Lesson 5 – March, 14th, 2017

Global law 全球法律

Legal pluralists explored the myriad ways that overlapping **legal systems interact with each other** and observed that the very existence of multiple systems can at times create openings for contestation, resistance, and creative adaptation.

Pluralist framework is essential if we are to more comprehensively conceptualize a **world of hybrid legal spaces**. International law scholars have not often paid attention to the pluralist literature, nor have they generally conceived of their field in terms of managing hybridity.

the formal state-to-state relations,
the creation of overarching universal norms,
the resolution of disputes by locating them territorially in order to choose a single governing law to apply.

these approaches **attempt to eliminate hybridity** altogether by imagining that disputes can and should be made susceptible to a single governing normative authority.

Problem: Managing Legal Hybridity: Interaction between multiple normative communities: state, international, and non-state normative communities.

Three alternatives:

-sovereigntist territorialism,

-universalism

-legal pluralism

both sovereigntist territorialism and universalist harmonization will at least sometimes offer normatively unattractive options and will, in any event, only succeed partially, if at all

Argument for legal pluralism: useful strategy for managing, without eliminating, hybridity.

1) "help mediate conflicts by recognizing that multiple communities may legitimately wish to assert their norms over a given act or actor…

2) by seeking ways of reconciling competing norms, and by deferring to alternative approaches if possible.

3) And even when deference is impossible (because some instances of legal pluralism are repressive, violent, and/or profoundly illiberal), procedures for managing hybridity can at least require an explanation of why a decision maker refuses to defer.

Response to critics:

Sovereigntists will object to the idea that nation-states should ever take into account international, transnational, or non-state norms.

Universalists, for their part, will chafe at the idea that international norms should ever be subordinated to local practices that may be less liberal or less rights-protecting. And even hard-line pluralists will complain that a view focusing on how official actors respond to hybridity is overly state-centric. All I can say to such objections is that if a perspective displeases everyone to some extent, it is, for that very reason, also likely to be a perspective that manages hybridity in the only way possible: by forging provisional compromises that fully satisfy no one but may at least generate grudging acquiescence. And, in a world of multiple norms, such provisional compromises may ultimately be the best we can do."

Legal Pluralism: Features and principles

1) "jurisgenerative" this model focuses on the creative interventions made by various normative communities drawing on a variety of normative sources in ongoing political, rhetorical, and legal iterations.

2) Legal pluralism is "thus principally a descriptive, not a normative, framework. It observes that various actors pursue norms and it studies the interplay, but it does not propose a hierarchy of substantive norms and values."

3) Legal pluralism doesn't require negotiation with all views: Bermann argues not necessarily for undifferentiated inclusion, but for a set of procedural mechanisms, institutions, and practices that are more [*1168] likely to expand the range of voices heard or considered, thereby creating more opportunities to forge a common social space than either sovereigntist territorialism or universalism."

4) Research agenda that "emphasizes the micro-interactions among different normative systems. Such a case study approach would serve as a contrast to rational choice and other forms of more abstract modelling, by focusing instead on thick description of the ways in which various procedural mechanisms, institutions, and practices actually operate as sites of contestation and creative innovation."

Legal Pluralism and the Global Legal Order

Basic features of Legal pluralism:

1) Rejection of "hierarchical model of one legal system simply dominating the other and instead argued that plural systems are often semiautonomous, operating within the framework of other legal fields, but not entirely governed by them".

2) “legal systems as bidirectional, with each influencing (and helping to constitute) the other.”

3) Defining “the idea of a "legal system" sufficiently broadly to include many types of nonofficial normative ordering”. (E.g. England and the church, stack exchange, legal profession, insurance market, Jockey Club)

4) “pluralism offers possibilities for thinking about spaces of resistance to state law”

5) “encourages international law scholars to treat the multiple sites of normative authority in the global legal system as a set of inevitable interactions to be managed, not as a "problem" to be "solved."”

6) Rejection of Legal Positivism: “pluralism frees scholars from needing an essentialist definition of "law"… and pluralists refuse to focus solely on who has the formal authority to articulate norms or the coercive power to enforce them. Instead, they aim to study empirically which statements of authority tend to be treated as binding in actual practice and by whom.”

