'The limits of normative legal pluralism: Review of Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*,'

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1 Introduction

It is now commonplace to explore the myriad ways in which globalization has engendered changes in the structures and sources of law.[1] Of course, the concept of "globalization" is not uncontested: one cannot always be entirely sure what globalization really entails or what kind of phenomena it comprises. Yet, it is uncontested that we are in a transition period in which the traditional conceptions of law[2] are insufficient for capturing the present shifts in the contours of law and the role of the state in the process of the production of legal norms.[3] Lest one think this is all a matter for municipal[4] law,

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[1] See, *inter alia*, A. Chayes and A. H. Chayes, *The New Sovereignty: Compliance with International Regulatory* Agreements (1998); B. de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, Emancipation* (2002, 2nd ed); G. Teubner, 'Breaking Frames: Economic Globalization and the emergence of Lex Mercatoria', 5 *European Journal of Social Theory* (2002) 199; B. Kingsbury, N. Krisch, R. B. Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Legal Problems* (2005) 15; P. S. Berman, 'From International Law to Law and Globalization', 43 *Columbia Journal of Transnational* Law (2005) 485; A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *LJIL* (2006) 579; D. J. Bederman, *Globalization and International* Law (2008); P. Zumbansen, 'Transnational Legal Pluralism', 10 *Transnational Legal Theory* 141 (2010).

[2] See G. Teubner, 'Global Bukowina: Legal Pluralism in the World-Society', in G. Teubner, *Global Law without a State* (1996) 3.

[3] Although there are some authors that have argued that globalization is not a new phenomenon, see in this regard P. Hirst and G. Thompson, *Globalization in Question* (1999, 2nd ed). However, following Sassen, we are of the opinion that it is indeed a distinct phenomenon in comparison with past periods, see S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (2006), at 14-18.

[4] We take the term from Hart. See H. L. A. Hart, The Concept of Law (1994, 2nd ed), at 215.

international law has not avoided these shifts either. The explosion of legal normativity in quantitative and qualitative terms in the supranational arena has affected the basic tenets and underpinnings of international law. This transformation can be easily noticed within the realm of scholarship. In a period of 20 years, international law has gone from a state of affirmation[5] to the possibility of disappearance[6] to a state of uncertain calm in which it is not clear what the next paradigm will be. The only certainty is the presence of a renegotiation of the structural conditions in which legal normativity is being produced. Beyond that, nothing is certain.

In order to make sense of this 'disorder of normative orders',[7] several normative proposals have been advanced. The most prominent one – in terms of ink spilled for and against it - has come from the constitutionalization camp. Under this rubric, legal scholars argue that international law is in the process of being (or should be) 'constitutionalized'. Of course, there is much diversity of opinion within this camp. Nevertheless, there is clearly a common core that can be discerned: the desire to extend the typical elements from state constitutional law in liberal democracies to the international legal order. In this vein, enthusiasts promote a reading of international law in which the features of constitutional law are transposed and adapted to the supranational domain. One of the leading figures in advancing this discourse is Mattias Kumm. In an ever-developing corpus, he expounds his vision of a political order in which constitutional principles dictate the production of legality.[8]

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[5] T. M. Franck, *Fairness in International Law and Institutions* (1995), at 6.
[6] See M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *LJIL* (2002) 553.
[7] N. Walker, 'Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders', 6 *ICON* (2008) 373.
[8] See, e.g., M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 *EJIL* (2004) 907; or M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship

In contrast to the constitutionalist perspective, a seemingly radically different normative proposal has lately gained some traction and is the object of discussion in the present essay. Legal pluralism, which not so long ago was confined to the socio-legal domain,[9] has increasingly gained attention as a normative framework within which to analyse and explain current developments in the transnationalisation of the legal sphere. Although legal pluralism does not (so far) attract the same intensity of interest as constitutionalism, it has become an attractive option for reasons that we will explain below.

For more than a decade, Paul Schiff Berman has been one of the leading advocates of the normative virtues of legal pluralism.[10] His book *Global Legal Pluralism* is the result of these considerable efforts.[11] In this volume, he articulates the core features of his pluralist position. He attempts to make a convincing case for the acceptability and superiority of legal pluralism as *the* normative framework in dealing with the existence of multiple normative realms.

We will argue that, as it currently stands, legal pluralism does not provide a sufficiently adequate normative framework for managing conflict between and among normative orders. The principal reason for this stance is our conclusion that its basic

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Between Constitutionalism in and Beyond the State', in J. L. Dunoff and J. P. Trachtman (eds), *Ruling the World? International Law, Global Governance, Constitutionalism* (2009) 258.

[9] E.g., S. E. Merry, 'Legal Pluralism', 22 *Law & Society Review* (1988) 869; and B. Z. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global', 30 *Sydney Law Review* (2008) 375.

[10] The other leading pluralist within international law is Nico Krisch and whose book *Beyond Constitutionalism: the Pluralist Structure of Postnational Law* (2011) was reviewed recently in the pages of *EJIL*; G. Shaffer, 'A Transnational Take on Krisch's Pluralist Structure of Postnational Law', 23 *EJIL* (2012) 565.

[11] See, *inter alia*, P. S. Berman, 'The Globalization of Jurisdiction', 151 *U. Pa. L. Rev* (2002) 311; 'Conflict of Laws, Globalization, and Cosmopolitan Pluralism, 51 *Wayne L. Rev.* (2005) 1105; 'From International Law to Law and Globalization', 43 *Colum. J. Transnational L.* (2005) 485; 'A Pluralist Approach to International Law', 32 *Yale J. Int'l L.* (2007) 301; 'Global Legal Pluralism', 80 *S. Cal. L. Rev.* (2007) 1155; and 'The New Legal Pluralism', 5 *Ann. Rev. of L. & Social Sciences* (2009) 225.

premises are implausible. Berman's argument helps us in illuminating the challenges legal pluralists have to overcome if they really want to provide a suitable and cogent alternative to global constitutionalism in relation to the growing complexity of law and its relations to other sources of normativity.

A caveat is in order. As will become clear, we are not discussing the utility of legal pluralism as an analytical framework for describing the legal landscape. What we are dealing with is the viability of legal pluralism as a *normative* framework (this being the premise of Berman's book). As Hume famously observed, one cannot always derive an ought from an is.[12] Thus, whatever the explanatory merits of pluralism might be, there is no direct translation of those efforts into the normative sphere. Hence, our focus is on the explanatory efficacy of pluralism as a normative theory of law.

