GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS by PAUL SCHIFF BERMAN  
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In *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*, Paul Schiff Berman ambitiously reinvigorates the time-honoured concept of legal pluralism, applies it on a global scale, and yokes it to an ethical framework inspired by procedural liberalism and cosmopolitanism. Briefly stated, legal pluralism is an analytical concept that addresses the existence of more than one mechanism for generating rules and adjudicating disputes within any given social or political field. Legal pluralism originated in the anti-positivist legal philosophy of the early twentieth century, as a reaction to the established view in law schools known as ‘legal centralism’ that regarded only state law as ‘law proper’. In reality, argued pluralists, state control in the domain of law was far from absolute, and in many colonial or post-colonial contexts, it was not especially relevant to the normative regulation of local society. This became the accepted view in the anthropology, history, and sociology of non-Western law in the second half of the twentieth century.¹

As the intellectual movement gathered momentum, the *Journal of Legal Pluralism* was launched in the 1970s out of the *African Law Studies* journal, and a sizeable body of scholarship on postcolonial African and Asian law (both state and customary) was carried out under this conceptual umbrella. After a lively and sometimes fractious set of exchanges in subsequent decades, lawyers and legal anthropologists largely moved on from the concept.² Instead of nailing their colours to the mast of legal pluralism, legal scholars are more likely to turn to theories of globalization, or to develop new ideas that drew an analogy with modern languages and contrasted their ‘formal/high’ and popular/vernacular forms.³ An exception to this trend can be found in the writings of postmodernist legal theorists such as Santos,⁴ who

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sees in legal pluralism and ‘interlegality’ a way to destabilize and decentre the legal positivist idea (myth?) of a formal, unified legal order. Whichever theoretical approach holds sway in any given moment, the perennial problem of how to demarcate the boundaries between law and non-legal norms, as well as how to comprehend the relations between different orders and sites of law, remains.

In my own research, I turned to the concept of legal pluralism while investigating the complex, knotty relationships between community courts, the state criminal justice system, and a new array of human rights bodies set up in the aftermath of apartheid in South Africa.5 In so doing, I encountered the inadequacies of legal pluralism as an analytical concept, in particular its limitations in conceptualizing the power and reach of national and global legal systems. Therefore I approached Global Legal Pluralism with a certain amount of hesitation, and a number of questions, the three main ones being, first: might legal pluralism be construed in such a way that it does not postulate a static, fixed model of legal orders and instead refers to flexible, open systems of law that are created and re-created through their interactions? Second, the idea of legal pluralism developed in the context of legal research in colonial and postcolonial Africa and Asia: can it be meaningfully applied to the entire globalized legal system of the twenty-first century, or is this too far a stretch? Thirdly, advocates of legal pluralism start with the premise that state and non-state law are structurally equivalent and mutually influencing. Could legal pluralism ever contain a satisfactory account of political and legal asymmetry (by this I mean the hierarchical ordering of law and the familiar inequality between legal systems, where states dominate civil society, and where states coerce other states, seeking to impose their will)? The legal pluralist starting points, that local law is usually paramount and legitimate and that local law and formal state law are mutual influencing and on a relatively equal footing, have been the main reasons why scholars and lawyers rejected the usefulness of the theoretical framework. In contrast, many lawyers contended that the concept elides the centralized power of formal state law (which, for better or worse, establishes law and backs it up with a coercive apparatus) and overextends the domain of law to incorporate everyday morals, norms, and social conventions (‘are table manners law?’). Marxist historians maintained that legal pluralism overlooks the prior, radical reorganization of ‘traditional’ or customary law by colonial regimes.6

Paul Berman’s book addresses the first two concerns very effectively and the third only partially. First, legal pluralism is understood as a process-

generated and shifting framework, not a fixed model. Gone are the diagrammatic models often found in 1970s issues of the *Journal of Legal Pluralism*, where legal orders were crudely represented as pyramidal structures or concentric rings. Instead, Berman offers a sophisticated rendition of how legal practices and institutions are constantly reconstructed through their interactions with the norm-generating communities that are the producers of legal hybridity. He effectively adopts Robert Cover’s term ‘jurisgenerative practices’ to convey how norms are created and nurtured from below, and then undergo a process of contestation and creative adaptation as they jostle for authority and representation in a dizzying assortment of legal and non-legal contexts. As Berman writes:

The range of norm-generating communities is so vast as to be almost impossible even to summarize. From religious institutions to industry standard-setting bodies to not-for-profit accreditation entities to arbitral panels to university tenure committees to codes promulgated within ethnic enclaves to self-regulation regimes in semiautonomous communities, the sites of nonstate lawmaking are truly everywhere. And the interaction of formal state law with such nonstate lawmaking has always been a complicated dance, reminiscent of the way ‘high’ composers from Mozart to Gershwin have incorporated and transformed more vernacular musical styles, while folk music persisted as an alternative to high art forms (pp. 41–2).

Turning now to the matter of global applicability, this is where we encounter the most highly unique and enduring contribution of the book. With a remarkably detailed grasp of diverse cases and contexts, *Global Legal Pluralism* applies the model of legal pluralism to a vast array of instances of law and adjudication, from oil companies in Nigeria to women’s rights in Hong Kong, to intellectual property lawsuits in the United States, the list goes on. The most effective illustrations are drawn from international humanitarian law, and Berman covers ground from Nuremberg to the International Criminal Court for Former Yugoslavia, via hybrid international criminal tribunals in Sierra Leone and Kosovo. He also peppers the text with cases from cyber-law and hate-speech regulation, and the French government’s efforts to regulate neo-Nazi propaganda on Yahoo! reappear throughout the book like a recurring musical phrase in a piano concerto. By the end, I was convinced that ‘global legal pluralism’ is a concept that can be applied usefully to distinct contexts of overlapping jurisdiction worldwide.