A PLURALIST FRAMEWORK FOR MANAGING LEGAL CONFLICTS

Argument against Sovereigntist Territorialism:

1) “nation-state bonds are neither natural nor inevitable…community formation is a …psychological process, not a naturally occurring phenomenon based on external realities (and) other affiliations may sometimes be more deeply felt than bonds of loyalty to nation-states.”

2) Nation states are based on physical space, but we are now affected by non-territorial interactions. E.g.: “the globalization of capital, the movement of people and goods across borders, the reach of global corporate activity, the impact of worldwide NGOs, and the development, in recent decades, of over a hundred international or transnational tribunals”.

3) The sovereigntist argument that “only territorially defined nation-state communities can legitimately claim to exercise democratically grounded power” is flawed for the **following reasons**:

(a) “it is no threat to sovereignty for a nation-state to decide that its sovereign interests are advanced overall by making agreements with other nations that limit what it can otherwise do…

(b) both international human rights norms and international institutions may actually strengthen domestic democracy…

(c) when foreign, international, or non-state norms are formally incorporated into domestic law, such incorporation usually occurs through the actions of domestic political actors on either the national or local level

(d) once one accepts the basic democratic legitimacy of counter majoritarian judges exercising judicial review, then it is difficult to see why there is an additional democratic legitimacy argument against those same judges issuing opinions that may sometimes be influenced by non-state norms

(e) legal norms have always migrated across territorial boundaries, and precepts that come to be thought of as constitutive of a community can often be traced historically to ideas borrowed from foreign sources

(f) that a total rejection of foreign, international, or non-state influence and authority is unlikely to be fully successful in a world of global interaction and cross-border activity" (Examples: Yahoo France and 1st Amendment, NAFTA, Federal government and states, banking industry, Iraq)

Argument against Universalism:

1) "universalism may fail to capture the extreme emotional ties people still feel to distinct transnational or local communities and therefore ignore the very attachments people hold most deeply…

2) It "erases diversity… (by) silencing of less powerful voices. Thus, the presumed universal may also be the hegemonic…

3) "preserving legal diversity can be seen as a good in and of itself because it means that multiple forms of regulatory authority can be assayed in multiple local settings…

4) "a legal system that provides mechanisms for mediating diversity without dissolving difference necessarily also provides an important model for mediating diversity in day-to-day social life…(and is) more likely to create the context for a tolerant society than one that, in contrast, seeks uniformity as its goal…

5) "as a practical matter, harmonization processes will ever fully bridge the significant differences that exist among states, let alone the variety of non-state orders at play in the world…

6) "it would be difficult to develop a process for determining which norms should be elevated to universal status…

7) “harmonization is generally backward-looking, and in a rapidly-changing world, harmonization processes will tend to lag behind social, technological, and economic realities”

Principles of Legal Pluralism: whose function is “evaluating the ways in which legal systems interact”

1) “a pluralist approach to managing hybridity should not attempt to erase the reality of that hybridity…

2) “Ludwig Wittgenstein's idea that agreements are reached principally through participation in common forms of life, rather than agreement on substance…

3) “in order to help create this sort of shared social space, procedural mechanisms, institutions, and practices for managing hybridity should encourage decision makers to wrestle explicitly with questions of multiple community affiliation and the effects of activities across territorial borders, rather than shunting aside normative difference…

4) “conflicts values… the independent benefit that may accrue when domestic judicial and regulatory decisions take into account a broader interest in a smoothly functioning overlapping international legal order…

5) “embracing pluralism in no way requires a full embrace of illiberal communities and practices or the recognition of autonomy rights for every minority group across the board

6) “a middle ground between strict territorialism on the one hand and universalism on the other

Liberal Core Objection:

Berman notes that his view may incorporate liberal principles that are defended as basic human rights by universalists (cosmopolitans):“my focus on procedural mechanisms, institutions, and practices necessarily limits the range of pluralism somewhat because it requires participants to accept the principles underlying the values of procedural pluralism itself. This is, to a large extent, a vision consonant with liberal principles, and many may reject it on that basis. Alas, there is no way to extricate oneself from this concern if one wants to have any type of functioning legal system for negotiating normative difference. Thus, I argue only that a pluralist framework is more likely able to bring participants together into a common social space than a territorialist or universalist framework would. As philosopher Stuart Hampshire has argued, because normative agreement is

impossible, "fairness and justice in procedures" are the only virtues that offer even the possibility for broader sharing. Accordingly, the key is to create spaces for such broader sharing, spaces for turning enemies into adversaries, without insisting on normative agreement."