2 A new jurisprudence: a cosmopolitan pluralist outlook

The crucial empirical premise of *Global Legal Pluralism* is the claim that 'We live in a world of multiple overlapping normative communities' (at 3). This claim cannot be disputed. From here, Berman wants to move beyond the fiction of the nation-state as the only source of (legal)normativity: he wants to push beyond the model in which the territorially defined nation-state is 'treated as the only relevant normative community' (at 61) and law as pertaining exclusively within the state, specifically on the acts of state-sanctioned officials (at 51).For him, the notion of law operating in territorially distinctive

[12] 'For as this ought, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason shou'd be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it', D. Hume, *A Treatise of Human Nature* (1739-1740), ed. D. F. Norton and M. J. Norton (2007), book 3, part 1, sect. 1, at 302, vol. 1.

units in which only official state-based legal systems have the ability to exercise power is a convenient fiction that has to be discarded in favour of a broader understanding of law and normativity (at 4-5).[13] The presence of multiple overlapping sites of normativity (and not just legal normativity) necessitates reconsideration of law's basic assumptions: we need to recognize that we inhabit a world of constant normative 'hybridity'.[14]

In order to illustrate this legal hybridity, Berman offers several examples in which different types of normative conflicts arise. To the classic "state-versus-state" conflict, he adds conflicts of norms arising from the state versus the international, the nation-state versus a substate, and a state versus a non-state. The plurality of distinct normative communities enables him to argue that normative clashes are here to stay and that only a commitment to pluralism can do justice to the present state of affairs. As one can imagine, Berman opposes two lines of thought that also attempt to explain the unravelling of traditional structures: sovereigntists and universalists. We shall treat both in more detail below. Instead of subscribing to one or the other approach he proposes to 'deliberately seek to create and 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' (at 10).

Berman grounds his proposal in a double theoretical approach, one which he dubs 'cosmopolitan pluralist'. As the name implies, it is ostensibly cosmopolitan as it

[13] Berman actually draws a distinction between law and 'other sources of normativity'. He wants to bring non-legal norms into the discussion and make them part of his framework. Unfortunately, Berman never advances a conception of 'law' whereby one could recognize non-legal norms as such (at 54-55).

[14] Berman does not specify what hybridity means. The closer he gets to define hybridity lies at page 171. There, in the context of discussing 'Hybrid Participation Arrangements', he seems to posit that hybridity concerns 'the relationships among multiple communities and their decision makers.' Nevertheless, he considers also hybridity as the mix of decision-making bodies (at 171ff). Thus, hybridity could be understood as the simple interaction between different normative spheres.

recognizes that we all belong to a myriad of normative communities (at 11). It is plural in the sense that it acknowledges and accepts that law is a phenomenon that goes beyond the (nation) state. There are multiple normative commitments that can arise from different spaces that cannot be relegated only to state (or official) institutions. Law is created by the different norm-generating communities that populate the globe.

This normative approach has a distinct procedural profile. For Berman, his framework has to be understood as the only plausible one in managing competing normative commitments. Because normativity is pervasive, and conflicts an inescapable feature of life, substantive normative considerations have to yield to normative proceduralism. The purpose of cosmopolitan pluralism, according to Berman, is to simply manage legal hybridity by devising procedures in which the voices of different communities can be heard. The most we can achieve is to simply channel (or tame) opposing normative commitments (at 16)[15] with the hope that by expanding the range of voices a common social space can be built (at 18). This is Berman's self-described proceduralist solution to the challenges of pluralism.

Acknowledging that his framework is normative and not analytical, Berman concedes that his cosmopolitan pluralism is not entirely value-free. To accept his proceduralism implies the acceptance of certain values that are intrinsic to the use of procedures that require commitment to 'a common set of discursive forms' (at 17). Thus, certain illiberal communities cannot be accepted normatively as they do not accept or cannot be readily accommodated within a cosmopolitan pluralist framework. Chapters 3 and 4 are dedicated to the opposing normative rivalries that attempt to cope with plural

[15] Compare G. Teubner and A. Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan Journal of International Law* (2004) 999.

normativity. As we stated above, Berman pits his normative approach against sovereigntists on one hand and universalists on the other.

Berman defines sovereigntism as the view that sees the nation-state as the only proper locus of legal normativity. Sovereigntism refers to the specific American debate concerning the influence and impact of international norms on the American legal order. The crux of their position concerns arguing vigorously against international law or diminishing its impact or influence vis-à-vis the USA. Among them one can find Justice Scalia,[16] John Yoo,[17] Jack Goldsmith and Eric Posner.[18] For them, norms that have not been generated within the confines of the state are deemed irrelevant or their influence should be contained. Put differently, for sovereigntism, 'territorially defined nation-states are the only legitimate source of legal norms and therefore reject all other influence' (at. 63). He chastises the sovereigntist account on analytical grounds because it does not adequately reflect how legal norms evolve and develop (at 63).

To debunk the statist approach, Berman develops a two-pronged criticism. Firstly, drawing on the literature on identity formation in relation with community,[19] he argues that the nation-state is not the only source of 'community' as the notion is socially constructed. Berman follows the view that the idea of a nation, or belonging to a specific community (which is territorially delimited), is neither natural nor predetermined. As

[16] Antonin Scalia, 'Commentary', 40 St. Louis U. L.J. (1996) 1119.
[17] J. Yoo and J. Ku, *Taming Globalization: International Law, the U.S. Constitution, and the New World Order* (2012).
[18] J. L. Goldsmith and E. Posner, *The Limits of International Law* (2006). For a useful exposition of their views see A. Lorite Escorihuela, 'Cultural Relativism the American Way: The Nationalist School of International Law in the United States', 5 *Global Jurist Frontier* (2005).
[19] The scholarship from which Berman draws on is quite extensive. See, for a short sample, R. J. Foster, 'Making National Cultures in the Global Ecumene', 20 *Ann. Rev. Anthropology* (1991) 235; U. Hannerz, *Transnational Connections: Culture, People, Places* (1996); P. Cheah & B. Robbins (eds), *Cosmopolitics: Thinking and Feeling Beyond the Nation* (1998); R. T. Ford, 'Law's Territory (A History of Jurisdiction)', 97 *Mich. L. Rev.* (1999) 843; H. Herb & D. H. Kaplan (eds), *Nested Identities: Nationalism, Territory, and Scale* (1999); B. Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (2006, rev. ed.).

with other identities, it is continuously reproduced by certain structures. The feeling of belonging to a specific place is simply a by-product of social and material forces. For example, the idea of being an 'American', is no different from any other sort of affiliation. Thus, it is unwarranted to give precedence to the nation-state over other sorts of communities, as all identities are constantly in flux and constructed. As he puts it, 'if communities are based not on fixed attributes such as geographical proximity, shared history, or face-to-face interaction, but instead on symbolic identification and social psychology, *then there is no intrinsic reason to privilege nation-state communities over other possible community identifications that people might share*' (at 80).

