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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".

There are nations (cultural groups) without States. Sometimes these cultural groups are scattered among several States and sometimes they are a minority in one State. Sometimes these stateless nations are unwelcome and are a course of conflict. Some of the most well-known include the **Kurds** in Southwest Asia and the **Gypsies/Romani** of Eastern Europe.

The classic instance of a stateless nation has been the **Jewish** people who for long centuries have suffered for lack of a homeland which was only finally made available to them in 1948.

The **Kurds** numbering an estimated 20 million Kurds, are commonly seen as the world's largest nation without a state. About 10 million are in Turkey, 4 million in Iraq, 5 million in Iran and a million in Syria. There may be another million in the former Soviet Union. About 400,000 of the 1.8 million guest workers from Turkey living in Germany are of Kurdish origin.

The Kurds, a mostly Sunni Muslim people who share a unique language and whose mountainous territory spans Iraq, Turkey, Iran, and Syria, have a long history of oppression, suffering, and fierce armed struggle in these countries. Past

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Syrian governments have tried to strip Kurds of their Syrian citizenship. Kurds in Iran have faced similar oppression, often regarded with suspicion and hatred as Sunni Muslims in a Shiite state.

In **Turkey**, Kurdish separatist fighters and government efforts to eradicate Kurdish language and culture have claimed untold lives. Saddam Hussein's genocidal war against the Kurds in **Iraq**, capped by the infamous 1988 gas attacks that killed thousands of civilians, ranks among the worst atrocities of the twentieth century.

This tragic legacy makes the question of Kurdish independence a contentious one. Nonetheless, a sovereign Kurdistan seems extraordinarily unlikely. Since all four host nations are extremely resistant to losing territory, the Kurds would be best off publicly committing themselves to their respective countries, advocating for the protection of minority rights, and perhaps pursuing limited local autonomy.

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)

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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…

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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."

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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.

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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

Non State Actors:

Today, one can say that the majority of **international activities are** conducted by non-state entities. For the conduct of such activities these entities have to be controlled and their interests protected. The legal system that is best suited to regulate and protect these entities is international law. Although international law has many imperfections, over the years it has been able to evolve according to the needs of the international arena.

It can have as many subjects as needed, all with the international legal personality necessary for their raison d'être. In order for this system of law to protect these entities, they have to enjoy at least a limited amount of international legal personality. In other words, in order to enjoy rights and duties they have to be recognised as actors of this legal system.

There are various non-state actors in international law such as international organisations, companies, individuals and sui generis entities. These do not have the same amount of power in the international legal system, since this depends on the functions the entity performs. According to the amount of power the non-state actors possess, this thesis seeks to determine their status in the international legal system.