Book Review
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Ubiquitous Law: Legal Theory and the Space for Legal Pluralism (2009) by Emmanuel Melissaris*

Not long ago, Margaret Davies wrote that there was ‘ethos of pluralism’ in much contemporary legal and social science thought.¹ While the spread of this ethos among jurists and jurispruders is more gradual (and perhaps more geographically limited) than she suggested, it is nevertheless real. The awareness of legal and normative complexity is also increasingly important to legal theory, most notably perhaps in the ‘general jurisprudence’ of Brian Tamanaha and William Twining.² Federalism, the ‘bijuralism’ of Quebec, and the constitutional role of the laws and customs of the First Nations makes the study of this complexity particularly relevant in Canada. Sensitivity to legal and normative pluralism is evident in Canadian legal history, including that of Harry Arthurs, the comparative scholarship of Patrick Glenn, and the ‘critical legal pluralism’ associated with Roderick Macdonald (McGill) and Jacques Vanderlinden (Emeritus, Moncton).

This contemporary pluralist ethos is linked to a broad assortment of approaches, many rooted in the social sciences, that have sought to challenge state law’s claim of normative dominance and exclusivity. The earliest of these was the so-called ‘classical’ legal pluralism. Especially important to anthropology over the last half-century, it largely focused on non-Western, post-colonial communities and often served as a critique of Western colonialism and hegemony. More recently, ‘new legal pluralism’ has added Western case studies, suggesting the continuing importance of non-state norms here. The recently-fashionable ‘global legal pluralism’, part of the wider recognition of globalization, encompasses a complex assortment of international law, human rights, and transnational commercial law. ‘Post-modern legal pluralism’ and ‘critical legal pluralism’ make more radical claims. These theories maintain that individuals rather than institutions are the site or nexus of ‘legal’ pluralism in a complex and fluid normative web.

Emmanuel Melissaris’ Ubiquitous Law sits at the more radical end of the legal pluralist spectrum. As will be clear, he also uses ‘law’ in an unconventional manner. Indeed, by rooting ‘law’ in shared normative commitments, he concludes that even ‘state law’ may not qualify as good law because of its disconnect with

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actual normative loyalties. The work is built on a number of earlier articles that appeared in the *McGill Law Journal*, the *Northern Ireland Legal Quarterly*, *Ratio Juris*, and *Social and Legal Studies*. The book is another in a steady and impressive parade of texts on both legal pluralism and philosophy from Ashgate. The author explains that the book is his ‘attempt to provide a philosophical grounding of a socio-theoretical approach to the law’ (4), though this method is, as I’ll discuss below, substantially different from empirical socio-legal approaches. More critically, Melissaris’ work is explicitly normative in two different senses. First, his focus is actually on normative orderings generally rather than ‘laws’ in the more common use of that term. Secondly and more importantly, his book is not merely descriptive. His ‘hope’, he says, is to

reliev[e] the law of the fear of domination and restor[e] its critical and emancipatory potential. The law’s ubiquity will then mean polycentricity of authorship and control over it, and hopefully this can at least be used as a critical tool in the first instance (6).

As I’ll suggest, the work reveals an impressive and passionate intellect. But the work may be challenged on both of these ‘normative’ grounds.

In the first chapter, Melissaris criticizes, with an ever-increasing number of contemporary jurisprudences, the association of law with the state. He rightly suggests that this should allow ‘a reconceptualization of the law as well as a rethinking of the research programme of legal theory (7).’ In clearing the ground for this reconceptualization, he begins with a critical discussion of HLA Hart’s conventionalist positivism and Ronald Dworkin’s prescriptive interpretivism. Each of these rival theories takes an ‘internal’ viewpoint, that is, that of legal officials, especially judges. But this professional perspective distorts their conclusions and concepts of law. Perhaps more surprisingly, Melissaris charges Critical Legal Theory with similar faults. ‘Critical legal theorists’ fail to wrestle with what ‘law’ is and, he argues, remains focuses on the ‘critic [as] a judge, a witness or a clerk (22).’

Chapter two turns to a discussion of ‘legal pluralism’. As Melissaris states, there are many forms of legal pluralism with many different purposes. ‘Legal pluralism’ can be: (i) a legal theory about what law is; (ii) a normative jurisprudence about what it ought to be; (iii) a meta-theory on law and the legal; and (iv) ‘potentially meta-jurisprudence as well (which legal order ought to prevail?) (25).’ He suggests that legal pluralists tend to concentrate on one aspect or another of legal experience, but fail to account for the whole. Instead, he argues, ‘legal pluralism as a way of theorizing the legal must itself be pluralistic, … it cannot be contained in the form of a one-dimensional legal theory (26).’ The author then surveys what he calls the traditional ‘Empiricism-Positivism’ of legal pluralism within the social sciences, especially anthropology and sociology. He includes theories as diverse as those of Jean Carbonnier, Eugen Ehrlich, John Griffiths, and George Gurvitch. These approaches ‘apply formal criteria in order to identify non-State legal orders and their relationship with

