CAMBRIDGE
Cambridge University Press
978-1-108-70725-1 — In Pursuit of Pluralist Jurisprudence
Edited by Nicole Roughan , Andrew Halpin
Excerpt
More Information

1

Introduction

NICOLE ROUGHAN AND ANDREW HALPIN

1.1 Preliminary Remarks

This book presents both advocacy and critique of a number of approaches to what is described as Pluralist Jurisprudence – theories of law moving beyond, within or without the state. Pluralist Jurisprudence, with its interest in phenomena such as customary law, international/regional law, transnational law, religious law, indigenous law and global law, takes seriously both the theoretical challenges of exploring these orders in themselves and the challenges they pose to state-centric/monist jurisprudential theories.

The objective of collecting the present contributions together in a single volume is to provide a metatheoretical interrogation of pluralist jurisprudence, its scope, its aims, its methodologies, and its distinctiveness. This objective was advanced at a conference held at the Centre for Legal Theory in the Faculty of Law, National University of Singapore, in February 2015. Most of the chapters in this book first saw light as papers delivered at that conference. In addition, the book contains a paper originally delivered by Joseph Raz as the inaugural Singapore Symposium in Legal Theory in January 2014,[1] a further chapter from Kirsten Anker commissioned for this book, and a joint reflection by the editors on the promises and pursuits of pluralist jurisprudence.

The volume does not present a united front. Instead it features scholars offering a variety of approaches to pluralist jurisprudence yielding quite different insights but willing to engage directly in foundational questions. From sociologists of law to theorists of legal reasoning, from critical theorists to scholars of liberal constitutionalism, and from conceptual analysts to theorists of the rule of law, the contributors neither assume nor take for granted the significance of

[1] We have retained the content and style of the oral presentation for its inclusion in this book.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-70725-1 — In Pursuit of Pluralist Jurisprudence
Edited by Nicole Roughan , Andrew Halpin
Excerpt
More Information

pluralist jurisprudence. Rather, they examine whether, how and to what ends it can or should be pursued.

It is customary to use an editorial introduction to offer a frame that will illuminate the contributions and spell out their thematic connections to one another. In our view, however, the image of a frame is inapposite for an interrogation of pluralist jurisprudence. The subject matter of pluralist jurisprudence is itself contested and obscure, and the prospect of providing a clear picture bordered by a firm frame appears misguided, if not simply undeliverable. The title of the book perhaps conveys a more appropriate image. The pursuit of pluralist jurisprudence is suggestive of a chase, possibly with no quarry in sight. It suggests tracking an elusive object across terrain that may be open, or cluttered with obstacles; even, littered with the remnants of prior pursuits. The image also suggests the possibility that the pursuit itself may be fanciful, or fruitless; that it may simply fail. Nevertheless, our aim as editors, and also as contributors to this volume, is to collect the insights the authors have generously provided from a rich abundance of perspectives, and to fashion out of them a portrayal of pluralist jurisprudence that captures its qualities and potentialities, without seeking to bring it into captivity.

One obvious way to commence a more detailed setting for the interrogation of pluralist jurisprudence is by way of establishing a contrast with non-pluralist jurisprudence. But even at this preliminary point the contestability of our subject matter does not permit a sharp contrast to be made. Among the central challenges in producing a portrayal of pluralist jurisprudence are considering the precise extent to which it can be regarded as differing from non-pluralist jurisprudence, to what extent it requires new tools and methodologies, and to what extent it is called upon to deal with material that non-pluralist jurisprudence is unequipped to deal with.

The cumbersome phrase, non-pluralist jurisprudence, suggests that the problem of contestation does not commence with pluralist jurisprudence alone but is already present in its comparand. What precisely did we understand by the condition of jurisprudence before pluralist jurisprudence came along and jostled with it in a bid for special recognition? Without being committed to a definitive understanding of pre-pluralist jurisprudence, or taking a side on what might determine a significant distinction between pluralist and non-pluralist jurisprudence, it is helpful to point to a temporal point of departure from non-pluralist jurisprudence that can be noted without controversy as the impetus for contemporary interest in pluralist jurisprudence. Connected to that observation,

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-70725-1 — In Pursuit of Pluralist Jurisprudence
Edited by Nicole Roughan , Andrew Halpin
Excerpt
More Information

it is also possible to note (again, uncontroversially) a key feature that has been associated with the scope of pluralist jurisprudence, and has been marked out as the basis for its distinctive recognition. In simple terms, we can take the relatively recent enthusiasm of the past couple of decades or so with the phenomena of non-state law as prompting the call for a pluralist jurisprudence; and at the same time we can regard its distinctive scope as dealing with the phenomena of non-state law in a way that traditional jurisprudence had neglected.

