

Legal Pluralism and Global Law

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Original publication / How to cite this text: B. FRYDMAN et W. TWINING, « A Symposium on Global Law, Legal Pluralism and Legal Indicators », *Journal of Legal Pluralism*, 2015, vol. 47, n° 1, pp. 1-8.

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IN recent years, the idea of ‘global law’ has gained extraordinary relevance in legal theory as a means of casting off the political boundaries and formal constraints of state law in theorizing the transformations of contemporary law. Global law has also gained followers among legal professionals, especially among those who wish to provide an expertise with the law of multiple jurisdictions. Their enthusiasm has led to the development of worldwide networks of law firms and the creation of self-proclaimed global law firms. A similar pattern is developing in legal education. A growing number of law schools, research centers and networks now offer and conduct global law training and research. However, next to these initiatives, seems to exist a misunderstanding about the idea of global law. It is sometimes described as an aspirational project seeking to develop a universal legal system and common rules across the globe, which would then presuppose the existence of a global state, or at least, a global constitution. This conception of global law is fairly unrealistic. Most legal scholars are well aware that we *LIV*^e in a multipolar world, and that reaching consensus on key social, economic and political issues, as well on their driving values, is unlikely to happen.

However, there is no reason why legal scholars should limit themselves to a monist conception of global law in which rules must belong to a unique legal order or legal system under the authority of a global political institution. Would it not be more promising, and perhaps more relevant, to develop a working conception of global law from current practices, focusing on the questions they raise and initiatives they set off? In my view, global law is more likely to grow out of the new realities created by globalization, which are often, but rightly, characterized by the proliferation, intensification and generalization of interactions, relations and exchanges extending beyond the jurisdiction of states, and interstate, legal orders or happening to fully take place outside of them. Hence, the central question global law is called to address is how to regulate issues arising from the emerging global society in the midst of a multiplicity of legal systems and fragmented legal regimes. Attempting to answer this question without suggesting the need for unification or convergence constitutes in my view the baseline of a pluralistic conception of global law.

Subsequently, one should distinguish among multiple pluralistic conceptions of global law; it seems that legal pluralism is itself pluralistic. In the following pages, I will put down three questions in the form of binary distinctions as an attempt to sketch a basic and non-exhaustive categorization of legal pluralism in the field of global law. I hope they will be useful to read across the illuminating contributions of this special issue of the **Journal of Legal Pluralism**. The reason why I focus on these questions only, which are of course not the only ones worth discussing, is because they shaped to a great extent the

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research carried out at the Perelman Centre for Legal Philosophy in Brussels. Our choices in each of these issues, shaped the pragmatic and radical-pluralist conception of global law characterizing most of our present works.

1. Ordered v. Radical Pluralism?

A legal scholar may want first to define his standpoint. Scholars like Paul Schiff Berman¹ in the United States and Mireille Delmas-Marty² in France have leaned towards the perspective of ordered pluralism; they enquire global law by looking at the relationships between different legal systems and their multilevel rules. Their works both identify and discuss the means and procedures through which it is possible to harmonize the relationships between several legal systems and to solve conflicts arising from their interaction. Ordered-pluralist scholars have also looked beyond national legal systems to include local and regional legal orders, sectoral regimes and even religious orders. For instance, in the systems theory tradition of Niklas Luhmann, the works of Gunther Teubner and Andreas Fischer-Lescano make the point that, at a global scale, law is called to regulate and arbitrate the relationships and conflicts between rules and sectoral regimes of activities such as finance, health, trade and the Internet³. Although there are significant nuances and disagreements between these approaches, they all consider the globalization of law in the light of the relationships between legal orders. From a legal theory perspective, they relied on a normative conception of law according to which rules do not exist by their own, but only as part of a system which endows them with meaning, legitimacy and efficacy.

In opposition to the ordered pluralism approach stands Jacques Vanderlinden's idea of radical pluralism. Rather than looking at rules that can be applied to a concrete situation from the macro-perspective of the legal order, radical pluralism adopts the micro-perspective of the actors effectively involved. From this standpoint, legal pluralism defines the situation of an actor engaged in a legal relationship in which he may either resort to rules belonging to different legal or normative orders in pleading his case or, on the contrary, be asked to conform to these diverse rules. If these developments are not new or specific to the globalization of law, they intensify considerably because of the strategic behavior of actors in a global context which

1. Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* 286-287 (Cambridge U. Press 2014).

