Abstracts

Session 1

Do Lawyers Need a Theory Of Legal Pluralism?

Roger Cotterrell

Legal pluralism is a condition in which laws derived from different regulatory regimes or systems interact or compete in the same social space. Do lawyers need theories to explain the nature of this interaction or competition and how they should take account of it? This paper argues that lawyers in modern complex legal systems already address issues of legal pluralism routinely in practice but that orthodox juristic methods for doing this are ceasing to be adequate. Legal pluralism has the potential to undermine the orthodoxies of modern juristic thought in two fundamental ways: (i) by destabilising the idea that law has a timeless essence which legal philosophers can hope to define, and a well-understood character which lawyers can always assume; (ii) by reviving the old (pre-modern) idea that legal authority is not to be revealed by applying positivist pedigree tests of validity but is rather to be negotiated and compromised between the competing claims of different normative orders and practices. Juristic thought presently lacks the resources to deal with these emerging challenges. Confronting them will require an alliance between modern lawyers' familiar analytical techniques and socio-legal empirical studies of regulatory practices. A theory of legal pluralism is needed to inform this alliance.

Equity, Legal Pluralism and the "Honour of the Crown(s)" in Settler State Legal and Political Theory

Kirsty Gover

The relationship between common law and equity is in many respects a paradigmatic expression of legal pluralism. Equity co-evolved with the English common law as a body of laws designed to qualify and alter legal relationships in circumstances involving matters of conscience, first as a vestige of the King's discretion in administering justice outside of the common law courts, and more lately as a device to condition private legal rights and duties with moral ones. In the settler societies equity has emerged as a powerful tool in the management of state-indigenous relations, reaching back to its origin in sovereign discretionary power, and borrowing from the private law of trusts and fiduciary duty, to personify the settler executive as the Crown, and to condition, through the "honour of Crown" doctrine, its dealings with indigenous peoples and their property. This paper explores the function of equity in enabling and managing the legal pluralism of settler states and considers the ways in which equitable concepts have contributed to the concept of the "plural executive" in the settler federations of Australia and Canada. In so doing the paper aims to develop three arguments:

1. First, that a traditional function of equity is to remove certain relationships (especially those characterized by power imbalances or promises) from the scope of general law. In the settler societies equitable principles have been deployed to insulate the state's legal dealings and agreements with indigenous peoples from the application of contemporary human rights law. This serves to protect those undertakings from claims that they constitute racially discriminatory preferences.

2. Second, that in the settler states equitable principles have provided a method and justification for the revision of the English common law doctrine of tenure, by enabling the Crown's sovereign power with respect to land to be "burdened" by aboriginal property interests, in the same way that trustees are obliged by equity to act in the interests of the beneficiaries of a

proprietary trust. This approach enabled the positivist conception of singular sovereign authority to be reconciled with the continuing existence of indigenous law, so preserving the (qualified) legal pluralism now familiar to practitioners and theorists of aboriginal title law.

3. Third, that equity's role in the (re)personifcation of the executive as the Crown directs our attention back to the fundamental constitutive premises and histories of the western settler states, in particular to the mitosis that created the several Crowns in right of the colonies that subsequently formed the Canadian and Australian federations (now the Crowns in right of the states, provinces and territories of those countries), and to the variegation of the common law prerogatives exercised by each of those Crowns. The common law prerogatives and obligations of each of the colonial Crowns differed in accordance with the terms of their inheritance. The pluralism of the settler Crowns and the common law prerogatives they retain persists today as a conceptual and legal conundrum in the settler federations, notwithstanding dominance of legal theories of monism and positivism, expressed for example, in the Australian High Court's recent insistence that Australia has a "single body of common law".

The ancient legal pluralism of equity, then, plays an important role in settler constitutionalism in areas far beyond the private law realms of trusts and property. It has served to reconcile the legal and political theories of the western settler societies by bringing to bear on the public law of indigeniety, the concepts of justice, responsibility and honour that are tenets of the private law of equity.