In these simple terms, traditional jurisprudence is municipal or state-centric jurisprudence. Even if it touches upon international law, it does so from a state-centric, Westphalian perspective of viewing international law through the agency or authority of states. It remains, in that sense, monist.[2] By contrast, pluralist jurisprudence involves the recognition of non-state law in a way that is independent of both the agency and the authority of states. In order to get the discussion started, there is some value in going along with this simple view, taking non-pluralist jurisprudence to be an established jurisprudential preoccupation with state law and in that sense to be monist in outlook; and to take that as having recently been challenged by a growing concern to recognise non-state legal phenomena, and with that recognition to acknowledge the plural bases of law beyond the state, together with their interactions, so requiring a pluralist jurisprudence.

Although this move is helpful in getting the discussion started, we shall see that the subsequent discussion soon becomes reflexive, turning in on the simplicity of this starting point. For one thing, whatever traditional jurisprudence might have been considered to be, jurisprudential thought prior to the recent awakening of interest in a pluralist jurisprudence was far from homogenous. Strong disagreements could be detected in traditional jurisprudence between and among analytical/empirical, philosophical/sociological, descriptive/normative, positivist/non-positivist approaches, and vehement oppositions which split even those approaches broadly agreeing on an appropriate intellectual emphasis (empirical, philosophical, critical) while remaining utterly at odds over the effective way of delivering it. For another thing, the mere expansion of the scope of jurisprudence to take in non-state law does not

[2] This sense of monist is wide enough to embrace both 'monist' and 'dualist' understandings of the relationship between municipal law and international law. As Cormac Mac Amhlaigh points out in Chapter 4, these conventionally used terms amount to a reordering of hierarchy between municipal and international legal orders within a non-pluralist perspective.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-70725-1 — In Pursuit of Pluralist Jurisprudence
Edited by Nicole Roughan , Andrew Halpin
Excerpt
More Information

necessarily require a different jurisprudence, with different tools and different methodologies. Perhaps the old jurisprudence could simply be diverted to take account of the new phenomena; perhaps we are still simply dealing with questions of legality, normativity and legitimacy, which could be answered with the resources already available.

Taking these two points together, we can recognise the situation arising out of the relationship between monist and pluralist jurisprudence as being particularly complex. If traditional monist jurisprudence is fragmented into a number of competing intellectual approaches, the call for a novel pluralist jurisprudence might (opportunistically or legitimately) be directed in a partisan manner to promoting one of those previously existing approaches while criticising the inadequacies of another, as much as it might be a call for a truly original approach to be discovered. We are, accordingly, soon presented with an array of possibilities in charting the relationship between monist jurisprudence [MJ] and pluralist jurisprudence [PJ].

Some possibilities would effectively preserve a conventional MJ, of which the most straightforward would be: (1) PJ simply requires the tools and methodologies of MJ to be applied to an expanded field of phenomena. Additionally, there might be some input into the concerns of MJ, as where: (2) Dealing with the expanded field of phenomena found in PJ demonstrates the superiority of $\text{Approach}_{\text{A}}$ from MJ over $\text{Approach}_{\text{B}}$ from MJ. Alternatively, there might be no commerce between the two: (3) Whatever is required for an effective PJ does not touch upon the appropriateness of an effective approach to MJ.

Other possibilities would not preserve a conventional MJ. So, we might find that radical modification is called for, where: (4) Dealing with the expanded field of phenomena found in PJ requires a completely novel approach, $\text{Approach}_{\text{N}}$, which entails a modification of MJ due to the inadequacy or incorrectness of any of the approaches found in MJ. Here the modified MJ would sit alongside the novel PJ without being integrated within it. That amounts to a further possibility: (5) $\text{Approach}_{\text{N}}$ adopted for PJ implies the inadequacy of any of the approaches found in MJ, and should be taken as supplanting them all in a common jurisprudence of state and non-state law.

Another possibility is that the fresh requirements of PJ exert a synthesising influence over the rival approaches within MJ: (6) $\text{Approach}_{\text{N}}$ adopted for PJ requires a composite of the different approaches found in MJ, thus revealing their true compatibility in a common jurisprudence of state and non-state law. Alternatively, there is the possibility

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-70725-1 — In Pursuit of Pluralist Jurisprudence
Edited by Nicole Roughan , Andrew Halpin
Excerpt
More Information

that: (7) There is no singular Approach_N appropriate for the different phenomena found in PJ but a diversity of approaches is required by PJ, so providing no stable relationship with MJ.