State legal orders (28).’ Such criteria are drawn from experience and, so he argues, consequently prejudice the analysis by limiting what ‘law’ is. Melissaris also discusses the work of Brian Tamanaha. Indeed, he notes that he finds much of Tamanaha’s approach to legal pluralism attractive. He rejects, however, the latter’s conventionalist ‘labelling’ argument that ‘law’ is whatever particular communities refer to as such. Among other objections, this leaves us with the conclusion that ‘all the various phenomena’ referred to as law ‘can only be normatively and ontologically incommensurable with each other (33).’ The author’s difficulty then is to find a coherent way to define ‘law’ in such a way that meaningful, commensurable discourse remains possible.

In pursuing this goal in the same chapter, Melissaris discusses the work of the ‘other legal pluralism’, or ‘post-modern’ legal pluralisms, of Margaret Davies, Günther Teubner, Martha-Marie Kleinhans and Roderick Macdonald, Desmond Mandelson, and Boaventura de Sousa Santos. He also reviews Robert Cover’s related ‘jurisgenerative’ approach, an approach that will prove particularly important to the text. According to the author, each of these pluralist approaches ‘den[ies] the possibility of saying anything meaningful about the concept of law and collapse the latter into all other kinds of normativity as well as forms of social control (43).’ This analysis continues into chapter three where Melissaris seeks an alternative understanding of law that is at once universal and plural. Outlining different pluralisms, he first discusses what he refers to as ‘metaphysical’ and ‘cognitive’ variants. He pays particular attention, however, to ‘contextualist’ pluralism. Contextualism, he writes, sees alternative interpretations of law as both universal as well as true to their specific contexts. This brings him back to a discussion of Cover’s ‘contextualist legal pluralism’ and ‘political liberalism’. Melissaris agrees with Cover,

\[\textit{[t]hat we can make sense of the plurality of }\textit{nomoi as contextualizations of a universal sense of law in light of participants’ real commitments and normative experiences…} \textit{[This maintains] the possibility of there being a universal sense of law with both ontological and normative aspects, without needing to take a stance as to whether this sense is part of the fabric of nature or purely socially constructed and yet constant through time. Furthermore, Cover’s contextualism dissociates the law from the State without giving up on its institutional autonomy and differentiation from other normative orders, thus addressing the shortcomings of other theorizations of legal pluralism (59-60).}\]

This allows us, Melissaris writes, to see ‘law as primarily about mutual understanding rather than force, about the way we make normative sense of our shared experience … rather than the necessary suppression of inevitable irreconcilable disagreement’ (60). It is these ever-present shared normative commitments that are, according to the book’s thesis, ‘law’.

Chapter four is a revival of sorts of arguments made in the first chapter. Melissaris is again deeply critical of what he sees as a long-standing focus within legal philosophy on experts. This is obvious enough with Hart’s concept of law

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and legal systems, an odd marriage, the author suggests, of Thomas Hobbes, Max Weber, and Ludwig Wittgenstein. Similarly, Dworkin’s theory is still more reliant on experts. ‘[I]t dismisses people’s fragmentary and local experience and self-understanding as irrelevant and unsophisticated by the standards set by the legal culture (69).’ We must rely instead on the judgments of Hercules, rather than popular public judgements, to find right answers. Melissaris proposes instead a democratic ‘interspectival, Critical Legal Theory’ where plural, contextualised, and self-reflective normative commitments interact in dialogue with one another. Among other things, this moves us a considerable distance away from a focus on both state law and its experts. By way of Jürgen Habermas’s ‘discourse theory’—with Thomas McCarthy and various American pragmatists—he sees a possibility ‘to detranscendentalize and situate reason in context while, at the same time, retaining the possibility of objectivity (72).’ His theory, Melissaris suggests, combines the sociological and philosophical study of the law, rooted in various examples of situated legality, while remaining subject to the revisions of theoretical analysis. The discussion here, it must be said, favours philosophy over situated legalities or normativities.