The second strand of the argument questioning the efficacy of sovereigntist accounts is that of democratic legitimacy. According to Berman, those who staunchly defend the nation-state argue that 'only territorially defined nation-state communities can legitimately claim to exercise democratically grounded power' (at 92) and want to keep at bay any norm that comes from any other 'community'. Berman provides two different replies to that claim. First, he contends that external normativity (that is to say, any norm that has not arisen explicitly from nation-state institutions) does not necessarily imply the loss of democratic legitimacy and, conversely, that it can (in some contexts) enhance the democratic character of the nation-state (at 93). Secondly, sovereigntists ignore how norms come into being within nation-states. Contrary to their simplistic view, norms are never the product of a single procedure nor are they produced within the confines of a monolithic state. Norms are the product of multiple interactions between diverse communities, actors, or groups. Thus, the 'total rejection of foreign, international, or nonstate influence and authority is unlikely to be fully successful in a world of global

interaction and cross-border activity' (at 96). Among the examples he provides in making a plausible case against the shortsightedness of sovereigntists arguing in favour of the possibility of normative containment within the nation-state is the Pinochet case in which attempts to prosecute Pinochet in Spain had the effect of reinvigorating the prosecution of him in Chile. Similarly, the attempts to prosecute members of the Argentine military during the dictatorship helped in achieving their prosecution in Argentina (at 114 *et seq*.). Normativity, then, according to Berman cannot be confined and delimited in a globalized world.

Berman also opposes universalism. According to Berman, universalism holds 'that people are fundamentally the same despite differences in culture and circumstance' (at 129). As he sees it, universalists argue for the erasure of any sort of normative difference between the plurality of existent communities and affiliations worldwide and for the realization of a common set of normative assumptions. For him, this approach is undesirable because it reduces or eliminates diversity: core purpose of universalism is to eradicate differences and embrace our sameness. This seemingly ignores the fact that everyone has multiple identities that cannot be subsumed within one normative framework. Furthermore, this insistence on universality has the unfortunate consequence of disempowering weaker communities as the more powerful can present their interests as promoting a purported 'universal normativity'. Additionally, universality stifles normative competition. Because universality represents a monolithic governance model, it misses the point of diversity as experiment. In this reading, diversity is seen as a good in itself due to the fact that by underwriting diversity, many, alternative normative proposals can arise. Thus, diversity is equated with competition, in which different

normative solutions vie for attention. Finally, universality is implausible at a practical level as it is highly unlikely that differences can be easily erased. Hence, universalists 'would have to acknowledge that normative conflict is at the very least a constant transitional reality that will require more pluralist processes to address' (at 137).

Against this background Berman presents his own normative proposal, one that tries to straddle the divide between the global and the local (at 150). As we stated earlier, he has dubbed his framework 'cosmopolitan pluralist'. It is cosmopolitan because it allows for the recognition of the other without demanding individuals to give up their own normative commitments. As he puts it, 'The cosmopolitan worldview shifts back and forth from the rooted particularity of personal identity to the global possibility of multiple overlapping communities' (at 148). It is pluralist in that it recognizes the existence of law beyond the paradigm of the nation-state. Normativity is all around and to simply focus on the state is misleading, according to Berman, as it glosses over the wealth of extant normativities. For him, the advantage of this approach is that it 'does not require people to be conceptualized as fundamentally identical in order to be brought within the normative system' (at 141). Accordingly, he proposes the establishment of procedures in which difference is managed without imposing any particular identity configuration. Berman argues that this arrangement will be more attractive than sovereigntist or universalist approaches in drawing people into a shared social space in which normativity can be negotiated. This shared social space will allow us to at least make the other an adversary rather than an enemy (at 150). Even if there are moments in which conflicts of values cannot be tamed, he thinks that these will be the exception.

Thus, law must be oriented towards ‘an understanding of and sensitivity to the cosmopolitan pluralist reality’ (at 321).

In the remainder of the book, Berman extends this framework toa series of mechanisms and procedures for managing hybridity within the cosmopolitan pluralist framework. Chapter six is entirely dedicated to showing how different tools help in managing pluralism without eliminating it. Here Berman reviews tools, such as dialectical legal interactions, margins of appreciation, limited autonomy regimes, and so forth, to show how they would help foster pluralism and manage normative disagreements without erasing diversity. The last part of the book is dedicated to re-envisioning conflict of laws in a hybrid world. There Berman simply reassesses his approach but focuses on the traditional elements of conflict-of-laws doctrine, i.e., jurisdiction, choice of law, and judgement recognition. The salient feature of this section of the book is that it is directed to judges, with a view to how they should position themselves within a world of manifold normative communities. They ‘must consider how best to construct a world system of law … and they may develop hybrid norms for resolving multistate disputes’ (at 266). Hence he argues for a conscious cosmopolitan pluralist approach in which judges pay attention to non-state communities. Instead of relying on territorialist analysis, judges would need to apply the relevant normative community norms, regardless of their status. In order to buttress his case, Berman provides several real life cases. He dissects four cases in total. Two concern state-sanctioned courts and the other two concern religious communities. All four of them, despite their difference origins and source of conflict, are dealt from the perspective of

the relevant community tie. Hence, it will suffice with describing the cases involving state-sanctioned courts as an example of what he aims to accomplish.

On the one hand, we have the *GlobalSantaFe Corp. v. Globalsantafe.com* case. The crux of the matter involves the issue of trademark. On September 3, 2001 two American companies – Global Marine, Inc., and Santa Fe International Corporation, reached an agreement whereby they decided to merge both companies into one. The new corporation would be named GlobalSantaFe Corporation. Almost right after the merge was announced, a South Korean citizen named Jongsun Park registered the internet domain globalsantafe.com with Hangang, a domain name registrar. Berman criticizes how the US court approached the issue by focusing solely on jurisdictional grounds. Instead, a cosmopolitan pluralist approach to the issue, according to Berman, would have pay attention to the relevant community affiliations. Thus, the most appropriate norm would have been US trademark law as the issue at stake involved an action from a South-Korean citizen directed against a US corporation based on the United States (at 275-276).

A similar situation and result happens with *Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona* case. In this case all parties came from Spain. Here, a Spanish citizen, Joan Nogueras Cobos, registered the domain Barcelona.com with an American domain name registrar, Network Solutions. The Barcelona City Council argued that Nogueras Cobos had no right to the domain and requested the transferred of it to the city council. In order to gain the domain name, the city council went to the World Intellectual Property Organization (WIPO) which ruled in favour of the city council. Nogueras Cobos, then, went to American courts. The district court, after looking both Spanish and American law and ignoring WIPO's ruling, ruled in favour of the city

council. Later on, the Fourth Circuit reversed the district court's decision. The appellate panel decided that the case had to be decided under US law. Because Barcerlona is a geographical term that cannot be protected under US law, the Fourth Circuit found nothing unlawful on Nogueras Cobos's actions. Once again, Berman criticizes how US courts have approached the issue. Against analyzing conflicts under territorial demarcation, Berman advocates his cosmopolitan pluralist framework. For this case, he would have dismissed legal formalism and have adopted Spanish law because that is where the substantive community affiliations were (at 285).

