Mapping Global Legal Pluralism

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Pluralists generally acknowledge the concurrent existence of different legal mechanisms applying to identical situations within a particular society (Vanderlinden, 1971, 19 etc. and Belley, 1988, 300). In so doing, they refute monistic theoretical conceptions that identify the law as purely the judicial system of a state.

The effects of globalization on the law have recently given pluralist theories somewhat of a revival, with increased importance attributed over the last fifteen-odd years to doctrines falling under "Global Legal Pluralism." The theories proposed by authors of this trend, however, vary significantly from one to another. This paper examines two such variations.

Paul Schief Berman proposes a procedural pragmatic approach that favors procedural mechanisms and sidesteps the result of certain substantive norms prevailing over others. Schief Berman considers such procedural mechanisms to be "*jurisgenerative*" in that they allow for new creative interventions and normative trends that facilitate a procedural dialogue of cross-fertilization. They thereby offer "formulas" for overcoming conflicts without reducing the plurality of a globalized world by imposing a unique or hegemonic solution.

Mireille Delmas-Marty, for her part, offers a theory intended to "organize" the somewhat anarchical phenomenon of global pluralism. Her theory would allow for an organization of the multiple without reduction to the identical- in other words, pluralism without a universal code of law. To this end, she identifies three interactive processes of decreasing hierarchical levels: unification, harmonization, and coordination.

I. The sources and definition of law

The starting point for pluralists is a reaction against legal monism and a denunciation of the nationalization of law (Michaels, 2009, 244). For pluralists, monism has an exclusive element that both dangerously supports state supremacy and ignores the complexity of societal interactions by giving society, its political organization, and its laws an *all*-coherent, homogenous and integrated face (Moret-Bailly, 2002, 197). In other words, pluralists contest the idea that the law is only a phenomenon of the state and refuse to systematically grant legitimacy or superiority to state law over other community norms.

Pluralists do not deny the significance of state law but instead identify areas of society where it does not apply, or only partially applies – generally, where alternative normative values exist that either compete with national law or replace it altogether. Pluralist theories indeed diverge over the nature and terms of this judicial overlap between societal authorities (Günther, 2008, 12). For some, like Georges Gurvitch, the different authorities share equal footing (Gurvitch, 1935, 78). For others like Santi Romano or Leopold Pospisil, the state still occupies the central position and remains the most influential focus of power (Birnbaum, 1990, 1159). Finally, a change in focus may be noted amongst certain influential authors like Jacques Vanderlinden, who no longer wish to read pluralism through the lens of collective practices, but rather through individual practices: "[we must] *abandon all references to society, and particularly those in reference to any given society, while speaking of pluralism… shifting our approach towards the individual"* (Vanderlinden, 1992, 583). According to this variation, "*legal pluralism only exists where confronted with a possible choice between remedies offered by two or more systems, the subject of which will lead to preference for one over the other[s]*" (Ost and Van de Kerchove 2012).

Despite these divergences, the authors remain in agreement on the two following hypotheses: (1) the coexistence of a plurality of legal systems interacting outside of any hierarchy, and (2) the existence within society of non-state bodies that create law (Carbonnier, 2001, 14). These hypotheses result in an expansive view of the law and its sources, which is not restricted to any one definition. Indeed, pluralists consider it unnecessary to "rehash long and ultimately fruitless debates (both in philosophy and in anthropology) about what constitutes law. They instead take a non-essentialist position: treating law as that which people view as Law" (Tamanaha, 2000, 296).

Pluralism has received renewed interest in the past several years as a result of globalization. However, the theoretical issues raised have remained largely the same for decades: the irreducible plurality of legal systems in the world, the coexistence of a state legal system with other legal systems, and the absence of a clear hierarchy amongst them. It is only natural, therefore, that certain theories concerning globalization of law have turned to legal pluralism, thereby giving rise to theories of

global legal pluralism (Michaels, 2009, 244), increasing in their recognition (Teubner 1996, Snyder 1999, Perez 2003, Koskenniemi 2005, Merry 2005 and 2008, Michaels 2005, Rajagopal 2005, Berman 2007b and 2012, De Burca, Keohane and Sabel, 2013).

