



GLOBAL LEGAL PLURALISM

**A Jurisprudence of Law
Beyond Borders**

PAUL SCHIFF BERMAN

CAMBRIDGE

Global Legal Pluralism

A JURISPRUDENCE OF LAW
BEYOND BORDERS

Paul Schiff Berman

The George Washington University Law School



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA
www.cambridge.org
Information on this title: www.cambridge.org/9780521769822

© Paul Schiff Berman 2012

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2012

Reprinted 2012

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Berman, Paul Schiff.

Global legal pluralism : a jurisprudence of law beyond borders / Paul Schiff Berman.

p. cm.

Includes index.

ISBN 978-0-521-76982-2 (hardback)

1. Legal polycentricity. 2. Globalization and law. I. Title.

K236.B47 2012

340.9-dc23 2011030488

ISBN 978-0-521-76982-2 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs
for external or third-party Internet Web sites referred to in this publication and does not
guarantee that any content on such Web sites is, or will remain, accurate or appropriate.

GLOBAL LEGAL PLURALISM

We live in a world of legal pluralism, where a single act or actor is potentially regulated by multiple legal or quasi-legal regimes imposed by state, substate, transnational, supranational, and nonstate communities. Navigating these spheres of complex overlapping legal authority is inevitably confusing, and we cannot expect territorial borders to solve all the problems that arise because legal norms inevitably flow across such borders. At the same time, trying to create one universal set of legal rules is also often unsuccessful because the sheer variety of human communities and interests thwarts such efforts.

Instead, we need an alternative jurisprudence, one that seeks 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. Such mechanisms, institutions, and practices can help mediate conflicts, and we may find that the added norms, viewpoints, and participants that are included actually produce better decision making, better adherence to those decisions by participants and non-participants alike, and ultimately better real-world outcomes. *Global Legal Pluralism* provides a broad synthesis across a variety of legal doctrines and academic disciplines and offers a novel conceptualization of law and globalization.

Paul Schiff Berman is Dean and Robert Kramer Research Professor of Law at The George Washington University Law School. Before arriving at George Washington, he was Dean and Foundation Professor of Law at the Sandra Day O'Connor College of Law at Arizona State University. He has also served as the Jesse Root Professor of Law at the University of Connecticut School of Law and as a Visiting Professor and Visiting Research Scholar at Princeton University in the Program in Law and Public Affairs. Berman has published two edited collections, authored a pioneering casebook on cyberlaw, and written more than 25 scholarly articles and book chapters. He has also served on the Organizing Committee of the Association for the Study of Law, Culture, and the Humanities.

To my parents, Ellyn and Benjamin, whose support has been unconditional, no matter the path I have taken.

To my wife, Laura, whose radiant spirit piles loveliness upon loveliness.

To my son, Julien, whose talents are plural and whose reach is global.

Acknowledgments

This book has, alas, been in gestation for more than a decade, with work on it delayed by the birth of our son, two deanships, four academic moves (including two of the transcontinental sort), and a host of other intervening events. As a result, the number of people and institutions that have supported and contributed to the finished product is quite large, and reconstructing a truly comprehensive list is daunting and likely doomed to failures of omission. Nevertheless, I have been part of so many supportive academic communities, and so many generous colleagues have offered advice along the way, that it would be churlish not at least to try to acknowledge the many debts I owe.

First, I have benefited greatly from my time at four different academic institutions while writing this book: the University of Connecticut School of Law, the Princeton University Program in Law and Public Affairs, the Sandra Day O'Connor College of Law at Arizona State University, and The George Washington University Law School. At each location, I received important research support as well as significant wisdom from colleagues, wisdom that in all cases has altered the shape of the finished product.