This brief sketch of some of the possible relationships between monist and pluralist jurisprudence is better amplified through considering the substantive arguments of the contributions to this book, but a number of other preliminary points are worth making here, before surveying these contributions in detail.

One important point to note (which is latent in the array of different possibilities just enumerated) is that the contestability, or instability, that might be found in monist and pluralist jurisprudence can extend to the notion of pluralism itself. This involves a number of factors. First there is the potential move from a mere recognition of plurality to the adoption of pluralism. A plurality of phenomena might be fitted under a monist perspective, which dictates how exactly each of the phenomena will be regarded in accordance with the dominant understanding it imposes. (Only state law is truly law, and the great variety of other law-like phenomena must be understood as failing in different respects to fully exhibit the qualities of law.) What changes when a pluralist perspective is adopted? What seems to be deeply implicated by the pronouncement of pluralism, on top of a simple recognition of plurality, is the promotion of some degree of accommodation of diversity. Whereas a monist perspective carries with it a connotation of exclusivity (only this amounts to law in accordance with this outlook), the adoption of pluralism permits the plurality of phenomena to be approached in an expansive way so as to acquire status in whatever way suits each contender (all of these amount to law in their own different ways).

Characterising pluralism as involving a turn to liberal accommodation adds to the problems of contestability and instability, in that we now need to consider just how open the pluralist approach we adopt will be in bestowing the cherished status (of law), and on what basis or bases that status will be bestowed. The problems here are immense. It is not even as though we start with a fixed set of phenomena, whose status needs to be determined. It is not even the case that the phenomena (whichever they turn out to be) provide a stable subject for the attention of pluralism. Different aspects of the phenomena may be selected, different perceptions of the phenomena may be at stake, in liberally working through a pluralist allocation of status.

Attempting to take a theoretical interest in these matters does not reduce the problems. A unitary theory that seeks to account for the

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-70725-1 — In Pursuit of Pluralist Jurisprudence
Edited by Nicole Roughan , Andrew Halpin
Excerpt
More Information

diversity of phenomena, which a liberal pluralist approach has admitted, risks diluting the credentials for obtaining the status to the point of becoming meaningless (everything is law, so having the status of law tells us nothing about anything). A less indulgent unitary theory, which restricts admission to the status (only those phenomena that satisfy these criteria in one way or another count as law), runs the risk of betraying the pluralist cause. Although less exclusive than the outright monist approach, it still sets the bar at a certain height and excludes those contenders that fail to reach it. Is the answer then to look for theories that are themselves pluralist in trying to account for the different ranges of diversities that pluralist approaches might admit?

One reason for hesitating at this extreme extension of pluralism into the theoretical realm is that it would appear to be self-defeating. If a pluralist diversity of *theories* is to be tolerated in order to account for the alternative ways in which the status of law can be bestowed, then what is to prevent a monist theory producing an exclusive bestowal of status being counted among them? Another way of expressing the danger here is that the pre-theoretical problems of contestability and instability we have recognised in taking a pluralist approach are simply resurfacing by attempting to deal with them at a higher level of theoretical pluralism. A more applied concern for avoiding ratcheting up ever-increasing levels of pluralism is that this move avoids the very practical bite of pluralist challenges. While the abstract discussions featured throughout this work situate its principal contribution in the realm of theory, it involves an area of theory which grapples with a set of challenges that, for jurists and law subjects, are real and sometimes urgent. A compelling reason to be dissatisfied with simply multiplying our theories of law, and pluralising explanations or justifications of plurality, is the disservice it represents to those who need a robust pluralist jurisprudence in order to discern the value of particular non-state legal forms against monistic legal forms that presently ignore or exclude them. Again, it is better to augment these suggestive remarks with the solid discussion of these points that can be found within the chapters that follow, which we draw attention to in the survey below.