The term global legal pluralism suggests a unified concept but actually encompasses a number of relatively different theories. Two main categories of theories however emerge, primarily differing in their starting points. The first category, of anthropological origin and linked to an analysis of colonial societies and un-official law (Pospisil, 1971 or Hooker, 1975), begins with legal pluralism and adds globalization as a case study (Sousa Santos, 1995, 114 etc). The second category, of legal origin and therefore doctrinal roots, is championed amongst authors who link pluralism to the recognition of "intermediary" bodies in society (Carbonnier, 1969/2001 or Romano, 1975). These authors start with globalization and the ensuing new legal situations, and propose pluralism to provide a theoretical substrate to their proposed remedies.

This paper primarily addresses the theories covered in this second category. Two variations are identified as representing the principal trends therein: the pragmatic pluralistic approach of Paul Schief Berman, and the "ordering pluralism" of Mireille Delmas-Marty.

II. Theories of Global Legal Pluralism

1. Pragmatic Pluralism

According to Paul Schiff Berman, globalization has created a world traversed by legal pluralism because all situations and individuals are potentially subject to multiple legal or quasi-legal systems of state or intrastate entities, transnational, supranational or private communities. This overlap of regulators and authorities ("overlapping legal authorities") is imperfect and produces a legal hybridity. For Paul Schiff Berman, such hybridity composed of diverse standards and implementing authorities should be maintained and promoted as "an independent value" insofar as it promotes conflict resolution, tolerance, and dialogue.

However, according to P.S. Berman, the two solutions generally offered to this hybridity are not satisfactory. On the one hand, there are those who would "re-impose" the model of the nation state as sovereign and originator of law in a territory with well-delineated borders. P.S. Berman believes that this model based on the sovereignty of nations and their laws is too ideological and disconnected from reality – ideological because the nation state is an unnatural notion, and disconnected from reality because there is no allowance for the increasing number of transnational situations nor the

increasing significance of non-state norms (tribal, religious, customary, regulatory, commercial, or social). On the other hand are Universalists that defend the notion of a unique, universal law common to humanity ("world law"). P.S. Berman equally rejects this path because such law is illusory in a vast majority of areas, and includes hegemonic aims that would eliminate diversity (Berman, 2007b, 2012)[1]. In conclusion, both proposals should be rejected because they do not sufficiently account for the hybridity of law that characterizes modern society or promotion of its underlying values.

From this observation, P.S. Berman proposes a procedural approach of Habermassian inspiration[2] that does not result in promoting one set of substantive norms over another, but instead favors procedural mechanisms. Such mechanisms would be "*Jurisgenerative*," placing the emphasis on creative interventions by new parties and norms to foster a procedural dialogue of cross-fertilization (Berman, 2012, 15). P.S. Berman then identifies a series of practices and procedural mechanisms that would enable the resolution of conflicts inherent to hybridity while preserving its values.

Among the dozen practices proposed, the following four seem most illustrative of his approach:

a) *Dialectical Legal Interaction*

This category covers legal practices based on an exchange of legal remedies without a strict hierarchical relationship. This "dialogue between judges" should be considered for its general acceptance – whether in the same or different instances – on a national, regional, or international scale, as well as in other systems such as arbitration or non-governmental organizations (Berman, 2007b, 1198 and 2012, 153). Here, J.S. Berman provides several examples, such as the numerous interactions between the European Court of Human Rights (ECHR) and the constitutional courts of member states that make up the European Council.

b) Limited Autonomous Regime

[1] On this point, P.S. Berman clearly and specifically sums up his position in a blog dedicated to his book '*Global Legal Pluralism'* (2012): "I argue that we should be wary of pinning our hopes on legal regimes that rely either on re-imposing sovereigntist territorial insularity or on striving for universals. Not only are such strategies sometimes normatively undesirable, but more fundamentally they simply will not be successful in many circumstances." http://opiniojuris.org/2012/06/18/opening-post-paul-berman-on-global-legal-pluralism/