Second, I have presented parts of the arguments contained here at conferences, workshops, and other academic gatherings over the past decade, including, at the beginning, a trial run of the article that became *The Globalization of Jurisdiction* at the Yale/Stanford Junior Faculty Forum at Yale Law School, and later including presentations and

workshops at American University, Amherst College, Boston College, UCLA, Columbia University, Duke University, University of Exeter, Georgetown University, University of Georgia, Goethe University in Frankfurt, Harvard Law School's Berkman Center on Internet and Society, Hofstra University, Humboldt University in Berlin, University of Missouri, Kyoonpook National University in Korea, University College of London, University of Montreal, Notre Dame University, University of Oregon, University of Pennsylvania, Princeton University, Temple University, University of Texas, University of Tulsa, University of Utah, Washington & Lee University, Willamette University, and two subsequent return visits to Yale. I am grateful to participants at those gatherings for probing questions, further examples, and useful insights.

Third, I must name individually the many colleagues who have gone beyond simply the norm of academic discourse to read drafts, make comments, provide advice, answer questions, or offer suggestions. These individuals include David Abraham, Robert Ahdieh, T. Alexander Aleinikoff, Kenneth Anderson, Rachel Barkow, Timothy W. Bartley, Lofty Becker, Patricia L. Bellia, Bethany Berger, Phillip Blumberg, Dan Bodansky, Mary Anne Case, Kamari Maxine Clarke, Sarah H. Cleveland, Anne Dailey, Anthony D'Amato, Meg deGuzman, Anuj Desai, Laura A. Dickinson, Graeme Dinwoodie, Mark Drumbl, Jeff Dunoff, Christine Haight Farley, David Fontana, Katherine Franke, Marc Galanter, Kate Gordon, Robert W. Gordon, Jacob Hacker, Hendrik Hartog, Helen Hershkoff, Rhoda Howard-Hassman, Dan Hunter, Vicki Jackson, Mark W. Janis, Jonathan Kahn, Stan Katz, Lisa Kloppenberg, Harold Hongju Koh, Stephen Kotkin, Janet Koven Levit, Peter Lindseth, David Luban, Stewart Macaulay, Chibli Mallat, Jamie Mayerfield, Peggy McGuinness, Sally Engle Merry, Naomi Mezey, Ralf Michaels, Russell Miller, Andrew Moravcsik, Ved Nanda, Noah Novagrodsky, Diane Orentlicher, Leonard Orland, Mark Osiel, Hari Osofsky, Jeremy Paul, Deborah N. Pearlstein, Mark Pollack, Richard Pomp, David G. Post, Catherine Powell, Margaret Jane Radin, Balakrishnan Rajagopal, Jaya Ramji-Nogales, Michael Reisman, Judith Resnik, Ellen Rigsby, Lawrence Rosen, Mark Rosen, Richard J. Ross,

Ted Ruger, Austin Sarat, Kim Lane Schepple, David Schneiderman, Vicki Schultz, Gregory Shaffer, Peter Siegelman, Kathryn Sikkink, Linda Silberman, Susan Silbey, Anne-Marie Slaughter, Avi Soifer, Clyde Spillinger, Peter Spiro, Allan Stein, Catherine T. Struve, Colin Tait, Brian Z. Tamanaha, Gunther Teubner, David R. Tillinghast, Cora True-Frost, Wibren van der Burg, Carlos Vazquez, Leti Volpp, Kay B. Warren, Carol Weisbrod, Siegfried Wiessner, Steven Wilf, and Andrew Willard.

Three scholarly debts in particular I must underline: Kay Warren, for first introducing me to the powerful lens that cultural anthropology offers to understand the world; Carol Weisbrod, for an offhand comment that became the genesis for this book (something along the lines of “You keep talking about when communities are allowed to assert jurisdiction, but communities don’t ask you or anyone else for permission to assert jurisdiction; they simply do so.”); and Laura Dickinson, my wife, who has read every word of my work for the past fourteen years, offering both love and insight all along the way.