Furthermore, in a global plural world courts should acknowledge their place and accept foreign judgements as part of their embrace of pluralism and as players in a transnational world. Without going further into specifics, the last part represents a mere instantiation of the cosmopolitan pluralist framework. There is nothing novel in that part that modifies Berman's approach.

3 Legal pluralism as the new normal

Recently, a number of international law scholars have turns to international private law and more specifically conflict of laws in order to suggest approaches to norm conflict/fragmentation. It would be useful if you could clarify how Berman's own proposals relate to these writings. Does he build on them, criticize, ignore….

Moreover I would suggest to include a paragraph on how Berman's proposal compares with those of other "pluralists", in particular Nico Krisch's.

As indicated at the beginning of this essay, legal pluralism has become one of the several frameworks open to international lawyers in order to grasp the realities of the international legal order. The unprecedented expansion of international law, especially if we compare it with past periods, has generated a renewed questioning over its continuation because of an excess of law. This discussion around the identity and coherence of international law, also known as the 'fragmentation' debate, has unsurprisingly elicited many responses. Of those responses, the one with the greatest appeal for international lawyers has been the constitutionalist.[20] The other response and one that has only lately gained some traction has been legal pluralism.[21]

The most surprising aspect of this opening up towards legal pluralism is the obliviousness towards it by international lawyers - by and large - until now.[22] It is surprising, because international law has always had a pluralist streak within its structures. This pluralism can be noticed in two aspects. First of all, as Michaels has noticed, international law's relation with domestic legal orders in terms of dualist and monist conceptions of law resemble pluralist and monist conceptions of law.[23] Secondly, the fact that states have been deemed sovereign entailed that they had the right to be limited as long as they agreed upon it. This implies that there can be treaties focused on different objects and which different states on it. The result is the creation of a plurality of treaties that could already conflict with each other due to several causes. Surely, to discern the reasons of this lack of engagement with legal pluralism until now is a

[20] For an overview of the reasons of this appealing see
[21] For an account of legal pluralism see
[22] There are some exceptions. See, which is also is noted in Berman's book, B. Kingsbury, 'Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgment', 92 *AJIL* (1998) 713.
[23] R. Michaels, 'Global Legal Pluralism,' 5 *Annual Review of Law & Social Science* (2009) (CHECK PAGE).

question worth pursuing. Nevertheless, we do not have the space to do so here. What is worth bearing in mind is that legal pluralism has become one normative option available for international lawyers.

Those that accept pluralism as a fact that cannot be denied and should be thoroughly embraced has adopted different strategies from those embracing the constitutionalist project.[24] Drawing on or coming from the private side of international law, scholars have argued that a solution to manage legal pluralism rests on conflict of laws. The reasons of why conflict of laws can vary.

On the one hand, we can find Teubner and Fischer-Lescano's position. For them, any attempt to systematize the international legal order is futile. Their argument rests on Luhmann's systems theory whereby society is governed in different sub-systems that are independent of each other and which are constantly self-reproducing themselves. For them, the rise of the different regimes in different issue-areas simply represents an instantiation of society being differentiated in different sub-systems. Each regime merely reproduces their distinctive rationality. Furthermore, due to the inherent structure of the sub-systems, normatively closed, cognitively open, each field will reproduce itself and expand over distinctive regimes which will cause collusions in a struggle for the centre, 'to make the special rationality govern the whole.'[25] Hence, the only possibility is the formation of weak normative compatibility within the context of an inter-regime conflict of laws.[26]

[24] This acceptance of legal pluralism can be adopted at the normative level or at the empirical level. There is no necessary link between the two.
[25] Koskenniemi, "The Fate of…", *op. cit.*, 23.
[26] A. Fischer-Lescano and G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Mich. J. Int'l L.* (2004) 999, at 1004.

From a less theoretically ambitious framework we can find Michaels and Pauwelyn who advocate as a technical matter the embracing of conflict of laws as a solution.[27] For them, conflict of laws should be viewed as a plausible alternative in managing fragmentation within the context of specialized regimes. Adopting, broadly speaking, a functional approach they argue for an inter-systemic conflict of laws whenever different sub-systems enter into contact. They argue that conflict of laws allows for the coordination of the different sub-systems.[28] The reasoning that underpin their assessment, in which is not unique to them, relates the circumstance of conflict of laws being traditionally used as a technique through which it is determined which law should be applied for a given case. This case usually referred to situations where several domestic legal orders were involved. Conflict of laws, then, involves 'typically rules of domestic law that determine which of several domestic substantive laws should apply (e.g., whether Belgian or German law applies to a fact pattern), according to certain factors, for example, the location of the object in question or the nationality of the parties.'[29] This circumstance of conflict of law as the convergence of elements from different systems, has led some to argue that the utility of conflict of laws resides in the management of alterity.[30] Similarly, viewing conflict of laws as a 'technique' helps us in addressing conflicts that can be viewed as intractable. Under this reading, the 'form' of

[27] R. Michaels & J. Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law', 22 *Duke Journal of Comparative and International Law* (2012) 349.
[28] R. Michaels & J. Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law', 22 *Duke Journal of Comparative and International Law* (2012) 349, at 375.
[29] R. Michaels & J. Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law', 22 *Duke Journal of Comparative and International Law* (2012) 349, at 351.
[30] See H. Muir Watt, 'Private International Law Beyond the Schism', 2 *Transnational Legal Theory* (2011) 347.

conflict of laws allows for the resolution of conflicts in a manner that permit the treatment of differences without entering in larger societal conflicts.[31]

Finally, we find Nico Krisch's position. Contrary to the others, he adopts a strong normative position.[32] He embraces pluralism as a normative stance in opposition to the constitutional project. He argues for the maintenance of a strong systemic pluralism. His normative solution resembles conflict of laws approach. Although he does not call them like that, he has named them 'interface norms,' which they perform a similar role than conflict of laws norms, despite arguments to the contrary.[33] The purpose of those norms is to define how the interactions between orders will take place.[34]

Undoubtedly, Berman should be seen as part of the same group. As we have stated in the prior section, Berman not only accepts pluralism as an empirical fact but as a normative stance. He sees pluralism as a value that has to be embraced and accepted. Despite these similarities, Berman does not deal with the abovementioned scholars directly. He draws on an extensive scholarship dealing with conflict of laws, for instance. But the literature from which he builds on his arguments is unrelated to the scholarship bringing conflict of laws as an explicit technique through which conflict of norms can be dealt with. Certainly, part of the reason is due to chronological factors. The book is the result of almost 10 years of research. Hence some of those adopting a conflict of laws