2. Mireille Delmas-Marty, *Les force imaginantes du droit (II) – Le pluralisme ordonné* 7-33 (Seuil 2006).

3. Gunther Teubner, *Constitutional Fragments* (Oxford U. Press 2012); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 Mich. J. Int'l L. 999 (2004).

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tends to result, increasingly, in the generalization of *law and forum shopping* practices.

It is self-evident that each perspective leads to a whole set of different questions. For the perspective of ordered pluralism, global law and legal pluralism reflect the viewpoint of a global observer. Hence, the key question an ordered-pluralist scholar will address is how to organize the relationships and conflicts between multiple legal orders at a global scale. In contrast, from the perspective of radical pluralism, the observer adopts the point of view of an engaged actor. Hence, a radical-pluralist scholar will rather enquire the possible effects of using, in a strategic and opportunistic way, the variety of existing legal systems, regimes and rules. As a result, ordered pluralists tend to emphasize the importance of harmonizing legal regimes or developing rules for the conflict of laws. Instead, radical pluralists focus primarily on understanding and explaining the ‘normative competition’ set off by globalization and its possible effects on law, including the so called “race to the bottom” of both, issuers and users of rules.

Both perspectives are in a certain way legitimate and necessary for understanding the dynamics of law in the context of globalization. Since Chaïm Perelman, the Brussels School of Jurisprudence has embraced the radical pluralistic perspective. The leading works of Jacques Vanderlinden and current research conducted at the Perelman Centre for Legal Philosophy follow this tradition⁴. Radical pluralism relies on a pragmatic approach to the study of law which sets aside the concept of legal order. In the field of global law, radical pluralism facilitates studying the destructive effects of globalization on state law and identifying, in the field, the emergence of new regulatory devices created by the interaction and hybridization of norms and rules of different nature. In brief, for a radical pluralist, the study of rules and norms in a global setting does not end with the study of the relationships and interactions between the normative or legal orders.

For instance, Internet regulation has developed regulatory devices that combine rules of legal liability with technical protocols and techniques, while negotiable pollution rights has similarly attempted to bring together (though without much success so far) legal rules on the reduction of CO₂ emissions with financial market products and instruments. Similarly, corporate social responsibility blends moral

4. Jacques Vanderlinden, *Return to Legal Pluralism: Twenty Years Later*, 28 J. Legal Pluralism and Unofficial Law 149 (1989) and *Les pluralismes juridiques* (Bruylant 2013); Benoit Frydman, *A Pragmatic Approach to Global Law*, in *Private International Law and Global Governance* 181- 200 (Horatia Muir Watt ed Oxford University Press, 2014) and *Prendre les standards et les indicateurs au sérieux*, in *Gouverner par les standards et les indicateurs: De Hume aux Rankings* 1, 1-65 (Benoit Frydman et Arnaud Van Waeyenberge eds. Bruylant 2014); Thomas Berns, Pierre-François Docquir, Benoit Frydman, Ludovic Hennebel & Gregory Lewkowicz (eds.), *Responsabilités des entreprises et corégulation* (Bruylant 2007).

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and technical norms (*standards*), such as ISO 26000, with compliance mechanisms based on *benchmarking* and *labeling* practices. All these regulatory devices refer to and embrace rules from a variety of legal and normative orders without however intending to redefine their relationships at a general level.

2. Legal Pluralism v. Normative Pluralism?

A legal scholar in a global law setting may also want to discuss the nature of the orders and norms he is taking into consideration in his work. A first option is to focus exclusively on the interactions between orders and rules which are defined to be legal in nature from the perspective of a normative or positive law theory of sources⁵. A second possibility is to conduct research beyond positive law to outline, from a global perspective, the interactions and relationships between, on the one hand legal rules, and on the other hand, other types of norms, whether they belong to religious orders (P.S. Berman), technical protocols (G. Teubner), or managerial processes (Benedict Kingsbury and the GAL group⁶). In these cases, it seems more appropriate to replace the term legal pluralism with what William Twining has called “normative pluralism”⁷.

Once again, this issue is not new or specific to global law. Globalization reinforces however the need to consider the relevance of normative pluralism if one is to take seriously observations accounting for the decreasing efficacy of state rules in framing transnational relations and transactions in highly globalized domains of our societies. The reason is that, in many cases, these observations also account, in my view rightly, for the greater use and efficacy of technical norms implementing technological and statistical solutions. If these norms are not fully replacing state law, they are at least, in certain domains, complementing and competing with rules of positive law.

