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BOOK REVIEWS

Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*, Cambridge, Cambridge University Press, 2012, 344 pp., ISBN 9780521769822 (hb), £60.00, $99.00.
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The idea of global legal pluralism is original and one of the most challenging contributions to contemporary international law. It is original because it offers an innovative pluralist perspective and it is also challenging because this perspective questions many assumptions about traditional understandings of international law.

The book *Global Legal Pluralism* by Paul Schiff Berman offers a comprehensive, clear, and insightful account of what the global legal pluralist framework stands for. As the title of the book suggests, this perspective attempts to bring together various legal systems in the global community. An underlying presumption is that the international community has moved away from the territorial paradigm. Recent developments have extended legal orders beyond territorial limits, which have resulted in an increased level of interaction between domestic and international legal regimes. These spheres of overlapping authority represent a hybrid legal reality in which there is ample opportunity for conflict, confusion, and competition. According to Berman, global legal pluralism provides an adequate response to this tension. The aim of global legal pluralism is to 'seek to create or preserve spaces for productive interaction among multiple, overlapping legal systems by developing procedural mechanisms, institutions, and practices that aim to manage, without eliminating, the legal pluralism we see around us' (p. 10).[1] This approach is cosmopolitan and pluralist at the same time. Cosmopolitan pluralism accepts that various actors generate different norms (in the sense of norm-generating communities) and examines the interplay between them. However, it does not propose a hierarchy of substantive norms and values. Thus, the defining characteristic of cosmopolitan pluralism is that it is not substantive, but *procedural* in nature.

The book consists of four parts. The first part deals with the mapping of a hybrid world. The second part attempts to draw a distinguishing line between hybridity and other concepts, such as sovereignist territoriality and universality. Following this

1 No emphasis added.

conceptual delineation, the author goes on to deal with frameworks, mechanisms, and techniques designed to manage pluralism. The last part deals with conflict of laws in a hybrid world.

In the first part Berman pictures the world as a world of legal conflicts. He offers legal pluralism as a framework to conceptualize the clash of normative communities in the modern world. On the basis of a pluralist framework he conceives a flexible legal system – a system that is autonomous and permeable at the same time. Communication between outside norms and the system proceeds through a dialectical and iterative interplay (pp. 24–5). The typology of existing normative conflicts consists of the following levels of interaction: state versus state, state versus international, state versus sub-state, and state versus non-state. All these levels brought together represent a legal space with numerous areas of overlapping authority and jurisdictional hybridity which depicts a heterogeneous and complex legal world (p. 44).

It is clear from this conceptual exposition that the author does not follow traditional postulates of international law, such as sovereignty and universality. In the second part, he tries to delineate global legal pluralism from these two notions. For that purpose he pictures the state as an imagined community.[2] This allows him to move away from the concept of the state and its focus on territoriality. Instead the author introduces categories of subnational, transnational, supranational, and cosmopolitan identities. The author addresses his main discontent with the sovereignist perception of global affairs through the critique of the cost–benefit model of international law by Jack Goldsmith and Eric Posner (pp. 97–112).[3] The other postulate of international law – universalism – ignores emotional ties that people have with their communities and fails to capture their multifaceted identities. In addition, according to Berman, universalism inevitably erases diversity. Thus, the presumed universal may easily turn into the hegemonic (p. 131).

In the third part, which represents the most innovative segment of the book, the author offers an overview of procedural mechanisms, institutional designs, and discursive practices aimed at managing pluralism. The first mechanism is *dialectical legal interaction* 'that is neither the direct hierarchical review traditionally undertaken by appellate courts, nor simply the dialogue that often occurs under the doctrine of comity' (p. 154). The author here gives examples of, on the one hand, a judicial dialogue between NAFTA panels and US state courts and, on the other, legal interactions of the European courts (European Court of Human Rights (ECtHR) and European Court of Justice) with constitutional courts of European member states. Another judicial technique to accommodate pluralism is the doctrine of *margin of appreciation*. This technique is an interpretative device of the ECtHR to give weight to local variations and to strike a balance between deference to national authorities and the Court's supranational aims and objectives. A similar mechanism is the one of *limited autonomy regimes*, which applies to interactions between state and non-state law, especially in the context of religious and ethnic communities. In such situations

2 He bases his thoughts on the work by B. Anderson, *Imagined Communities* (2006).
3 See J. L. Goldsmith and E. A. Posner, *The Limits of International Law* (2006).

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a state may devolve certain functions to these communities or opt for power-sharing arrangements.

The fourth part deals with the issue of conflict of laws in a hybrid world. First, the author expands the notion of jurisdiction. Instead of linking it to coercive power, he resorts to cultural construction and portrays jurisdiction as a social space that shifts the focus from community dominion to membership. The ensuing cosmopolitan pluralist framework includes the traditional state-sanctioned courts with extended range of jurisdiction (demonstrated by possibilities arising from the *Yahoo!* case) and non-state courts (such as people's courts established in terms of Bertrand Russell's informal justice). The choice of law regime in this conceptual framework compels judges to see 'themselves as part of an interlocking network of domestic, transnational and international norms' (p. 262). When it comes to recognition of foreign judgments this task often presupposes normative conflicts that are best resolved through adjudicatory negotiation between competing norms: 'in a plural world, eradicating normative conflict is not only impossible, it is undesirable' (p. 321).