[31] See K. Knop, R. Michaels & A. Riles, 'From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style', 64 *Stanford Law Review* (2012) 589.
[32] See generally N. Krisch, *Beyond Constitutionalism: the Pluralist Structure of Postnational Law* (2011).
[33] He claims that 'the conflict-of-laws approach' is guided by the 'idea is to distribute jurisdictional powers among *a priori* unconnected orders with parallel claims to autonomy, whereas the pluralist setting is concerned with orders that have established firm linkages and accepted forms of common decision-making.' This is entirely question-begging, the fact that the different orders are unconnected or they are linked does not affect how the decision has to be taken. The action is internal to the order and will have to decide accordingly which norm to apply and different reasons will be given different weights. N. Krisch, *Beyond Constitutionalism: the Pluralist Structure of Postnational Law* (2011) 287-288.
[34] N. Krisch, *Beyond Constitutionalism: the Pluralist Structure of Postnational Law* (2011) chapter 8.

approach have appeared later on.[35] Said that, it is possible to make a brief comparison between them. Overall, we notice hardly any meaningful differences between those advocating a conflict of laws approach. Partly, as just stated, because sometimes they start from similar positions. If we were to notice some disagreement, this would lies between Teubner and Fischer-Lescano's position and Berman. We do not see him accepting the holism of Teubner and Fischer-Lescano. Berman has a more inclusive notion of communities and does not seem to share the systemic understanding of Teubner and-Lescano. Besides that, the reliance of conflict of laws is based on what we mentioned just above; that conflict of laws is an attractive tool from which pluralism can be manage as it has been used for decades by judges in order to manage issues that transcend boundaries and affect different communities.

More interestingly, is the comparison with Nico Krisch as he is alongside Berman one of the leading pluralists within international law. Despite the fact that both take different routes in underpinning their cases, it is fair to argue that both share the same normative allegiances. Both are in favour of pluralism as a normative position. More surprisingly, there is hardly any engagement between them. Berman simply mentions Krisch as one of the few exceptions in international law in paying attention to the pluralism literature (at 53, fn 110). Viceversa, Krisch does not engage much with Berman; although the engagement is larger than Berman's. Krisch argues that Berman is clearly within the pluralist side. However, he posits that Berman's 'discussion of the forms that may allow for managing the resulting conflicts recalls the constitutionalist instruments for accommodating diversity,' implying that Berman does not fully embrace

[35] Or they draw from Berman himself like K. Knop, R. Michaels & A. Riles, 'From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style', 64 *Stanford Law Review* (2012) 589.

the radicalism of pluralism. Rather, he is demoted as a sort of institutional pluralist whereby pluralism has to be tamed through institutions.[36] In our view, this is an unfair characterization of Berman's approach. Berman is actually open in his pluralism and is conscious of the fact that normative pluralism entail that conflicts will not be resolved, there will be simply 'an ongoing normative discourse that has no final resolution' (at 15). Furthermore, Berman is explicitly against universalism, which is similar to the type of constitutionalism that Krisch opposes in his book.[37] Quite the opposite, he celebrates the fact that individuals belong to many different normative communities. Certainly, the enumeration of the different mechanism by Berman has as purpose the managing of pluralism. But he is explicit that he does not want to 'solve' pluralism (at 141). The purpose of describing those mechanisms lies in seeing them 'as sites for continuing debates about pluralism, legal conflicts, and mutual accommodation' (at 153). Compare this with Krisch's 'interface norms.' According to him,

> interface norms will also reflect other factors, such as the degree of prior formal acceptance of other norms (for example, through ratification), the proximity of values (for example, equivalence or identity in the interpretation of rights), or functional considerations, such as the utility of cooperation in a regime. Yet these should be secondary factors, operating *within* the autonomy-based framework I have just outlined. If a polity has a strong autonomy pedigree, its norms are due respect even if they are based on distinct values or compliance with them does not have immediate benefits.[38]

[36] N. Krisch, *Beyond Constitutionalism: the Pluralist Structure of Postnational Law* (2011) 71-75.
[37] He dubs it 'foundational constitutionalism.'
[38] N. Krisch, *Beyond Constitutionalism: the Pluralist Structure of Postnational Law* (2011) 296.

Furthermore, 'the strength of the respective claims in a pluralist order is not assessed by a single decision-maker or from a central vantage point' and 'the quest for coherence—as compatibility, rather than deep uniformity —is part and parcel of the broader quest for a just postnational order.'[39] Is this *that* different from Berman's? We do not think so. The fact that Krisch simply reduces the diversity of mechanisms to the all-encompassing 'interface norms' does not detract from the existing similarities between both authors. Admittedly, differences do exist, but these concerns more the different routes taken than the overall course that they want to pursue and advocate.

4 Neither here nor there: problems of a cosmopolitan pluralist jurisprudence

There is no doubt that Berman makes a convincing case when describing the current state of global affairs. Normative pluralism is an important fact that cannot be ignored. However, Berman is not content with merely providing an analytical description of existing developments. He wants to offer a *normative* vision for a postnational world. It is not only an argument about how things are but about how things ought to be organized. For Berman, cosmopolitan pluralism shows the way how best to manage a world of norm plurality. We doubt that Berman's arguments are sufficient in providing a robust justification for embracing his normative framework.

In our critique we focus on three points that are of central concern for Berman's position as they underpin the cosmopolitan pluralist framework. First, we argue that contrary to

[39] N. Krisch, *Beyond Constitutionalism: the Pluralist Structure of Postnational Law* (2011) 296 (footnote omitted).

what Berman claims, his distance from liberalism is less pronounced than he imagines. Whilst he does not deny the influence of liberalism, he stresses some distinctive differences. We disagree and argue that he fully embraces if not exudes a liberal position. We emphasize how liberalism informs Berman's substantive position because everything else is affected by this fundamental choice. Secondly, we argue that his cosmopolitan pluralist framework does not taken pluralism seriously. Contrary to what Berman maintains, because his pluralism is qualified by cosmopolitanism, in the end, his alleged penchant for pluralism is diminished due to a set of underlying limitations that cannot be overcome. As a result pluralism loses a good part of its meaning. Thirdly, as a normative approach to the management of pluralism, Berman's cosmopolitan pluralism does not provide adequate guidance in how to approach it. As a result, it ends up looking somewhat arbitrary. That is, that any solution based on his framework would be almost equally valid. There would be no meaningful possibility of distinguishing between them. Hence, there are no grounds in which Berman's framework could be useful in providing a meaningful guidance.

A *Liberalism in disguise*

Despite his emphasis on the inescapability of normative pluralism, Berman does not fully embrace pluralism as a normative stance. His reading of pluralism is unmistakably liberal. Thus, he inadvertently undermines the pluralist case that he is so eager to defend. As we see it, Berman's liberalism greatly undercuts pluralism as a normative stance as it reduces pluralism to a basic substantive core of rights that cannot be infringed. This is a problem that pervades the entire book. Even more problematic is the fact that a

justification concerning this limited vision of pluralism is nearly absent; there is a conspicuous lack of argument properly justifying why liberalism should be the normative default position. This is a significant omission insofar as it diminishes the appeal of Berman's position and greatly limits the type of pluralism(s) deemed acceptable.