Session 2

Legal Theory and Global Justice: the Gap
Neil Walker

Legal theory, notwithstanding its strong state-based roots, has adapted well to many of the pertinent question concerning the nature of transnational law. The analytical dimension of legal theory has provided many insights into the nature of non-state legal systems and of the relationship between them. The normative dimension of legal theory has responded in some measure to the challenge of providing ethical standards by which to judge particular non-state legal orders and the relationship between particular non-state legal orders. In both 'relational' questions pluralist legal theory has had a significant contribution to make. However, with regard to overall questions of global justice - which has become such an insistent theme in the contemporary agenda of transnational politics and political philosophy, legal theory has had less to say - is less well adapted to its new horizons, In part, this has to do with the 'practical' gap between the possibility of global justice and the condition of transnational and global law. In part too, it has to be with a 'theoretical' gap. This concerns the ' system-bias' in legal and jurisprudential thought - the difficulty in conceiving of law in ways that are not more or less explicitly system-derivative, and because so, unable to adopt a globally-holistic perspective.

Collectivist Authority and International Customary Law
Stefan Sciaraffia

In this paper, I offer a limited defense of the relative merit of what I refer to as the collectivist conception of authority over Raz's service-conception. In the papers' first part, I argue that the following three theses form an inconsistent triad. (1) As a matter of conceptual necessity, a norm cannot be a legal norm unless it is capable of performing the function distinctive of authoritative

norms. (2) The distinctive function of authoritative norms is the function that Raz's service-conception assigns to such norms. (3) Certain customs among state actors are law qua customs as opposed to qua customs referenced and incorporated by an intentional law-making act (e.g., incorporation in the terms of a treaty) or qua custom recognized as law by the international legal system's norm-applying organs. I then offer reasons why we should be hesitant to reject (1) and (3). In the paper's second part, I argue that there is no inconsistency between (1), (3) and (2CA), where (2CA) holds that the distinctive function of authoritative norms is the function that the collectivist conception of authority assigns to such norms. I conclude that that the consistency of (1), (2CA), and (3) juxtaposed with the inconsistency of (1), (2), and (3) is a point in favour of the collectivist conception of authority. I also explain why this collectivist account of law and authority supports the non-positivist thesis that only norms that meet certain moral tests are law and hence counsels the rejection of Raz's claim that for any law, its existence and content can be determined on the basis of social facts alone.

Session 3

Legal Pluralism and The Value Of The Rule Of Law
Martin Krygier

It is common, nay virtually universal, in jurisprudential discussions of the rule of law, to focus on characteristics of the features and practices of central, state-issued legal rules and institutions. The existence of social pluralism, within which one might locate legal pluralism, might lead us to ask why this should be so. To what extent might acknowledgment of the existence of legal pluralism as a fact (quite apart from any normative attachment one might have) complicate and redirect the way we, including traditional jurisprudes, should think about the rule of law, and where we need to look to find it and to secure it. Why imagine that it is all to be found in the character of official legal institutions in a world where so many other social forces might threaten whatever values the rule of law is supposed to secure, and where so many non-legal institutions might contribute to securing such values? Why *in principle* privilege state law in any commitment to the rule of law? State law is never going to be sufficient to secure rule of law values; in certain circumstances, imaginable and perhaps real, it might not even be necessary. But jurisprudential discussions, much though they might include debate on particulars of what the rule of law requires, have nothing much to say about where those particulars should be sought. That is certainly sociologically inept; and it might be so philosophically as well.

The Many Uses of Law. Connecting an Instrumental and an Interactional Perspective.
Sanne Taekema

Legal instrumentalism has a bad name: it is criticized for reducing law to a policy instrument for external political or economic goals. In this paper I aim to rehabilitate instrumentalism, at least to some extent, by reinterpreting it from the perspective of pragmatist interactionism. By seeing law as emerging from the interactional expectancies of people towards one another, law is conceptually based on horizontal relationships (building on the theory of Lon Fuller). In the paper I will argue that this horizontal orientation can provide a specific version of an instrumental view of law because it pluralizes law's instrumentality. Law is no longer seen as a policy instrument in the hands of authorities, but as a tool for everyone who makes use of it (making use of John Dewey's pragmatism). Such a bottom-up account of law as an instrument requires arguing how the purposive activities of people in legal practices shape law as an interactional phenomenon. It also requires an

argument on how the horizontal and vertical dimensions of law are connected. This means exploring to what extent law as set by official authority figures in, limits or enables, the different uses ordinary people make of law.