Berman concludes his book with a statement that hybridity is a reality in the contemporary global legal community and that 'it is the task of scholars and policymakers to develop, evaluate, and improve the mechanisms, institutions, and practices for managing pluralism' (p. 326). Whereas a cosmopolitan pluralist approach for managing hybridity is unlikely to satisfy everyone, he is convinced that it is necessary to manage pluralism rather than eliminate it. In this sense the presented model of global legal pluralism may be the best way to foster peaceful coexistence in a diverse and contentious world (pp. 325, 327–8).

Because the book has been in gestation for more than a decade, it is not surprising that it offers a good and compact presentation of the idea of global legal pluralism. Nevertheless, there are certain points in this conceptual framework which necessitate further reflection. Although Berman puts the notion of hybridity at the core of his theory, there is no reference to literature in this field – for example, to anthropological works of Bruno Latour[4] or, in terms of legal theory, to works of François Ost and Michel van der Kèrchove.[5] Another unsatisfactory point is Berman's portrayal of the realist school in international law. Berman explicitly engages in a dialogue solely with the work of Jack Goldsmith and Eric Posner, who represent a very specific law-and-economy strand of international legal realism.[6] Although innovative and thought-provoking, their approach is not very influential. Perhaps this narrow dialogue makes it easier for the author to portray the state as an imagined community. However, if one speaks of imagined concepts then law may even better correspond to an 'imagined' construction. And yet, law has very realistic consequences as, is evident from the following thought of Robert Cover: 'A judge articulates her understanding

4 B. Latour, *Nous n'avons jamais été modernes* (1997), 21, 22, 47, and 105. Also available in the English translation: We *Have Never Been Modern* (1993).

5 F. Ost and M. van der Kèrchove, *De la pyramide au réseau?* (2002), 15, 27, 31, and 127.

6 Classifications are to some degree always arbitrary. However, the realist thought of international law includes figures as diverse as Roscoe Pound, Myers McDougal, Max Huber, Georg Schwarzenberger, Hans Morgenthau, Abraham Chayes, Charles de Visscher, Paul Reuter, Rosalyn Higgins, Jean Salmon, Alain Pellet, Brigitte Stern, Michael Reisman, Michael Byers, China Mièville, and others.

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of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur.'[7] From this perspective even the extraterritorial reach in public international law represents a potent manifestation of state power. One has only to take a look at the increasing use of drones by the Obama administration,[8] the exercise of police force on the high seas or the use of military force in the foreign territories under states' 'authority and control'.[9]

For that reason the legal space of global legal pluralism may be more conflict-ridden than Berman tends to envisage. The competing normative conflicts may represent an outgrowth of competing power structures in the global community, which would represent a state of anomie.[10] This would not allow for negotiation between norms through various legal techniques but would rather point to a direct clash between power structures and a lack of a common legal and moral denominator.[11] In this sense Berman's espousal of conflicts as an ordinary state of play becomes more doubtful.

All these remarks aside, there is no doubt that Berman's book represents an eloquent and intellectually compelling portrayal of global legal pluralism. Together with Nico Krisch[12] they are major proponents of the pluralist worldview, which could represent a new paradigm for international law. However, here a major question regarding the contents of Berman's book arises; although this book deals with concepts such as sovereignty, jurisdiction, and (international) adjudication, this is not, strictly speaking, a book about international law. This is a book that joins various areas of law into a single concept: (US) domestic law, conflict of laws, constitutional law, and public international law. It mainly deals with procedural techniques and does not provide substantive argumentation in favour of global legal pluralism. As such, the book offers valuable insights to a public international lawyer. However, it does not offer any profound answers to the questions whether and how the traditional model of public international law is about to evolve into a more global concept. Perhaps that was not the aim of this book and further works on global legal pluralism will devote more attention to a relationship between global legal pluralism and public international law.

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7 R. M. Cover, 'Violence and the Word', (1986) 95 *Yale Law Journal* 1601, at 1601.

8 See 'Living under Drones', International Human Rights and Conflict Resolution Clinic, Stanford Law School, and Global Justice Clinic, NYU School of Law, September 2012, at http://livingunderdrones.org/report.

9 See the following cases of the European Court of Human Rights: *Medvedyev and Others v. France* (10 July 2008), *Hirsi v. Italy* (27 February 2012), *Al-Jedda v. the United Kingdom*, and *Al-Skeini v. the United Kingdom* (7 July 2011).

10 On the notion of anomie see E. Durkheim, *De la division du travail social* (2004); and R. K. Merton, *Social Theory and Social Structure* (1962), 131–94.

11 See B. M. Zupančić, 'Criminal Law and Its Influence upon Normative Integration' (1974) 7 *Acta Criminologica*, 53–105, at http://www.erudit.org/revue/ac/1974/v7/n1/017031ar.pdf.

12 See N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010). See, e.g., a review of Krisch's book in this journal: T. de Boer, 'Review Essay: The Limits of Legal Pluralism' (2012) 25 LJIL, 543–56.

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