One of the few instances where Berman explicitly discusses liberalism is when he introduces his procedural conception of cosmopolitan pluralism. There he acknowledges a certain liberal bias. He regards his characterization as fair (at 17). What is curious is that in the footnote to that statement he immediately rejects the isomorphism between his cosmopolitan pluralism framework and liberalism in general. He concedes that the vision of pluralism he advances shares many attributes with liberalism; nevertheless, by embracing pluralism he gives 'independent value to dialogue among communities and an importance to community affiliation that is absent from (or at least less central to) liberal theory' (at 17). While we cannot discuss in detail the conceptual problems this view may have, it clarifies Berman's assumption of a very particular conception of liberalism. Certainly liberalism rests on the premise of the individual as the basic moral unit, as a bearer of rights. But once one moves beyond that core precept, liberalism contains many variants; indeed, some of them give due importance to the status of groups. There is no shortage of liberal thinkers striding between the individual and the community and their intricate relationship. A good example of such an approach is the work of Will Kymlicka,[40] and he is not the only one in this regard.[41] In short, there are, indeed, versions of liberalism that give due importance to communities. Our point here is not so much in defending the possibility of liberalism and pluralism co-existing. On the

[40] See W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995).
[41] For a summary of liberal thinkers with respect to communities see M. Murphy, *Multiculturalism: A Critical Introduction* (2012).

contrary, there are strong reasons for thinking that liberalism and pluralism cannot be reconciled.[42] Rather, our point concerns how Berman constructs his normative framework. We are a bit surprised how he seems to ignore that specific strand of liberalism. It might have helped his case, even if the task is highly difficult.[43]

This omission is relevant because it equally affects him when he tries to depart from liberalism. It becomes unclear what Berman means by claiming that liberalism does not ascribe independent value to dialogue among communities and importance to be part of a community. He posits that liberalism gives 'at least' a less central role to the importance of communities (at 17, fn 37): but how much? As argued in the book, it is quite unclear both the extent to which Berman departs from liberalism and how much liberalism, as he sees it, places less importance on communities. Does the acceptance of communities entail the total elimination of individual rights? Do communities bear independently of individuals rights and duties? Do they have ontological status? What is their relationship? None of this is ever developed in any detail. These are all important questions that need to be clarified in order to ascertain how the cosmopolitan pluralist framework operates. How communities are envisaged will affect how to see them and how to treat them when conflict arises between communities and individuals and between communities. Hence what type of liberalism he is adopting has an impact on how pluralism is to be managed. Even if the reconciliation brings with itself internal analytical tensions.

[42] See J. Kekes, 'The Incompatibility of Liberalism and Pluralism', 19 *American Philosophical Quarterly* (1992) 141.
[43] See, for instance, G. Crowder, 'From Value Pluralism to Liberalism', 1 *Critical Review of International and Social Philosophy* (1998) 2.

The most one can glean from Berman is some inchoate understanding of the interrelationship between the community and the individual, but little more. Overall, we are inclined to read Berman as unwilling to discard individual rights. We come to this understanding from the examples provided by him when addressing the impact of illiberal communities on other type of communities. He accepts that when some issues are deemed outrageous to another community, like stoning in case of a minor violation, a community does not have to yield to the community where the violation was committed (at 225). Likewise, he explicitly states that he wants to pay more importance to communities, not that communities are the only type of existing actor; and that he is conscious of the fact that communities are not 'monolithic' (at 291-293). Given these considerations, the question that immediately arises is how distinctive his approach is from an author like Kymlicka? How different is his view from liberalism in general? Not much, in our opinion. He is simply advocating liberalism with a mild penchant for communities.

It is even more surprising that he seems to want to distance himself from liberalism when he embraces cosmopolitanism as one of the two pillars of his framework. Cosmopolitanism, at least in its most accepted form currently, strongly derives from liberalism.[44] It is a necessary though insufficient condition on which to ground cosmopolitanism. The basic feature that distinguishes cosmopolitanism from other political theories is that at its core lies 'the idea that all human beings, regardless of their

[44] 'Derives' because the individual is at the center of the theory. True, cosmopolitans talk about 'mankind' but this is so because the individual is what it is considered. As Godrej argues, 'Contemporary cosmopolitanisms within political theory cohere around a normative position that is identified with certain basic assumptions: individualism (humans as the ultimate unit of moral worth), egalitarianism (humans as having equal worth), and universalism (the scope to which this moral theory should be applied)', F. Godrej, *Cosmopolitanism, Comparative Political Theory and Civilizational Alterity* (2011) 9 (footnote omitted). See also C. Jones, *Global Justice: Defending Cosmopolitanism* (2001) chapter 2;

political affiliation, do (or at least can) belong to a single community, and that this community should be cultivated.'[45] The main point is the equal consideration (respect) of human beings as moral entities. But this is a point that would be embraced by any liberal political or legal philosopher. Thus, it seems *prima facie* reasonable to argue that Berman's normative approach is buttressed by liberalism, something that he seems never to properly admit and therefore justify.

B *The limits of Berman's pluralism*

It is by now clear that how Berman frames his approach, the rest of the argument will be affected.. Needless to say, pluralism suffers the most. To begin with, for liberalism community derives from the individual. Once you accept the moral centrality of the individual, as liberalism and cosmopolitanism do, the community's value is dependent upon it. The value of and the voice given to the community is purely instrumental or functional. It becomes a second-order institution which has validity so long as it permits the flourishing of the individual. Likewise, if the moral value of the individual is accepted as foundational, it follows that there are certain individual rights that must be basic and inviolable. Therefore, pluralism, that is to say, the acceptance of multiple normative communities with multiple values, is reduced to a 'greater' good. Differently put, pluralism is accepted as long as it is reasonable. Rawls comes in through the backdoor.[46]

[45] See P. Kleingeld and E. Brown , 'Cosmopolitanism', in E. N. Zalta (ed), The Stanford Encyclopedia of Philosophy (2011), at: http://plato.stanford.edu/archives/spr2011/entries/cosmopolitanism/ (last visited 6 May 2013).
[46] See J. Rawls, *Political Liberalism: Expanded Edition* (2005). About the problems with Rawls's approach see, for instance, J. Bohman, 'Public Reason and Cultural Pluralism', 23 *Political Theory* (1995) 253.