[2] To which he makes explicit reference and cites the work *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy.* (Berman, 2012, 18)

The interactions between state and non-state law envisaged in this category are a variation of the "margin of appreciation." Here, a degree of autonomy is granted to ethical, religious, and linguistic groups. If such autonomy is not possible on a territorial level because the intended group is too scattered, alternative solutions exist concerning the implementation of voting, the number of seats guaranteed to Parliament or the executive, or the right to veto in certain areas. The most commonly cited examples are the Belgian linguistically divided system and the legal system of Singapore, which has parallel jurisdictions organized by the State for civil matters, and by religious authorities for religious matters (Berman, 2007b, 1204 and 2012, 163).

c) Hybrid Participation Arrangement

This system contemplates altering the composition of decision-making bodies with a view towards reinforcing their legitimacy and effectiveness. Many examples exist in the legal sphere, such as the composition of the Constitutional Court of Bosnia (3 non-Bosnians out of 9 judges), the composition of a jury in the United States, which should reflect a "fair cross-section of the community," and the various dispute-settling bodies in post-conflict countries such as East Timor, Sierra Leone, or Cambodia. This hybridity also exists outside of the legal sphere, such as in the operating agreement between the World Bank and Chad where the Bank conditioned its loan for the construction of an oil pipeline on its participation in the oversight and management of Chadian oil revenue (Berman, 2007b, 1219 and 2012, 171).

d) Mutual Recognition Regime

Mutual recognition is an alternative to harmonization, which is often difficult to achieve for lack of political consensus. This mechanism at the heart of the European Union internal market is intended to prevent a product that is legally produced in one member state, for example, from being denied entry into another member state, even where technical and qualitative requirements differ between the two states. With mutual recognition, products legally produced and marketed in one member state (i.e., conforming to its regulations) are no longer obliged to conform to the requirements of the destination member state; the latter must accept the regulations and monitoring of the member state of origin (Berman, 2007b, 1225 and 2012, 179).

In conclusion, the "*Global Legal Pluralism*" defended by P.S. Berman considers the hybridity of our post-modern and increasingly globalized societies not as an inconvenience, but rather as an impetus for pluralism and tolerance. The merits of this theory also lie in the solutions he proposes, taken from concrete examples.

2. Ordering pluralism

Mireille Delmas-Marty has, for her part, developed the theory of "ordering pluralism," which proposes maintaining the multiple without turning identical, or allowing for pluralism without embracing one universal system of law (Delmas-Marty, 2006a, 7 to 33).

Ordering pluralism therefore embraces a pluralist conception of law but with the aim of avoiding leading to anarchy, hegemony or nationalism. As such, pluralism does not denote a fixed system, but rather a trend of harmonization (but not a merging) of legal systems towards a common law (Brunet, 2010, 197).

In "ordering" the pluralistic systems of law, M. Delmas-Mary identifies three interactive processes by decreasing hierarchy: unification, harmonization, and coordination (Delmas-Marty, 2006a, 39 to 139 and 2006b, 1).

Unification refers to the implementation or imposition of identical laws. The process is imperfect from an empirical perspective because the difficulties inherent to implementation often place its effectiveness in jeopardy. Unification also raises issues of legitimacy vis-à-vis its hegemonic aim. To this regard, two types of unification must be distinguished. The first type of unification involves unilateral transplant of one system onto another, which translates to the dominance of one system over others as well as a loss of diversity, and an oversight of both history and societal innovation. This type of unification is often found in corporate law. The second type of unification involves hybridity, or the combining of different systems while incorporating elements of global legal diversity. This second method involves reciprocity and, according to Mireille Delmas-Marty, constitutes a more palatable method of pluralism, of which international penal courts provide example. She nevertheless points out that transplants are often rejected and hybrids are often futile (Delmas-Marty, 2006a, 101 to 137, and 2006b, 12 etc).