A close consequence of admitting to contested possibilities affecting the very core of our subject matter is thus to recognise the likelihood of normative or aspirational agendas becoming interwoven with theoretical efforts to achieve clarity of understanding for that subject matter. Jurisprudence in any shape or form is notoriously difficult to insulate from normative concerns. Unsurprisingly, given the basic business of law

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-70725-1 — In Pursuit of Pluralist Jurisprudence
Edited by Nicole Roughan , Andrew Halpin
Excerpt
More Information

in providing norms guiding relationships between members of a society. Move, through non-state law, beyond the society contained by a state, and it is easy to entertain grander normative ambitions for pluralist jurisprudence. These may move outwards, breaking through state barriers to encompass a cosmopolitan vision; or, unshackled from the constraints of the hierarchical submission of citizen-subjects to the law, they may move inwards to a deeper concern with a participatory status offered by non-state forms of normative ordering. And given the possibility that we have mentioned of a reflective dynamic invigorating the relationship between monist and pluralist jurisprudence, we can expect fresh enthusiasms for the normative concerns of conventional jurisprudence to be released by the theoretical investigations of pluralist jurisprudence. The normative or aspirational aspect of the pursuit of pluralist jurisprudence is a further feature that is explored in imaginative and significant ways within the chapters of this book.

In the survey of these chapters that follows we shall take the trouble to point out the particular ways they respond to the three expectations for a pluralist jurisprudence that we have mentioned above: establishing the relationship between pluralist jurisprudence and monist jurisprudence, with the respective understanding of each that follows from how that relationship is viewed; clarifying the precise role of pluralism within a pluralist jurisprudence, with the degree of accommodation or even encouragement that suggests in terms of theoretical expansiveness and practical import; and promoting a normative or aspirational agenda within a pluralist jurisprudence, with the impact that might have on working through the contested possibilities which a pluralist jurisprudence contains. That is not to suggest that other valuable features and significant controversies are not to be found in the discussions of pluralist jurisprudence these chapters contain. We shall do our best also to bring these out in our survey. Our motivation for drawing special attention to the three expectations of this introductory chapter is to set the scene for our own efforts in the final chapter to engage more fully with our contributors, and to discharge both a debt to their generous influences and a responsibility to put forward our own understanding of pluralist jurisprudence.

1.2 The Contents of This Book

The chapters by Roger Cotterrell and Maks Del Mar clearly take up the burden of the practical import of pluralist jurisprudence. In Chapter 2,

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-70725-1 — In Pursuit of Pluralist Jurisprudence
Edited by Nicole Roughan , Andrew Halpin
Excerpt
More Information

Cotterrell explicitly addresses the utility of legal theory from the viewpoint of lawyers, and in doing so draws on earlier work influenced by Gustav Radbruch to suggest a class of theoretically oriented lawyers whom he labels jurists. The responsibility of these jurists is to be concerned for the value of law as a social institution. That value is seen to be under threat from the forces of legal pluralism, which unsettle the expectations of legal orthodoxy and render monist (Western) accounts of law ineffectual. Cotterrell observes a regulatory plurality, which may or may not be perceived as a legal plurality. The task of the jurists differs from the philosophical task of getting at an essential nature of these pluralist phenomena, and from the sociological task of examining the detailed experience of claims to regulatory authority. The jurist's task is to negotiate regulatory plurality as a practical matter. Theoretical assistance to aid this task needs to focus on normative materials or doctrine, and the agencies that institutionalise it; but it also has to be combined with explicit reflection by jurists on the values law bears, importantly giving effect to aspirations for justice and security.

In the following chapter, Del Mar turns his attention to the place for a theory of legal reasoning within pluralist jurisprudence. His concern is to build on but avoid the limitations of a perspectival or hermeneutic pluralism which he associates with Neil MacCormick.[3] Despite the respect that offers to different norm-generating units, Del Mar considers that the absence of a rigorous theory of legal reasoning to determine the exact relations between those normative sources makes it vulnerable to a collapse into monism. Del Mar offers a solution to this problem by exploring the possibility of a 'relational pluralism' which permits legal reasoning to be practised in a way that maintains healthy relations between the different norm-generating units. The key to opening up this possibility is harnessing the power of the relational imagination within legal reasoning. Del Mar illustrates this potential with his own impressive collection of imaginative resources, taking in the lessons of history, a survey of cognitive devices and a study of common-law practices, before drawing on the support of recent writers (notably, Patrick Glenn) who in different ways have sought to generate 'cognitive space and time' within legal practice. This is the feature Del Mar treats as the hallmark of relational pluralism, in creating space in which otherwise conflicting

[3] For ease of terminological consistency, hermeneutic pluralism here can be equated with radical pluralism in Michaels' discussion in Chapter 5, and more generally with strong pluralism – and contrasted with weak pluralism.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-70725-1 — In Pursuit of Pluralist Jurisprudence
Edited by Nicole Roughan , Andrew Halpin
Excerpt
More Information

norms from different norm-generating units may be maintained in a non-oppositional environment.