Session 4

Metaphors of the New Legal Theory
Margaret Davies

Like all theory, legal thought is reliant to some degree on a number of metaphors which are 'loaded' in the sense that they bring conceptual shape, orientation, and often aesthetic and even normative values to the subject-matter. This is of course unavoidable and a normal part of theoretical language. This paper will consider the metaphorical contours of legal thought and in particular a significant metaphorical transition. Broadly speaking this transition is from metaphors of singularity, hierarchy, verticality, purity, limitedness, foundation and spatial enclosure or boundaries to more plural and relational metaphors that see law as polymorphous, horizontal (or flat), networked, ecological and connective.

If there is a metaphor I would like to promote, it is the idea of law as a pathway, to convey a sense of both a kind of performativity (that is, the behavioural and linguistic iteration which creates the norm) as well as the physicality of actually going somewhere. The idea of normativity as a pathway is a metaphor developed in some detail by others. It is useful for theorising the ways in which patterned and repetitive behaviour crystallises into durable normative forms. Thinking of legality as a path or way helps to transcend otherwise entrenched dichotomies between time and space, singular and plural forms, structure and agency, ideal and material, and collective versus individual action.

Towards a genealogical understanding of transnational law
Detlef von Daniels

I discuss three ways to think about law: analytical jurisprudence, legal pluralism, and the philosophy of international law. I argue that each tradition, by aiming to present itself as a self-sufficient whole, reveals systematic weaknesses, which are highlighted by other traditions. The critique is genealogical insofar as there is no attempt to refute each tradition outright, but instead, to show how it is based upon historical and philosophical presuppositions. I conclude by demonstrating how a genealogical reflection can help to further self-awareness.

Session 5

Three concepts of legal pluralism: A Jurisprudential Assessment
Mattias Kumm

The article will begin by distinguishing between pluralism of sources, pluralism of legal systems (in a Hartian sense) and institutionally heterarchical (pluralist) legal practices. It will argue that the first raises no interesting jurisprudential questions and that Kelsen was right to claim that the second is

jurisprudentially implausible. The defensible part of pluralist legal practices that appear to fit a Hartian jurisprudential framework is better interpreted within a monist framework, which authorizes heterarchical institutional pluralism and makes do without a generally acknowledged final arbiter of legality. The world of law is thus conceptually unified, but neither statist nor fixated on institutional hierarchies.

Law and Legitimacy for Global Institutions
Pavlos Eleftheriadis

Legitimacy is a form of justice. It concerns the way in which institutions can be just or unjust, separately from the question of whether the actions decided by office holders - under those institutions - can be just or unjust. The distinction between the justice of institutions and the justice of actions implies that setting up and maintaining an institution is itself a different type of acting. Political and legal philosophy knows many theories of legitimacy for state institutions, mostly centred around the value of equal citizenship. Most of these theories start from the well known ideals of constitutionalism and the rule of law. We still lack, however, robust theories of legitimacy for international institutions. Most current attempts see international institutions as more or less incomplete attempts to imitate and match domestic ones. Such theories tend to suggest that the more an international institutions approximate those of a state, the more legitimate they become. Something like that is mentioned a propos of the EU's supposed 'democratic deficit. This conclusion is, of course, paradoxical: the role of international institutions is not to replace state institutions. In this essay I argue that the paradox arises partly from a wrong-headed legal theory: legal positivism. I will also argue for a very different theory of legitimacy, one that is internationalist and cosmopolitan in spirit and which respects the rights of self-governing states as parties to international law'.

Session 6

Law and Recognition - Towards a relational concept of law
Ralf Michaels

Legal pluralism, defined as the idea of a multitude of laws existing in the same social space, presents a dual challenge to the dominant paradigm of law state law. The first challenge is the claim that some law exists that does not emerge, directly or indirectly, from the state. The second challenge is the claim that not all laws fit together in a coherent way—instead, that there are overlaps and conflicts between laws that cannot be resolved through appeals to either hierarchy or objective delimitation.

The first of these two challenges correlates with a core concern in legal theory for millennia—the definition of law. In legal theory, unlike legal doctrine, the idea that law does not have to be state law has a long pedigree. It exists in ideas of natural law and, perhaps more importantly for the study of legal pluralism, in ideas of customary law. The recent re-entry of theories of legal pluralism into legal theory—most pronouncedly perhaps through the work of Gunther Teubner—has emphasized especially this aspect.