Legal scholars and practitioners seem hesitant to take a step forward and include these norms in their research and everyday practice respectively. Perhaps, they feel it will play against the specificity of their profession or lead to wrong or non-rigorous legal reasoning. Behind this denial lie ideas according to which these regulatory devices are not law formally speaking, reflect and respond to a different set of values, and fulfill different societal functions. Legal professionals

5. Neil MacCormick & Ota Weinberger, *Introduction*, in *An Institutional Theory of Law: New Approaches to Legal Positivism* 1, 1-6 (Kluwer 1992). See also Benoit Frydman & Gregory Lewkowicz, *Le droit global est-il soluble dans ses sources?* Working paper du Centre Perelman de Philosophie du droit, 2013/01.

6. See Kevin E. Davis, Benedict Kingsbury, and Sally Engle Merry, *Introduction: Global Governance by Indicators*, in Kevin E. Davis, Benedict Kingsbury, and Sally Engle Merry, *Governance by Indicators: Global Power through Quantification and Rankings* 3-28 (Oxford U. Press 2012).

7. William Twining, *Globalization and Legal Theory* 224-233 (Cambridge U. Press 2000).

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particularly may also consider these devices belong to different subsets of disciplines including management, economics, informatics and statistics.

All these concerns are legitimate. From a pragmatic perspective, they show there is a concrete professional and practical concern behind the theoretical question of “what is law?”, which is to know what legal professionals should take care of in the spectrum of normativity. The Brussels School of Jurisprudence has always been resolute to implement an interdisciplinary and non-formalist approach, pleading for the inclusion, within the scope of jurisprudence, of normative devices other than “rules in uniform” (to use Perelman expression)⁸, or those with a “legal pedigree” (if one follows Ronald Dworkin’s test)⁹. A first reason is that the notion or core meaning of what is law evolves over time, as does the boundaries between law and non-law. A telling example is human rights. Though they were earlier dismissed by scholars and lawyers, they are today at the heart of any field of law, and arguably stand, as a branch of law, at the top of the positive law pyramid. A second reason is that legal professionals are already dealing in their daily occupations with these new regulatory devices – *standards*, benchmarks, protocols, indicators, codes of conduct. Hence, it seems reasonable to include them within the field of legal research and teaching, and to prepare future legal professional for their encounter, preventing them from abandoning this now central normative domain to other professions.

3. Legal v. Axiological Pluralism?

A third issue worth discussing at this stage relates to the relationship between a pluralistic conception of global law and the fact of axiological pluralism as existing in the world society. Legal pluralist scholars of global law may want to think about how to deal with, and if appropriate accommodate, two or more conceptions of the good. The practical link between legal and axiological pluralism is, as the issues discussed earlier, neither new nor specific to global law. Globalization allows however putting them into a new perspective. The classic debate between John Rawls and Jürgen Habermas is a good starting point.

The issue at stake was to know how peoples and nations with different values and conceptions of justice could agree on the moral principles underpinning a world law. Rawls put forward his idea of an “overlapping consensus”, which sought to identify the points of agreement without giving consideration to the system of values as such. Instead, Habermas argued that it was necessary to have an

8. Ch. Perelman, *A propos de la règle de droit – Réflexions de méthode* 316 in *La règle de droit* (Perelman et Foriers eds Bruylant 1971).

9. Ronald Dworkin, *The Model of Rules*, 35 U. Chi. L. Rev. 14, 17 (1967-1968).

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actual discussion about the principles of justice under the rules of discourse ethics. This reasoning also underlies his more recent works on global constitutionalism. In my view, both ways of dealing with axiological pluralism are not only hardly realizable but also unsuitable for a pragmatic and radically pluralistic conception of global law. It seems vain to search for moral unification or ordering in a world highly divided by the conflicts of interests and values.

From the perspective of the Brussels School of Jurisprudence, law does not presuppose shared values or an agreement on the conception of the good. It is rather a battlefield where the confrontation between different values takes place. According to Perelman, law is created and applied not in spite of moral disagreements, which are often irremediable, but rather because they exist¹⁰. From his pragmatic standpoint, law is an instrument through which actors in morally pluralistic societies attempt to make their view of the good and right prevail, which also explains why law is essentially dynamic. In a global law setting, the lack of effective global political institutions suggests that the ‘struggle for law’ takes place well beyond positive international law. A radical pluralist perspective, which studies norms and regulatory devices as deployed by actors, may thus be far more fruitful and revealing about the dynamics of values in the global society, than one focusing exclusively on interstate law. Perelman may have taught us a valuable lesson: global law may be thought better as a confrontation of values than as an arbitrage.

10.