Fourth, a wide variety of student research assistants have, over the years, helped me in developing what has become the final manuscript. These assistants include Shannon Bratt, Brad Burns, Rita Bustos, Marilee Corr, Kyle Cramer, Ronald Crawley, Emily Dean, Monica Debiak, Lynn Fountain, Dave Gaetano, Sarah Gessner, Joshua Horton, Jennifer Montgomery, Lorene Park, Jeffrey Pease, Dorothy Puzio, Michelle Querijero, Allison Rohrer, Nina Robertson, Marianne Sadowski, Monika Silva, Shuyuan Tang, Ashley Williams, Heather Wood, and Lily Yan. Special thanks are owed to James Kite and William Knight for extraordinary work on the final manuscript.

Fifth, as befits a work in gestation over a long period, I have tried out elements of the argument contained herein in my prior published work. Accordingly, this book includes excerpts from:

Conflict of Laws and the Legal Negotiation of Difference, in *Law and the Stranger* (Austin D. Sarat, Martha Umphrey, & Lawrence Douglas, eds., 2010)

- Towards a Jurisprudence of Hybridity, 2010 *Utah L. Rev.* 11
- The New Legal Pluralism, 5 *Ann. Rev. of L. & Social Sciences* 225 (2009)
- Federalism and International Law through the Lens of Legal Pluralism, 73 *Missouri L. Rev.* 1149 (2009)
- Global Legal Pluralism, 80 *S. Cal. L. Rev.* 1155 (2007)
- A Pluralist Approach to International Law, 32 *Yale J. Int'l L.* 301 (2007)
- Seeing beyond the Limits of International Law, 84 *Tex. L. Rev.* 1265 (2006) (reviewing *The Limits of International Law*, by Jack L. Goldsmith and Eric A. Posner)
- From International Law to Law and Globalization, 43 *Colum. J. Transnational L.* 485 (2005)
- Conflict of Laws, Globalization, and Cosmopolitan Pluralism, 51 *Wayne L. Rev.* 1105 (2005)
- Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era, 153 *U. Pa. L. Rev.* 1819 (2005) and
- The Globalization of Jurisdiction, 151 *U. Pa. L. Rev.* 311 (2002)

Finally, I note that no creation is truly the work of one person. Victor Hugo, in describing the great cathedrals of Europe, pointed out that in all cases time is the true architect and the community is the builder. This book arises from a particular moment in time and a particular intellectual community, and I am grateful to be able to add these thoughts to an ongoing conversation that never ends. I feel privileged to be part of the dialogue.

Contents

Acknowledgments page ix

PART I. MAPPING A HYBRID WORLD

- 1. Introduction 3
- 2. A World of Legal Conflicts 23

PART II. RETREATING FROM HYBRIDITY

- 3. The Limits of Sovereignist Territoriality 61
- 4. Universalism and Its Discontents 128

PART III. EMBRACING HYBRIDITY

- 5. Toward a Cosmopolitan Pluralist Jurisprudence 141
- 6. Procedural Mechanisms, Institutional Designs, and Discursive Practices for Managing Pluralism 152

PART IV. CONFLICT OF LAWS IN A HYBRID WORLD

- 7. The Changing Terrain of Jurisdiction 195
- 8. A Cosmopolitan Pluralist Approach to Choice of Law 244
- 9. Recognition of Judgments and the Legal Negotiation of Difference 294
- 10. Conclusion 323

Index 329

Part I MAPPING A HYBRID WORLD

1 Introduction

WE LIVE IN A WORLD OF MULTIPLE OVERLAPPING normative communities. For example, I am typing these words in a house in Massachusetts, although I am a resident of Maryland, who works in Washington, DC. Thus, Massachusetts state law may govern some of my activities, while Maryland law or DC law may be relevant to other aspects of my life. And in Massachusetts, Maryland, and DC I am also located within a variety of political sub-divisions, such as towns, cities, counties, wards, neighborhood districts, water regions, and so on, each of which may have normative authority over me. Federal law governs many aspects of my life as well, from the speed limits on the interstate highways to certain environmental standards affecting the air and water, to the individual liberties the U.S. Constitution protects. International law may be the source of additional rights or protections, ranging from standards for trade, technology, and the use of satellites to the frameworks for regulating the environment, consumer product labeling, and the conduct of war. And certainly if I travel abroad or surf Internet sites based overseas or enter into contracts with foreign entities I will run up against international and transnational legal norms.