He goes further when he explicitly argues that legal pluralism is incompatible with anti-liberal views: "embracing pluralism in no way requires a full embrace of illiberal communities and practices or the recognition of autonomy rights for every minority group across the board"

I would argue that if these limits constrain his pluralism, then he is defending a version of universalism, specifically liberal univeralism. One needs to appeal to something in defending the inclusion of multiple voices in a shared social space where important decisions are being made. He offers pragmatic justification throughout, but this type of justification is defeasible: if limiting voices or violating rights turns out not to be the most effective strategy in a particular situation or arena, then on pragmatic groups it should be rejected. If one wants to argue that we should never limit voices or violate rights, even where doing so is not effective, then one is in effect defending those rights are inviolable and universal. This is the core of the human rights argument.

PROCEDURAL MECHANISMS, INSTITUTIONAL DESIGNS, AND DISCURSIVE PRACTICES FOR MANAGING HYBRIDITY

A. **Dialectical Legal Interactions**

Defined: "both courts pay attention to each other's interpretations and, while not literally bound by each other's decisions, develop a joint jurisprudence partly in tandem and partly in tension with each other" (24)

Examples: NAFTA and local courts, ECHR and member states, Canadian central and provincial governments.

B. **Margins of Appreciation**

Defined: way to "strike a balance between deference to national courts and legislators on the one hand" and supranational bodies in order to give local courts "some room to maneuver... in order to accommodate local variation... concept/conception distinction"

Examples: ECHR and trans-parents, Trade-Related Aspects of Intellectual Property Rights

C. **Limited Autonomy Regimes**

Defined: allow some groups (often religious or ethnic) freedom to operate independently within the larger bounds of a legal system. Three ways to do this: limited autonomy, power-sharing arrangements, personal law not related to territory.

Examples: Parallel civil and religious legal systems for Muslims (Sri Lankan adoption case)

D. **Subsidiarity Schemes**

Defined: "at its core the principle of subsidiarity requires any infringements of the autonomy of the local level by means of pre-emptive norms enacted on the higher level to be justified by good reasons."

Example: Article 5 of the European Community Treaty

E. **Jurisdictional Redundancies**

Defined: where multiple legal communities assert jurisdiction over the same act or actor. One type is a complementarity regime which is "when two legal communities claim jurisdiction over an actor, one community agrees not to assert jurisdiction, but only so long as the other community takes action."

Examples of non-complementarity regimes: Spain attempting to try Argentinean military for human rights abuses, Italy attempting to try CIA operatives for kidnapping

Examples of complementarity regimes: International Criminal Court

F. **Hybrid Participation Arrangements**

Defined: including members of various communities in the decision process.

Examples: mixed juries, ECHR and Bosnia, Chad and World Bank, Internet standards

G. **Mutual Recognition Regimes**

Defined: “Under a policy of mutual recognition, different communities retain their own standards for internally-produced products, but agree to recognize another jurisdiction's standards for products imported from that jurisdiction.”

Examples: German importation of French liqueur, US ban on importation of shrimp “caught without protection for turtles”.

H. **Safe Harbor Agreements**

Defined: “Instead of full harmonization of norms, safe harbor principles require that firms doing business abroad abide by some, though not all, of the standards of that foreign community. In return, the foreign community agrees not to impose further regulatory burdens.”

Examples: US-EC Data Privacy Initiative.

A Pluralist Approach to Conflict of Laws

The three central issues are how do we decide jurisdiction, choice of law, and judgment recognition when laws conflict.

a) Jurisdiction. Territory is most often cited as the way to decide, but Berman argues that “a territorial analysis tends to preclude any engagement with the fundamental issues surrounding how best to negotiate normative differences among multiple communities. And, as discussed previously, focusing on territorial location tends to result in jurisdictional stalemate”.) He argues for community affiliation as relevant criterion.

Example: Guantanamo Bay and U.S. courts, France and Yahoo over Nazi propaganda

b) **Choice of law**

Berman argues that “a pluralist approach asks courts to consider the variety of normative communities with possible ties to a particular dispute. In doing so, judges must see themselves as part of an interlocking network of domestic, transnational, and international norms.”

Examples: Barcelona.com, Telnikoff v. Matusevitch