Harmonization is a specific process that includes the goal of integration, but incomplete or imperfect integration. Harmonization establishes a vertical relationship, but its hierarchy is not unequivocal, and is always subject to the superiority of international law. Harmonization is the *raison d'être* of principles such as the subsidiarity of European Union law, or the complementing of the Statute of Rome with the International Criminal Court, which encourages an initial search for remedies within domestic law. In order to apply to countries with different legal traditions, harmonization maintains a certain degree of flexibility to acknowledge the national margins of appreciation, which express national resistance to integration within limit, and must nevertheless conform to the common principles in the threshold of compatibility. The national margin of appreciation, key principle of organized

pluralism, demonstrates that it is possible to conceptualize harmonization as an articulation process between partially distinct legal orders (Delmas-Marty, 2006a, 70 to 101 and 2006b, 8).

C*oordination*, which represents the weakest degree of organized pluralism, may take two forms: de facto "inter-normativity" or cross-interpretation. De facto inter-normativity assumes relationships between normative non-hierarchical schemes and employs both imitation and explicit cross-reference, depending on the situation. Here, Mireille Delmas-Marty cites the rules of procedure for the International Criminal Court for the Former Yugoslavia, which directly inspired Article 14 of the United Nations Global Pact on the right to due process. By contrast, cross-interpretation provides for jurisdictional and quasi-jurisdictional legal authorities responsible for applying concrete standards to cases. Dialogue between judges provides an example of this second form of coordination (Delmas-Marty, 2006a, 39 to 69 and 2006b, 1 and 2).

III. Criticism

Legal pluralism and, *a fortiori* global legal pluralism, is often the subject of criticism relating to the methodological ambiguities of its approach. More specifically, many pluralist theories are criticized for "confusing the concept of pluralism, which is a mental construction intended to account for reality – with reality itself" (Moret-Bailly, 2002, 203).

One criticism specific to global legal pluralism is its *lack of originality*. According to this criticism, global legal pluralism lacks "any theoretical specificity," (…) and "only comments on the international diversity of legal mechanisms" (Rouvière, 2011, 114). As such, pluralism would be none other than a version of international law taken from a broader perspective. For critics of global legal pluralism, the ideas of Mireille Delmas-Marty and Paul Schiff Berman amount to two main proposals: (1) solutions to settle the conflict of norms, and (2) the importing of existing devices from one legal system into another legal system.

Another criticism issued by certain internationalists particularly regards the *harmful effects* of global legal pluralism on *international law*. Indeed, for those who have fought for years to convince governments, political decision-makers, and their populaces to treat international law as binding rules on the same level as domestic law, global legal pluralism betrays their discourse by adding vagueness to an already fragmented picture (Koskenniemi, 2006 and Berman, 2009, 238).

A final general criticism regards the *democratic deficit* that legal pluralism promotes, given its proposal of a model where legitimacy is not directly linked to a

demos within the framework of a nation state (monism), but rather diluted by intra/supra/para-state norms from normative sources of varying status. This criticism of global legal pluralism is amplified in instances where the link to the *demos* is particularly weak (Perez, 2003, 25 and Günther, 2008, 17).

The presented theories are, in fact, the subject of more targeted criticism.

Criticisms of Paul S. Berman's theory primarily attack its methodology. Indeed, P.S. Berman's theory mainly uses examples from state law, and the jurisprudence of courts and tribunals, in order to support his positions about global legal pluralism. He therefore abandons other forms of normative sources, the existence and significance of which he has otherwise recognized (Levit, 2012 and Spiro, 2012).

According to some, ordering pluralism champions a doctrine that primarily favors judges because "no one could argue that the harmonization of judicial orders consists in a choice between values. And yet, (in organized pluralism), only judges seem up to the task" (Brunet, 2010, 204). Such competence therefore offers judges a basis of legitimacy, rendering them the principal actors in organized pluralism. Nonetheless, their competence rests only upon "a political strategy creating the illusion that judges speak the same language, and can therefore direct the 'dialogue' most likely to promote harmony between different legal systems" (Brunet, 2010, 211).

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