But these governmental normative communities are just the tip of the iceberg. Nonstate communities may also impose significant normative force. For example, if I think someone is violating the copyright of this book, I may use international arbitration sanctioned by the World

Intellectual Property Organization, a nongovernmental entity. If Web searches for my book do not place my Web page high enough on the list, I may need to challenge Google's search indexing protocols. And I am governed (or at least strongly influenced) by tenure rules at my university, religious rules of my faith (if I am a believer), American Bar Association rules regarding the conduct of law school classrooms, the metrics used by *US News & World Report* when it ranks law schools, and simply the practices and customs of the academic community of which I am a part. And on and on.

This book seeks to grapple with the complexities of law in a world where a single act or actor is potentially regulated by multiple legal or quasi-legal regimes. Law often operates based on a convenient fiction that nation-states exist in autonomous, territorially distinct spheres and that activities therefore fall under the legal jurisdiction of only one regime at a time. Thus, traditional legal rules have tied jurisdiction to territory: a state could exercise complete authority within its territorial borders and no authority beyond it. In the twentieth century, such rules were loosened, but territorial location remained the principal touchstone for assigning legal authority. Accordingly, if one could spatially ground a dispute, one could most likely determine the legal rule that would apply.

But consider such a system in today's world. Should the U.S. government be able to sidestep the U.S. Constitution when it houses prisoners in "offshore" detention facilities in Guantánamo Bay or elsewhere around the world? Should spatially distant corporations that create serious local harms be able to escape local legal regulation simply because they are not physically located in the jurisdiction? When the U.S. government seeks to shut down the computer of a hacker located in Russia, does the virus transmitted constitute an act of war or a violation of Russia's sovereignty? Does it make sense to think that satellite transmissions, online interactions, and complex financial transactions have any territorial locus at all? How can we best understand the complex relationships among international, regional, national, and subnational legal systems?

And in a world where nonstate actors such as industry standard-setting bodies, nongovernmental organizations, religious institutions, ethnic groups, terrorist networks, and others exert significant normative pull, can we build a sufficiently capacious understanding of the very idea of jurisdiction to address the incredible array of overlapping authorities that are our daily reality?

Thus, a simple model that looks only to territorial delineations among official state-based legal systems is now simply untenable (if it was ever useful to begin with). Thankfully, debates about globalization have moved beyond the polarizing question of whether the nation-state is dying or not. But one does not need to believe in the death of the nation-state to recognize both that physical location can no longer be the sole criterion for conceptualizing legal authority and that nation-states must work within a framework of multiple overlapping jurisdictional assertions by state, international, and even nonstate communities. Each of these types of overlapping jurisdictional assertions creates a potentially hybrid legal space that is not easily eliminated.

With regard to conflicts between and among states, the growth of global communications technologies, the rise of multinational corporate entities with no significant territorial center of gravity, and the mobility of capital and people across borders mean that many jurisdictions will feel effects of activities around the globe, leading inevitably to multiple assertions of legal authority over the same act, without regard to territorial location. For example, in 2000 a French court asserted jurisdiction over the U.S.-based web portal Yahoo! because French users could download Nazi memorabilia and Holocaust denial material via Yahoo!'s auction sites, in violation of French law.¹ Yahoo! argued in response that the French assertion of jurisdiction was impermissibly extraterritorial in scope because Yahoo!, as a U.S. corporation transmitting material

¹ Tribunal de grande instance (TGI) [ordinary court of original jurisdiction] Paris, May 22, 2000, *Ordonnance de référé, UEJF et Licra c/ Yahoo! Inc. et Yahoo France*, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm>.

uploaded in the United States, was protected by the First Amendment of the U.S. Constitution.² Yet, the extraterritoriality charge runs in both directions. If France is *not* able to block the access of French citizens to proscribed material, then the United States will effectively be imposing First Amendment norms on the entire world. And whatever the solution to this problem might be, a territorial analysis will not help because the relevant transaction is both “in” France and not “in” France simultaneously. Cross-border environmental,³ trade,⁴ intellectual property,⁵ and tax regulation⁶ raise similar issues.