In his defence, it could be said that Berman is conscious of the value-laden character of his normative proposal. He is quick to contend that embracing 'a cosmopolitan pluralist jurisprudence need not commit one to a worldview free from judgment, where all positions are equivalently embraced'(at 18). Thus, Berman argues 'not necessarily for undifferentiated inclusion, but for a set of procedural mechanisms, institutions, and practices that are more 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' (at 18). The footnote accompanying that assertion expands his view. He is quick to distance himself from multiculturalism; he does not want to give deference to all points of view, only to support the elaboration of jurisgenerative structures (at 18, fn. 38). Thus, his framework only 'requires' justifying why a decision was not taken (at 290-291). Overall, these comments would seem to undermine our criticisms. His pluralism is aimed at the procedural level; more voices ought to be heard. Nevertheless, even if that is the case, we maintain that he is not fully aware of the extent to which his cosmopolitanism undercuts pluralism.

Take, for instance, his insistence on managing pluralism through procedures and mechanisms. Berman accepts that the turn to proceduralism 'necessarily limits the range of pluralism somewhat' insofar as any legal system will always carry some in-built values in order to be functional (at 146). This is an entirely uncontroversial statement. The turn to procedure rather than to substance does not eliminate the confrontation of different worldviews: proceduralism incorporates or presupposes a set of rights in order to the procedures to operate. This has been a traditional point of contention between

liberals and opponents of liberalism.[47] In any case, he argues that his framework 'is *more likely* able to draw participants together into a common social space than territorialist or universalist framework would' (at 146). Now, it is question-begging, based on the argument made above, why certain communities would be willing to participate in his framework.[48] If normative communities observe that the diverse procedures already presuppose certain values that are alien to them, or they find them unrepresentative in general, they might decide simply not to take part in those very same procedures. Moreover, the supposed advantage of pluralism, the acknowledgement and recognition of multiple normative communities with particular worldviews, is never entirely fulfilled. Because cosmopolitan pluralism posits implicitly a normative background in which it is delimited what is deemed acceptable, communities will be stripped of their identity as long as they are within reasonable normative borders. Even more damaging for Berman's framework, due to the existence of this pluralism within boundaries, the supposed advantage of the model, i.e., contestation, is to some extent nullified. If the model depends on some predefined rights that cannot be denied, and certain claims can be rejected on the basis that they violate these rights, then contestation will be restricted, and certain discussions will be muted. Listening to other voices will purely be an exercise in window-dressing.

Take the case of sharia courts, which Berman himself raises. He posits that 'if the jurisprudential practices of the insular community [sharia courts] are so illiberal or beyond the pale … then even the deference that might be owed to a nonstate jurisdiction

[47] As Cohen argues 'Procedural and substantive values come … as parts of a package', J. Cohen, 'Pluralism and Proceduralism', 69 *Chicago-Kent Law Review* (1994) 589, at 591.
[48] We put aside the justification of why Berman's approach is more likely to draw participants together which to our minds is equally weak as his normative proposal. Likewise, this is an empirical claim that should be demonstrated.

could be overcome' (at 225). In our view pluralism thus understood cannot constitute a serious normative position and any possible justification to us appears unconvincing. Berman might reply that the pluralist side of his framework simply makes the case for an open reading of law, allowing for law to be found beyond state structures. In our mind, this conflates the analytical with the normative. The argument for pluralism as an analytical lens through which certain developments taking place can be properly ascertained is one thing; the other is to adopt pluralism as a normative position. The latter requires the acceptance of pluralism beyond a mere broadening of the concept of law. To demand that other voices are taken into consideration, as Berman purports to do, implicitly acknowledges that there is something valuable in different communities. Pluralism for him, then, does not stop at the level of juridical plurality but extends to the moral realm as well. Hence, Berman cannot argue that the pluralist side of his framework only affects his definition of law.

This weakening of pluralism is to an extent the reverse of what occurs in Nico Krisch's take on pluralism. At the risk of oversimplifying, Krisch's normative approach rests on two moral principles: public autonomy and toleration. As Capps and Machin have noticed, Krisch's principles in ordering pluralism, contrary to Krisch's own intention, lead him to a hierarchical position in which the principle of toleration takes precedence over the principle of public autonomy.[49] This is not the case with Berman. For him pluralism is acceptable so long as it does not breach certain minimum standards. Illiberal policies can be disregarded. For all these reasons, it is fair to argue that he only embraces pluralism as long as it can be accommodated in the framework of a liberal teleology.

[49] P. Capps and D. Machin, 'The Problem of Global Law', 74 *Modern Law Review* (2011) 794, at 807-810.

But this weakening of pluralism is not only restricted at the normative level but also at the procedural level. It is possible to notice an ambivalence on how Berman presents his propel in managing hybridity and pluralism. On the one hand, he celebrates pluralism as a normative fact, appreciates the existence of multiple overlapping normative communities and is explicitly against universalising tendencies that reduce diversity. On the other hand, Berman wants to produce and create hybrid legal spaces in order to manage legal pluralism. The problem with this stance is that Berman wants to strike a fragile balance between pluralism and normative agreement and it is not obvious that he is able to do so. Let us quote in detail what, for us, is a key passage in Berman's argument. In response to legal hybridity, Berman suggests,

> *we might deliberately seek 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 by recognizing that multiple communities may legitimately wish to assert their own norms over a given act or actor, by seeking ways of reconciling competing norms, and by deferring to alternative approaches if possible. And even when a decision maker cannot defer to an alternative norm (because some assertions of norms are repressive, violent, and/or profoundly illiberal), procedures for managing pluralism can at least require an explanation of why deference is impossible (at 10).

The spaces Berman relies on indicate that there is a need for a larger normative environment in which pluralism has to be negotiated. Those spaces are situated in a

certain normative framework. It is unclear why he argues against the idea of world legal order when some of the mechanisms he supports require the existence of a larger institutional framework. Take his reliance on subsidiarity schemes (at 168ff). Subsidiarity implies that if a lower institutional level can manage a certain matter it should do so. It has priority. This kind of mechanism implies that there is an overall normative order in which the allocation of jurisdiction is negotiated. It requires an agreement, even if a minimal one, on some basic norms in order to manage subsidiarity. A similar argument could be made with the other mechanisms and procedures he discusses. Dialectical legal interactions, margins of appreciation, and limited autonomy regimes can be accommodated within a single legal order. Pluralism could be managed.

The other type of techniques like hybrid participation arrangements or safe harbour agreements point to something different. A hybrid space is the combination of two different places. It might have a specific character but it is not plural as two normative communities unite to create something distinct. Hence, by mere contact or decision concerning norms, pluralism will necessarily be diminished. This would undermine Berman's agenda. He seems to be unaware of this possible upshot. And if he is aware of that possibility, it is unclear what his position would be in this matter. Once normative communities enter into dialogue, there is surely hybridity but, as a result, homogeneity kicks in. If two normative orders enter into a process of negotiation it is highly possible that a certain norm is imposed or accepted within both communities. Pluralism as it stands diminishes. The way Berman presents his framework seems ambivalent in this regard. He is not clear concerning his view on those techniques. One thing is to favour a negotiated resolution, but another is the fact that those very same

techniques at least diminish pluralism as they create an accepted norm between the normative communities.