Although there is much that could be united in the efforts of Cotterrell and Del Mar to formulate a pluralist jurisprudence that is capable of providing practical solutions to the actual use of pluralist legal materials beyond the limitations of a monist account, it is salutary to reflect further on whether Cotterrell's understanding of the juristic task as involving the negotiation of regulatory plurality is quite so accommodating as Del Mar's insistence on the imaginative creation of cognitive space in which otherwise opposing forms of regulation could be retained. There is a possible suggestion in the former of hard negotiation, requiring the support of definite normative commitments in order to reach resolution, whereas the latter's construction of cognitive space appears to carry with it the opportunity for avoiding the need for negotiation – at least the kind of negotiation that produces losing parties – and the need for deference to other normative commitments.

If this tension exists between the approaches found in these two chapters, it is certainly a creative tension which significantly raises a basic question about the nature of the non-monist environment in which the recognised pluralism has to be encountered (whether negotiated or not) by legal practice. The straightforward, traditional monist solution of taking the environment of a sovereign state may be unworkable once the pluralism has been accepted, but quite what takes its place is a conundrum that will repeatedly surface as we explore different perspectives on pluralist jurisprudence.

Cormac Mac Amhlaigh, in Chapter 4, confronts this conundrum in his invigorating study of constitutional pluralism, which has been proposed as a way of representing the pluralist environment. Mac Amhlaigh points to the role played within this perspective by suprastate judicial bodies in asserting the credentials and terms of an authoritative and effective legal order within the normative practices that they participate in. This amounts to a self-referential transformative exercise capable of bestowing legal recognition on a plurality of such orders. Despite MacCormick's early work in this area recognising the two distinct types of radical pluralism and monist[4] pluralism covering the relationships within this

[4] What we have referred to in Section 1.1 as 'unitary' to avoid confusion with the alternative use of monist for a non-pluralist setting. MacCormick's hierarchical monist pluralism amounts to a restrictive unitary theory of pluralism (in our terms), and falls on the weak side of the strong/weak divide.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-108-70725-1 — In Pursuit of Pluralist Jurisprudence
Edited by Nicole Roughan , Andrew Halpin
Excerpt
More Information

multiplication of legal orders (depending upon the absence or presence of a normative resource to manage the interactions between different orders), Mac Amhlaigh argues that the tendency within constitutional pluralism has been to assume a methodological monism, notably illustrated in the aspirations of Mattias Kumm for a unifying framework of cosmopolitan constitutionalism. Mac Amhlaigh's careful study comparing the emergence of suprastate legal orders for the EU and the ECHR, in accordance with the precepts of constitutional pluralism, leads him ineluctably to the conclusion that methodological monism fails and that the 'global disorder of constitutional pluralism' makes it necessary to pluralise constitutional pluralism itself.

Reaching a conclusion of theoretical pluralism carries with it the risks we noted above. Whether this result should be associated specifically with constitutional pluralism or be regarded as a broader manifestation of the current condition of theorising suprastate law, which Mac Amhlaigh emphasises is a work in progress, it leaves the practical import of regulatory plurality wide open, for the moment at least. A different strategy for resolving the interactions between multiple legal orders is suggested by Ralf Michaels in his efforts to advance a relational concept of law.

More accurately, Michaels' objective in Chapter 5 is to work towards a concept of *laws*. The relational nature of this concept is proposed on the assumption that a positivist account of inter-systemic recognition can be applied to an observable condition of legal pluralism. Michaels sees this as a third option to add to the prevailing trends in pluralist jurisprudence that follow MacCormick's alternatives of 'radical pluralism' (requiring extra-legal discourse) and 'monist pluralism' (requiring a higher body of law or legal values). The distinctive characteristic of Michaels' approach is to locate mutual relational recognition between pluralist legal orders in a 'rule of external recognition' found as part of each order. As a 'tertiary' rule within each system, it operates to signal a pluralist legal condition, beyond the more familiar internal Hartian rule of recognition associated with a monist conception of law. Michaels' discussion connects his relational concept of law to other recent suggestions in the literature of pluralist jurisprudence, such as Detlef von Daniels' idea of linkage rules. However, he insists on the constitutive nature of external rules of recognition. The mutuality of this constitutive aspect is seen as a strength in combatting John Griffiths's scepticism over a weak legal pluralism promoting a state-centric bias. It is also considered to amount to an admission that under conditions of global legal pluralism a concept of law(s) has to be relational, relative – and contingent.

© in this web service Cambridge University Press www.cambridge.org