The problem of multiple states’ asserting jurisdiction over the same activity is just the beginning, however, because nation-states must also often share legal authority with one or more international and regional courts, tribunals, or regulatory entities. Indeed, the Project on International Courts and Tribunals has identified approximately 125 international institutions, all issuing decisions that have some effect on state legal authority,⁷ though those decisions are sometimes deemed binding, sometimes merely persuasive, and often fall somewhere between the two. For example, under the North American Free Trade Agreement (NAFTA) and other similar agreements, special panels can pass judgment

² *Id.*

³ See, e.g., *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Rebecca M. Bratspies & Russell A. Miller eds., 2006); Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 *N.Y.U. J. Int’l L. & Pol.* 527 (2001).

⁴ See, e.g., Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 *Geo. Int’l Env’tl. L. Rev.* 1 (1999).

⁵ See, e.g., *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento de Barcelona*, 330 F.3d 617 (4th Cir. 2003); *GlobalSantaFe Corp. v. GlobalSantaFe.com*, 250 F. Supp. 2d 610 (E.D. Va. 2003); Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 *U. Pa. L. Rev.* 469 (2000).

⁶ See, e.g., Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 *U. Pa. L. Rev.* 311, 334–7 (2002).

⁷ See Project on International Courts and Tribunals, *The International Judiciary in Context* (2004), available at http://www.pict-pcti.org/publications/synoptic_chart/Synop_C4.pdf.

on whether domestic legal proceedings have provided fair process.⁸ And though the panels cannot directly review or overturn local rulings, they can levy fines against the federal government signatories of the agreement, thereby undermining the impact of the local judgment.⁹ Thus, now that a NAFTA tribunal has ruled that the conduct of a Mississippi trial against a Canadian corporation “was so flawed that it constituted a miscarriage of justice amounting to manifest injustice as that expression is understood in international law,”¹⁰ it is an open question as to how Mississippi courts will rule in future cases involving foreign defendants.¹¹ Meanwhile, in the realm of human rights, we have seen criminal defendants convicted in state courts in the United States proceed (through their governments) to the International Court of Justice (ICJ) to argue that they were denied the right to contact their consulate, as required by treaty.¹² Again, although the ICJ judgments are technically unenforceable in the United States, at least one state court followed the ICJ’s command anyway.¹³ Meanwhile, outside these more formal adjudicative processes, there are many powerful transnational networks of governmental regulators setting a kind of international policy as a *de facto* matter over much of the global financial system, among other areas.¹⁴

Finally, nonstate legal (or quasi-legal) norms add to this pluralism of authority. Given increased migration and global communication, it is not

⁸ See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 7–17, 1992, art. 1135, 32 I.L.M. 605, 646.

⁹ *Id.*

¹⁰ *Loewen Group, Inc. v. United States*, ICSID (W. Bank) Case No. ARB(AF)/98/3 (June 26, 2003) (Final Merits Award), reprinted in 42 I.L.M. 811 (2003), also available at <http://naftaclaims.com/Disputes/USA/Loewen/LoewenFinalAward.pdf>. Publicly released documents on all NAFTA disputes are available at <http://www.naftalaw.org>.

¹¹ See generally Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 *N.Y.U. L. Rev.* 2029 (2004) (discussing case).

¹² See *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12.

¹³ See *Torres v. State*, No. PCD-04-442, 2004 WL 3711623 (Okla. Crim. App. May 13, 2004) (granting stay of execution and remanding case for evidentiary hearing).

¹⁴ See, e.g., David Zaring, *Rulemaking and Adjudication in International Law*, 46 *Colum. J. Transnat’l L.* 563 (2008); David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 *Chi. J. Int’l L.* 547 (2005).