By contrast, the second of these challenges—the overlap of multiple legal systems—has played hardly any role in legal theory. Where such overlap is discussed, it is mostly confined to the relation between positive and natural law. There is also discussion about discrepancies between positive law and practiced law, but this discrepancy is usually conceptualized as a clash between text and

practice, not an overlap of multiple laws. Interactions of multiple laws are, largely, absent from legal theory. Their relevance is downplayed, their treatments is delegated to doctrinal discplines like private international law.

I want to suggest that both claims from legal pluralism are related. This means that, in order to assess one of them, we must consider the other one as well. More precisely, we will not get an adequate concept of law beyond the state unless we address also the question of interrelations between legal systems. These interrelations are not an afterthought to the concept of law; rather, they are constitutive.

The concept of law that I develop contains two elements: First, a normative order, in order to be viewed as law, but conceive of itself as law. In the terminology of systems theory, this means that the order must use the code of legal/illegal, or a similarly situated code.[1] The second element is one of relativity and recognition: in order to qualify as 'law' for the perspective of another system, including in particular another legal system, the order must be recognized as 'law' by that other system. As a consequence, the order's quality as law is always relative vis-à-vis other systems: an order may well be law with regard to English law, but not to Canadian law, and so on. (Unlike Roughan, I focus on the concept of law, not the legitimacy of authority, though of course both questions are related.)

In the paper I hope to develop this theory in more detail; I also hope to defend it against the most obvious criticism, and show how in what way it is superior to other concepts of law that we have.[2]

Against a General Jurisprudence of Pluralism

Cormac Mac Amhlaigh

A major fault line in pluralist approaches to system or regime interactions as a way of managing and theorizing the global 'disorder of legal orders' (Walker: 2008) is the division between radical and meta-constitutional approaches. Meta-constitutional approaches argue for the management of potential conflicts between regimes through their subordination to overarching trans-systemic 'meta-constitutional' conflict principles. (MacCormick: 1999), (Maduro: 2003) (Kumm: 2005, 2009) (Sabel & Gerstenberg: 2010). Radical or systemic approaches argue that such conflicts cannot or should not be juridified in the development of postnational law, but rather left to the pragmatism and politics of the judiciary, both state and suprastate. (MacCormick 1995), (Krisch: 2010, 2012).

This paper argues that this cleavage in the theorizing of pluralism is a false dichotomy. If pluralism is to elucidate the practices of regime interaction in a post-Westphalian world, then the nature of interaction and the suitability *vel non* of meta- constitutional conflicts norms will be contingent on the subject matter, nature and function of suprastate law, and most importantly, the nature of suprastate law as determined by suprastate judicial actors. Given that the claims about suprastate legal orders differ, there can be no general jurisprudence of pluralism.

This claim is illustrated by contrasting two examples of interactions between normative orders, the interaction between EU law and national law and ECHR law and national law. The interaction between EU law and national law is predicated upon the claims of legal imperium by the Court of

[1] Separately from this paper I have doubts that the dichotomy legal/illegal really represents the code of the legal system, and I also suggest, unlike most system theorists, that we can speak of separate legal systems as actual systems, not merely regimes. But I leave those issues aside for this paper.

[2] Elements of the theory can be found in two earlier publications. See R Michaels, 'Global Legal Pluralism' (2008) Annual Review of Law and Social Science 243, 250-1, 254-5; R Michaels, 'What is Non-State Law? A Primer' in M Helfand (ed), Negotiating State and Non-State Law: The Challenges of Global and Local Legal Pluralism (CUP, 2015).

Justice of the European Union. The resulting interaction with national law, based on mutually exclusive claims to legal imperium, is less conducive to conflicts norms. The interactions between ECHR law and national law, on the other hand, are characterized by the European Court of Human Right's claims regarding the common and consensual nature of ECHR values allowing for the 'suprapositive' values of ECHR to provide a framework for interaction.

What this juxtaposition reveals, the paper argues, is that different conceptual tools are required to explain these different interactions. EU conflicts are best characterized according to radical pluralist models whereas ECHR conflicts are more conducive to a meta-constitutional analytical frame. Therefore there cannot, and should not, be 'a' general jurisprudence of pluralism which applies to all regime interactions in the complex disorder of legal orders characterizing the post-Westphalian world. This is a particularly significant claim, the paper argues, in the light of a recent push in pluralist discourse to move from the European to the global level (Krisch: 2012), (Walker: 2012).