In chapter five, Melissaris further explores legal discourse or rather discourse about the ‘legal’. He draws most heavily here on Robert Alexy’s discourse theory and, consequently, indirectly on Habermas again. But we are treated, too, to a discussion of John Searle’s ‘speech act’ theory and to the *aporias* of Jacques Derrida. This discussion clarifies Melissaris’ view that law is rooted in shared normative commitments rather than in institutions, including the state. Indeed, ‘the fact that State law is incapable of doing justice to spontaneous and diverse alterities urges us to consider those [normative alterities] as constitutive of the law, rather than giving up on the possibility of reconciling regulation and emancipation (107).’ Melissaris finds a surprising ally in the arch-positivist Hans Kelsen, discussed in the sixth chapter of the book. In Kelsen’s neo-Kantian approach, certain elements are presupposed before our experience of the world. This makes possible, at least for those who agree with such a method, a subtle balance between conceptual and empirical analysis. This non-transcendental and contextualized sense of law might, the author hopes, ‘inform, or perhaps even kickstart … discourse on the ontological and normative contours of normativity (115).’ While law, defined in this way, is not necessarily bound up with the state, it remains inevitably linked to morality. Indeed, state law that fails to appropriately represent shared normative commitments is not properly ‘law’. At the same time,

[I]legality can now be discovered everywhere. The law is then ubiquitous in two senses. First, no source can claim exclusivity over the law…. Secondly, the law … engulfs our social presence…. [R]ule-following is not incidental but central in the human condition. Normativity itself is ubiquitous and human actions are never mere responses to physical stimuli or desires (126).

To repeat, it is not then ‘state law’, or even other, historical-conventional understandings of ‘law’ that is ubiquitous, but shared normative commitments.

Chapter seven explores, with hints again perhaps of Kant, the importance of time and space to law, to our shared normative commitments. Melissaris wrestles
with leading thinkers on the subject of time, especially Gerhart Husserl, François
Ost, and Michel van de Kerchove. He discusses more briefly ‘legal topology’,
concluding that our laws—defined as shared normative commitments—cannot
run out. They are instead ‘ubiquitous temporally and spatially (148).’ In a con-
cise conclusion, Melissaris repeats his hope to see law differently, to release,
through an ‘interperspectival’, reflective and critical discourse, its emancipatory
potential. He argues that ‘[l]egal theory must abandon the expert perspective
and democratize itself by opening up the dialogue concerning the law to all the
participants in legality, whichever form this may take or in whichever context it
may emerge (154).’

Even by the standards of legal philosophy, *Ubiquitous Law* can be dif-
ficult to penetrate. Readers will be rewarded, however, for their patience.
Melissaris is a deep thinker who deserves our attention. He is certainly right,
for example, to critique a narrow perspective, still too common throughout
the legal academy, that sees state law as the standard by which other norms
are measured. Both in the Western past and the global present, state law has
competed with other meaningful, normative regimes. Indeed, in the West,
‘law’ as an institutional normative order preceded the state and should not
be equated with the common national laws and legal institutions of the last
few centuries. On the other hand, ‘legal pluralists’ appear to many scholars,
especially jurists, to fail to acknowledge real differences between state laws
and other norms. There is the suspicion that the promiscuous use of ‘law’ for
all normative orderings ignores real and long-settled conventional distinc-
tions. Indeed, much of the shock of Melissaris’ argument dissolves if the work
is viewed as a theory of *normativity* (which it seems to be) rather than *law*
(which it arguably isn’t). As a result, however, he may be seen to be speak-
ing past many present debates in legal philosophy. This might appear a nig-
glingly criticism, but Melissaris’ thesis demands attention beyond the small
circle of jurisprudences precisely because it is normative rather than legal theory.
Jurisprudence has much to gain by a deeper engagement in the investigation,
both philosophical and empirical, of shared normative commitments. But
there is no need to claim these as ‘law’ and, at least at the level of rhetoric, it
may lead to a dialogue of the deaf.

Melissaris’ analysis of the actual and ongoing communication between
those of different normative commitments is admittedly thin. Taken as a gen-
eral normative theory, however, it proves reasonably convincing. He stresses,
with other pluralist scholars, not least the ‘critical legal pluralists’, the liberat-
ing potential of his account. The programme through which such freedom oc-
curs is, however, far from clear. True, we may be more enlightened as a result
of reading the work. We may be more aware that change can be accomplished
outside of the state, its laws, or other formal institutions. But even if we accept
this account as accurate, there is no guarantee that individuals will be liberat-
ing creators rather than mere conduits corrupted by more dominant forces. The
ubiquity of shared normative commitments does not necessarily result in dem-
ocratic control; existing social structures and power relationships do not disap-
pear. Indeed, the dynamic, normative web that Melissaris describes might en-
snare us instead, all too easily absorbing our attempts at reform. As Boaventura
de Sousa Santos has written in a slightly different context, ‘there is nothing inherently good, progressive, or emancipatory about “legal pluralism”’. 5

This concern with the two normative aspects of *Ubiquitous Law* is serious. The work is, I believe, more successful as a descriptive theory of norms than a prescriptive (normative) theory. That said, Melissaris has made a sophisticated and substantial contribution to our understanding of the legal and normative plurality of the present. The book deserves to be widely read.