticelli’s understanding that legal systems themselves identify one another as legal systems. 99 This is a preferable approach to wholly objective approaches, which are invariably conservative, and to entirely subjective approaches, which breed uncertainty. Rather than assessing the question of what is law against agreed standards or asking people whether they think it is law, it is preferable to determine how legal systems regard themselves. There is a danger here, however, that state law is regarded as providing a template. This needs to be overcome by ensuring that a range of legal systems are studied, including those systems that are on the boundaries between legal and other social systems, since these systems may shed light on where the line has been drawn. In short, there is a need to reverse the plurality. The quest should not be for manifestations of something that resembles state law; rather, it should be accepted that law can take various different forms, of which state law is simply one.100

CONCLUSION

In that infamous lecture in February 2008, Rowan Williams concluded that there was a need for ‘some thinking … about the very nature of law’.101 Generally, however, the significant literature which responded to the lecture

96 Ibid, p 220. He notes that this means that law ‘cannot be conceived of as an autonomous system which can be identified on the basis of various elaborate formal criteria of recognition’. This would reject caricatured versions of social systems theory, though Luhmann’s account does not see the autonomy of law as being complete so as to exclude external stimuli: ibid, p 221.
98 Ibid, p 178.
99 Muñiz-Fraticelli, Structure of Pluralism.
100 As Tamanaha, General Jurisprudence, p 172, argued convincingly, whereas ‘conventional accounts of legal pluralism began with an often State-centric concept of law and then sought to find variations of this single phenomenon in society at large’, there is a need to begin instead with the notion that ‘often different kinds and manifestations of law co-exist in the same social field’.
ignored this call. Indeed, Cotterrell has criticised an exception to this rule on the basis that focusing on the question of what ‘law’ is skews the analysis ‘too much towards an assumed need to save certain traditional legal philosophical projects’ and so ‘neglects more urgent and less parochial concerns’.102 This criticism is misguided. Focusing on the question of what ‘law’ is is a prerequisite to exploring the other questions. The focus is needed in order to overcome the failure of legal pluralism: the failure to distinguish law from other social norms. This failure is perpetuated by both centralist and expansivist approaches. Moreover, the act of distinguishing law should not be achieved on purely objective or subjective grounds. A wholly objective approach that measures law against set standards will be culturally and politically loaded. A completely subjective approach that recognises as law whatever people call law breeds uncertainty, making it impossible to identify law as a phenomenon separate from social control except on a case-by-case basis.

This article has sought to provide a means by which legal norms can be distinguished from other forms of social control in a way that does not succumb to a purely objectivist or subjectivist approach. It has done so by focusing not upon whether a particular norm is legal but rather upon whether the norm-making body is a legal order. Malik’s definition of a minority legal order was adapted to state that a legal order exists where norms exist and are enforced.103 However, Malik’s insistence upon some objective criteria for determining the mechanism for such enforcement was rejected. Similarly, it was considered inappropriate to rely upon the subjective identification of law. A middle way between purely objective and subjective approaches was sought and it was suggested that a solution could be found in Muñiz-Fraticelli’s understanding that legal systems themselves identify one another as legal systems. This was developed through introducing the notion of law as discourse. It was suggested that the definition of law, or at least its distinguishing features, can come from law itself. Luhmann’s social systems theory shows that law can be distinguished from other social systems in that it is comprised entirely of communications that uses the legal/illegal code and fulfil the function of the stabilisation of normative expectations. Alexy’s theory of legal argumentation demonstrates that law can be distinguished from general practical discourse in that it lays claims to correctness in terms of being rationally justified within the framework of the existing legal order and possesses a degree of socially efficaciousness. Any legal communications that share these characteristics should be regarded as being law.

103 Malik, Minority Legal Orders, pp 22–24.
The benefit of the two different but complementary theories of law put forward by the two German theorists is that they provide means of distinguishing law based upon criteria that are not objectively fixed but are not entirely subjective. This means that social changes can be accommodated. An approach based on law as discourse therefore enables a degree of legal certainty (like wholly objective tests) but also enables a degree of flexibility (like wholly subjective tests). It is suggested that this compromise provides a preferable way forward to begin to correct the failure that has led to the concept of legal pluralism being seen as academically banal but politically controversial: the inability to extend the understanding of law beyond that generated and adjudicated by state organs while simultaneously being able to distinguish law from social control.