Where Berman’s project becomes more problematical is how it addresses, or declines to address, the perennial bugbear of legal pluralism, namely, inequality, coercion, and hierarchy. The book certainly recognizes power differentials and the effects these have on legal outcomes, but for every instance of recognition, Berman furnishes three more examples of the salience of non-state or civil society actors and their novel legal norms. For this reader, there was just not enough empirical analysis of why parallel legal systems do not always enjoy parity, and often times do not mutually shape one another on an equal footing. Furthermore, as has been often noted, not all forms of legal pluralism and inventive norm-generation are emancipatory
and rights-respecting (think popular vigilantism, witch-burning, and so on).  

Any advocate of a theoretical cause will have a more persuasive case if he or she can acknowledge what is lost or occluded in using a particular analytical concept.

Perhaps the problem lies more in my expectations as a social scientist of law and the impulse to explain the legal practices and institutions we actually have in front of us. Paul Berman’s ambitions for the concept of global legal pluralism are quite different, however. His is a fundamentally normative project, and he certainly proposes this effectively in chapter five, ‘Towards Cosmopolitan Pluralist Jurisprudence’. Berman starts with the assumption that in any given political context there will be disagreement on core principles and instead of trying to identify mutually overlapping values, Global Legal Pluralism specifies the procedural mechanisms to manage and negotiate disagreement and a plurality of normative orders. These are subsidiarity, autonomy, hybrid participation, and complementarity, to mention but a few, and each has something to offer in adjudication and the management of conflict. Berman is careful to note that his version of cosmopolitanism:

> is emphatically not a model of international citizenship in the sense of international harmonization and standardization, but is instead a recognition of multiple refracted differences where (as in Young’s ideal city) people acknowledge links with the ‘other’ without demanding assimilation or ostracism. Cosmopolitanism seeks ‘flexible citizenship’, in which people are permitted to shift identities amid a plurality of possible affiliations and allegiances, including non-territorial communities (p. 148).

This discussion represents a considerable contribution to the literature, furnishing details of the specific mechanisms, institutions, and practices that could underpin the proceduralist liberal project, and engaging as it does with Hannah Arendt’s account of the encounter with the stranger to flesh out the sometimes arid and abstract approach of Jürgen Habermas, who patently inspires this undertaking.

I came to this book fairly convinced of the value of cosmopolitan political philosophy and Habermasian proceduralism, but in my view, cosmopolitanism needs to be complemented with an empirical account of why the grassroots norm-effervescence that Paul Berman favours is so often denied, marginalized, and even crushed. This divergence in approach can be illustrated in the discussion of the long-standing detention of terrorist suspects at Guantánamo Bay at the end of Global Legal Pluralism, which turns into a normative discussion about how the United States constitution should follow the flag wherever the United States military takes it. This view appears straightforward and laudable but if we stop there, then we evade some of the intractable dilemmas in the current anti-terror policies of Western govern-

ments. The book could have been greatly strengthened by an empirical and analytical account of why it is exactly that in certain critical moments, nation states, even liberal ones like the United Kingdom and the United States, create legal black holes such as in Guantánamo Bay, torture detainees, and marshal the awesome power of the state to decidedly illiberal ends. And perhaps more importantly at the present juncture, when and why do liberal states re-internalize the fundamental liberal values of due process and habeas corpus, and turn away from torture and unbridled executive power in the treatment of detainees?

Other concerns linger regarding the category of global legal pluralism. One relates to the conceptual relationship between hybridity and pluralism. These terms are used interchangeably at the outset of Global Legal Pluralism, but the discussion later on frames them rather distinctly. In short, legal pluralism refers to the social norms generated by, and embedded in, communities – be they political, ethnic or religious. That is, it has connotations of norms that have emerged over time from long-standing communities of association. Legal hybridity is not identical to legal pluralism, but instead can refer to the combination and fusion of two different sets of norms or institutions to create a ‘third space’ of law. This occurs a great deal in newly-constituted sites of international law. For example, trials at the International Criminal Court are heard in an adversarial courtroom arrangement derived from Anglo-American criminal law, but they are steered by a judicial case-management approach found more commonly in the civil law tradition.

Secondly, the idea of global legal pluralism seems to apply quite convincingly to the regulation of speech on the internet and international human rights, but does it work equally well in commercial law and international tax treaties? While it may seem unwarranted to conjure a litmus test based on tax law (of all things!), there are underlying issues here which niggled at this reader. Namely, can we conceive of any variation in applicability of the concept of legal pluralism, according to field of law or the scale of a legal practice or institution? Does it illuminate some areas of law and morality better than others, and can it be found to be hardly relevant in others? Berman is unwilling to concede any limits for legal pluralism, but in that case, shouldn’t we be a little wary of a framework that applies to all forms and expressions of law in the world, and moreover applies to all forms of law with equal insight and comprehension? Are we willing to embrace global legal pluralism as the hitherto elusive Unified Theory of Law, even in Berman’s relatively prudent and judicious rendering of it?

There is a great deal to admire in this impressive book. In Global Legal Pluralism, Paul Schiff Berman takes a concept that was roughly hewn by anthropologists, sociologists, and historians, and refines and polishes it substantially and brings it into the mainstream of thinking among international lawyers. He detaches legal pluralism from its historic tiers-mondiste localism and integrates it with a cosmopolitan political philosophy that is
more relevant to the twenty-first century. *Global Legal Pluralism* contains a remarkable richness of details and exposition that is balanced with a sensible recognition of the variation in perspectives on the most pressing issues of the day. Perhaps most importantly, it enacts and manifests that which it explicitly promotes; namely, to recognize diversity and acknowledge and respect a plurality of norms and values.

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