

The Turn to Pluralist Jurisprudence

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Nicole Roughan and Andrew Halpin, [In Pursuit of Pluralist Jurisprudence](#) (2017).

Jurisprudence usually changes gradually and imperceptibly, with large-scale shifts recognizable only with the benefit of hindsight. Seldom does it occur that a single piece signals a dramatic turn in the field. A prime example of a transformation-signaling piece is Karl Llewellyn's *A Realistic Jurisprudence—the Next Stop*,¹ announcing the emergence of legal realism. Llewellyn's article did not itself produce the transformation; rather, he identified a generational shift in jurisprudential thought that was already taking place, and he sought to bring attention to this shift and the themes around which it revolved. The article (and its follow-up, *Some Realism About Realism: Responding to Dean Pound*²) served to crystallize and give a label to what theretofore had been an inchoate development. Following this article, legal realism would be criticized, debated, and elaborated. A new school of jurisprudential thought thus was born.

In Pursuit of Pluralist Jurisprudence (2017), edited by [Nicole Roughan](#) and [Andrew Halpin](#), might turn out to be another transformation-signaling piece in jurisprudence, though its impact will not be known until a generation has passed. There are several reasons to think it might achieve this stature. For one, like Llewellyn's piece, this book has a catchy descriptive title that dubs the nascent field "pluralist jurisprudence." Furthermore, the volume contains ambitious original essays by established, as well as rising, jurisprudential figures from different parts of the world: Nicole Roughan and Andrew Halpin (*Introduction* and *The Promises and Pursuits of Pluralist Jurisprudence*), Roger Cotterrell (*Do Lawyers Need a Theory of Legal Pluralism?*), Maksymilian Del Mar (*Legal Reasoning in Pluralist Jurisprudence*), Cormac Mac Amhlaigh (*Pluralising Constitutional Pluralism*), Ralf Michaels (*Law and Recognition—Toward a Relational Concept of Law*), Sanne Takema (*The Many Uses of Law*), Joseph Raz (*Why the State?*), Detlef von Daniels (*A Genealogical Perspective on Pluralist Jurisprudence*), Stefan Sciaraffa (*Two Conceptions of Pluralist Jurisprudence*), Neil Walker (*The Gap Between Global Law and Global Justice*), Margaret Davies (*Plural Pluralities of Law*), Kirsten Anker (*Postcolonial Jurisprudence and the Pluralist Turn*), and Martin Krygier (*Legal Pluralism and the Value of the Rule of Law*). As their titles indicate, the essays cover a range of topics in relation to legal pluralism.

A central organizing theme of the collection, write Roughan and Halpin, is the contrast between monist and pluralist jurisprudence:

[T]raditional 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. 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.³

Pluralist jurisprudence recognizes the co-existence of multiple legal forms in social arenas with various sorts of relationships to state law and other forms of law, from integration, to mutual recognition, to fully autonomous and independent co-existence, to outright conflict, and further variations. In addition to state law, these co-existing forms of law mainly include indigenous or customary law, religious law, international law, transnational law, and human rights law.

Another reason to think this volume might signal a transition in jurisprudence is that, like Llewellyn's piece, it has been preceded by a significant body of jurisprudential work focused on plural legal phenomena. *Concepts of Law* (2015),

edited by Sean P. Donlan and Lukas Heckendorn Urscheler, focuses on legal pluralism from comparative, jurisprudential, and social scientific perspectives. Two recent jurisprudential works that discuss legal pluralism in connection with transnational law are Nicole Roughan's [Authorities: Conflict, Cooperation, and Transnational Legal Theory](#) (2013) and Detlev von Daniels's *The Concept of Law from a Transnational Perspective* (2010). Works on the topic by analytical jurists include Keith Culver and Michael Giudice's *Legalities Borders: An Essay in General Jurisprudence* (2010) and Emmanuel Melissaris's *Legal Theory and the Space for Legal Pluralism* (2009). Early social legal theory works on legal pluralism include William Twining's *Globalisation and Legal Theory* (2000) and my book, *A General Jurisprudence of Law and Society* (2001). To the foregoing list of books can be added several dozen theoretical articles on legal pluralism published in the past three decades.

A further reason to think *In Pursuit of Pluralist Jurisprudence* is a transformation-marking piece is that, like Llewellyn's article, the topics taken up within pluralist jurisprudence relate to pressing contemporary legal, political, economic, cultural and social problems and phenomena. Previous generations of Western legal theorists arguably could disregard or overlook religious law, customary law, and indigenous law as marginal legal phenomena not worthy of serious jurisprudential attention—through these are primary forms of law in many parts of the world—but major legal transformations wrought by contemporary globalization can no longer be ignored. A pluralistic jurisprudence is better equipped to deal with the issues of the day than a jurisprudence built exclusively around the state.

Perhaps the most telling indication that this collection reflects a shift in jurisprudence is Joseph Raz's contribution, *Why the State?* Raz acknowledges other forms of law, including "international law, or the law of organizations like the European Union, but also Canon Law, Sharia law, the law of native nations, the rules and regulations governing the activities of voluntary associations, or those of legally recognized corporations, and more[.]"⁴ Jurisprudence heretofore has focused almost exclusively on state law, he asserts, because until recently the state has been "the most extensive law-like system that is independent or free from external constraints."⁵ Today, however, state law is increasingly subject to external legal constraints by intrusions from transnational law, international law, and human rights law. Raz concludes: the "exclusive concentration on state law was, it now turns out, never justified, and is even less justified today."⁶ This essay represents a remarkable turnaround for Raz, who for decades has advanced a universalistic theory of law built on the state law model.⁷

Whether this collection marks a genuine shift in jurisprudence cannot be known until some time has passed. The contours of what a pluralistic jurisprudence might or should look like are unclear and the contributions to this collection raise many complex questions that go unresolved. Upon completing this volume, a reader may well be left with a disorienting sense of conceptual messiness that recognition of legal pluralism brings, and instead long for the relative clarity of the focus on state law. Discarding this longstanding dominant focus sets jurists adrift with no obvious replacement or mooring. Rather than new approaches, it may turn out, existing jurisprudential theories (like legal positivism) can account for legal pluralism with relatively minor adjustments.⁸ Or perhaps entirely novel jurisprudential frameworks must be developed. Whatever occurs, this collection leaves little doubt that jurists must now seriously consider and account for other coexisting legal forms besides state law.

1. Karl Llewellyn, *A Realist Jurisprudence—the Next Step*, 30 **Colum. L. Rev.** 431 (1930). [2]
2. Karl Llewellyn, *Some Realism About Realism: Responding to Dean Pound*, 44 **Harv. L. Rev.** 1222 (1931). [2]
3. Nicole Roughan and Andrew Halpin, *Introduction* (P. 3). [2]
4. Joseph Raz, *Why the State?* (P. 138). [2]
5. *Id.* at 147. [2]
6. *Id.* at 161. [2]
7. See Brian Z. Tamanaha, **A Realistic Theory of Law** Chapter 3 (2017). [2]
8. For an argument that current legal theory can accommodate legal pluralism, see Cormac Mac Amhlaigh, [Does Legal Theory Have a Legal Pluralism Problem?](#) I articulate an approach to legal pluralism based on legal positivism in Brian Z. Tamanaha, *Socio-Legal Positivism and A General Jurisprudence*, 21 **Ox. J. Leg. Stud.** 1 (2001). [2]

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