C *Arbitrariness*

The normative shortcomings of Berman's framework are found not only at the level of internal cogency but at the level of utility as well. Indeed, his normative proposal is defective insofar as it does not provide meaningful guidance on how matters such as conflicts of norms should be decided. Berman's proposal gives rise to two problems that seem to escape him: either any decision that an authority takes is arbitrarily valid or there is supposedly a 'right' solution (which would run into the same argumentative problems that Dworkin's position suffers from). Let us unpack in detail this problematic feature within the context of choice-of-law.

In the last section of the book, Berman explores the idea of a conflict of laws for a plural normative world. One of the main elements is choice-of-law, that is, the determination of which relevant norm is applicable in a given conflict. After carefully detailing the state of affairs concerning choice-of-law in US scholarship, Berman criticizes all the positions for a variety of reasons.[50] One damning critique that he makes is that despite the attempts of those American choice-of-law doctrines to provide an accurate procedure through which certainty in determining with type of norm should be applied, this has not been the case. In the end, the result has been one of arbitrariness (at

[50] He divides them in three distinctive positions: territorialism, parochialism, and substantivism. For territorialism see J. Beale, *A Treaties on the Conflict of Laws* (1935); for parochialism see B. Currie, *Selected Essays on the Conflict of Laws* (1963); and for substantivism see A. T. von Mehren, 'Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology', 88 *Harvard Law Review* (1974) 347.

267).[51] Berman himself accepts a degree of arbitrariness[52], as he does not want to prescribe a 'substantive' worldview. Rather, he simply entreats authorities to take into consideration both the most salient community attachment and to accept legal norms coming from non-state origins. When determining which 'community' a person belongs to, Berman argues that institutions could look into 'the citizenship and residence of the defendant, the amount of activity the defendant conducts in the forum community, and the extent of the defendant's impact on the community' (at 217). Determination of the relevant community affiliation affects in turn which types of norms have to be considered in a given dispute. In short, authorities using choice-of-law rules must look 'to a variety of possible legal sources' and should apply the closest norm to the community affiliation of the parties (at 264). To illustrate the usefulness of his approach he considers actual cases in order to excavate a solution that is sensitive to a cosmopolitan pluralist framework. The problem is that when following Berman, any decision becomes arbitrarily valid.

Berman does not provide any guidelines on determining a norm beyond 'paying attention to the fact that the ties are multiple' and thus any decision concerning the norm to be applied can be equally plausible. There would not be any actual 'wrong' decision within such a pluralist cosmopolitan framework. The only requirement that Berman insists on is taking into account which community is the closest to the conflict but this remains entirely unspecified. Hence, there would be no grounds for criticizing any decision as several community affiliations would be entirely valid. Let us take the case of

[51] His exact words are: 'current choice-of-law analysis is already quite unpredictable and often arbitrary'.
[52] He does not use the word 'arbitrary': instead, he talks of diminish predictability as his approach 'will increase the likelihood that disputes will be decided using norms of which the parties have little or no advance knowledge' (at 266). While this falls out of the scope of our section, it is interesting to note the disregard for the parties' will in choosing which law they would like to apply.

Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona as an illustration of this problem. In that case, Berman criticized the Fourth Circuit's ruling because it relied on US Law. Berman argued that the court should have applied Spanish law as both parties were located in Spain. Now, this is one interpretation of the matter. In geographical terms certainly Spain would be the 'closest' community affiliation. But framed it in technological terms then US law would be entirely appropriate as the servers were located in Virginia. The substantive affiliation would change depending on how is framed.[53]

If that is not the case, that is, that indeed there would be the possibility of differentiating between community affiliation, Berman would need to suggest that even when multiple affiliations are at play it is possible to identify the 'right' affiliation. As just noticed above, how this 'right' affiliation would be determined is far from clear. At some point he suggests that he is 'less concerned with the particular outcome than with the analytical framework' (at 290)[54] and that to identify the relevant community will be challenging as it will be comprised of objective and subjective elements (at 218). However, the manner through which Berman explains the cases seems to indicate that implicitly he assumes that there is a 'right' solution. In the case of *GlobalSantaFe Corp. v. Globalsantafe.com* he finds the correct 'affiliation' of the parties in confrontation (at 275-276); and the same with *Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona* (at 285). The problem is, once more, that his framework does not go further

[53] Likewise, although this is not our main focus of criticism, it could be argued that the quality of the law applied would also have an effect on determining which law to apply. This is not so much an issue of possible outrageous law but more a mundane question of selection. Even if the most substantive affiliation can be ascertained, the quality of the law could be a factor to bear in mind. Certainly, this would raise issues of autonomy and imperialism. But it is something to take into consideration.

[54] We note the fact that he uses the term 'analytical' rather than 'normative'. This is confusing as we cannot decide what point Berman wants to make.

than finding the most relevant substantive community at a very superficial level. No indication to what should we value between the competing elements in determining the most substantive affiliation. Certainly, he explains why in those cases there would be the correct affiliation, but this is far from evident as just noticed. Similarly, Berman's framework is silent concerning when more than one community affiliation is equally valid. Thus, it is not clear what a 'right' solution would look like (or why such a decision would be 'right'). The most we can ascertain is that he simply relies on a 'I know it when I see it' intuition. In the end, Berman finds himself in a conundrum similar to Dworkin in which identification of the 'right answer' is epistemically impossible either because we do not have otherworldly knowledge or because norms themselves never lend themselves to a single interpretation.[55]

The result is the disutility of Berman's framework as a normative procedure. Either because there are no proper grounds from which to ascertain what would be the most substantive normative affiliation and therefore any decision is inherently valid; or because there is implicitly the acceptance that a 'right' affiliation will be ascertained but the criteria for discovering them are insufficient beyond a pedestrian intuition.[56]

4 Conclusion

This review has highlighted what we perceive to be central concerns in the approach to pluralism taken by Berman. The implicit liberalism underpinning Berman's approach ends up becoming a fateful choice. Putting liberalism as a starting point,

[55] See R. Dworkin, *Law's Empire* (1986).
[56] One could even press further and posit that how Berman frames the search for substantive affiliations is 'objectivistic' as there seems to be a denial of how the actors perceive themselves. In the cases mentioned above Berman simply relies on 'objective' features like location or citizenship. Subjective elements are totally ignored.

however tacit, yet arguing that different voices need to be part of the conversations seems to us to be a bit of a non-starter. This seems to be 'pluralism' in name only. The range of opinions that normative communities can express are ultimately limited as long as certain basic norms are accepted. Despite our reservations, we find Berman's book to be an engaging text and one worth the time of anyone with an interest in the ongoing discussion of the changing nature of law in the transnational context. Berman rightly pinpoints one of the most pressing issues that affect current normative landscape, that of managing pluralism. The problems concerning the book should not obscure the fact that he is pointing towards the right direction.