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POLICY BRIEF

How Judges Think in a Globalised World? European and American Perspectives

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Highlights

How is globalisation impacting the role of judges? How does it affect the nature of the litigation faced by courts? Is there an increased "delegation on courts" of social and economically controversial issues, and how should they deal with it? What is the proper and legitimate use of foreign and international legal sources? To what extent do judicial dialogues take place, and what is their form? Is there a global community of judges and what is it? Is there a convergence on the models of judicial reasoning and deliberation?

These were some of the questions addressed by members of European and American higher courts and leading academics at the High-Level Policy Seminar "How Judges Think in a Globalised World? European and American Perspectives" at the European University Institute on 14 December 2013. The seminar aimed to address the issues of "judicial communities" and "judicial dialogues" and the forms these may take in the context of the increased transnational and international character of litigation, as well as the issue of avoiding judicial conflicts and developing a transnational consensus. The traditional dimension of the role of judges was also put under review, highlighting that judges do not only decide cases, but they also develop general principles and for this reason are better suited than other institutions to perform their functions on the global stage. Finally, the proper use of foreign and comparative law was taken into consideration, and the costs and benefits of this practice were widely discussed.

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Background

There is no doubt that courts are to be included among the main actors of legal globalisation. Whereas parliaments, governments and in general democratic institutions do not fit in with large systems, courts seem to be suitable for the grand stage.

This fact is remarkable and almost ironic: it proves that a dramatic change is taking place in the judiciary. After all, the judicial function has traditionally been considered intrinsically "national" or "domestic". Why are courts now more affected than other branches of government by the globalising process? Is the judicial branch more entitled than the other branches of government to act as a transmission belt between national and foreign legal orders? Why are courts at the forefront of this discussion?

This subject goes under the heading "judicial dialogue", a vague and ambiguous expression first used by sociologists: while judges are obliged to establish a "dialogue" with private parties before them, they cannot legally exchange ideas with other courts on each individual case, but only in general terms.

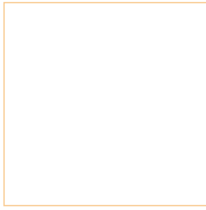
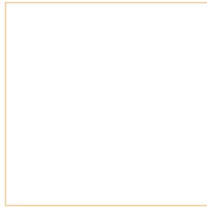
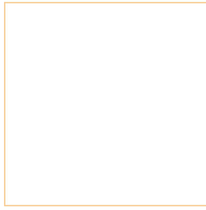
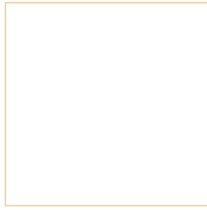
Be that as it may, it is a fact that stringent interconnections among courts are taking place all around the world. They do not necessarily require formal procedures; they may occur in an informal and implicit manner.

In order to appreciate the nature of these judicial interconnections that are developing in the global context, two preliminary considerations are required: one has to do with the judicial *method* and the other with the *contents* dealt with by courts.

From the *methodological* point of view, courts enjoy a number of qualities appropriate for a global context: they are re-active and not pro-active, and they engage in peer-to-peer dialogues; therefore, judicial interactions can be bi-directional and adapt reciprocally. Courts have great flexibility; they can solve, but also avoid problems, they can adapt to a case and experiment with new solutions, and they can proceed incrementally, on the basis of precedents and by successive adjustments, advancing and stepping back. Courts can also recognise and establish general principles, standards of decisions, doctrines and tests, etc., that are broad enough to be adjusted according to different contexts. In short, the judicial method appears to meet the needs of globalisation, which requires harmonisation without overlooking diversity, standardisation without disregarding pluralism, and generality without ignoring singularity. Judge-made law constructs general principles from specific cases, so that it is naturally inclined to bridge the opposite poles universal-particular (like the cosmopolitan citizen described).

From the *contents*' point of view, an increasing number of issues brought to the bench have a "global side". National courts are increasingly called to solve disputes in which global or foreign law is involved: disputes relating to people's mobility, immigration, and the like; disputes related to foreign investments; disputes involving global and supranational standards, such as trade, environment and sport etc.; disputes involving "individual rights".

As to this last point, the role of courts as "human rights adjudicators" is rapidly evolving, along with the amplification of "rights talks". Since the last decade of the 20th Century, an increasing number of human rights and individual rights have been included in new international conventions (such as the conventions on the rights of children and that on the rights of disabled people), further enriched by optional protocols. Moreover, new instruments for the protections of human rights have been enacted at regional (EU Charter of fundamental rights), national (new Constitutions) and local (Catalan and other local Statutes) level. Even more rights have been expounded by courts and other administrative bodies. The "rights language" is often consid-

ered as the most appropriate one when dealing with new challenging social and legal problems (i.e. non-discrimination issues and new problems relating to the development of new technologies and the Internet). Indeed, this evolution greatly affects the role of judges, first and foremost because it asks the courts to become protagonists of social change, but also because the more a rights-based culture thrives, the more translational judicial interactions are fueled: individual rights have a natural vocation to "trespass" the borders of a single country, because they move around with the individual. One might therefore say that controversies regarding individual rights are global – or universal – by nature. Human rights are one of the most fertile grounds for judicial globalisation.

Moreover, one needs to consider the idea that globalisation *per se* also implies judicial globalisation: There are now approximately 120 supra-national and global courts, and an equivalent number of quasi-judicial bodies. These courts belong to the global space, establishing links with national legal orders and with national courts. For example, the Strasbourg Court, through the margin of appreciation, the proportionality control and the "consensus" doctrines, and the Luxemburg Court, through comparison, by establishing which national law fits better the principles of the higher law and, indeed, by means of the preliminary ruling procedure.

In legal scholarship we can single out two different approaches: refusal (defensive attitude of the domestic legal system) and acceptance (some judges are strong advocates of foreign law). The debate about the use of foreign, comparative, global or transnational law in judicial decisions law has become topical in American contemporary constitutionalism. A symbol of this trend is the great debate at the time of the US Supreme Court decision on Lawrence v. Texas (2003). The same debate later took place in Europe and in other countries, though stripped of its original ideological strength. The question could be raised as to why, generally speaking, these kind of methodological issues are more divided in the US than in Europe? Originalism, the living constitution and also the use of foreign law are hot "political" matters in the US, whereas they appear to be less controversial in Europe. If this is true, why so?

Key issues

How Do Courts React to Globalisation?

Looking at the practice of national and supranational courts, one cannot help but note that transnational law affects judicial activities in many ways.

Courts decide cases on the basis of global law, because they are often required to apply global standards and global law. Regardless of the monist or dualist approach to international law, national legal systems are bound to conform to an increasing number of global standards and therefore Courts are bound to decide cases on the basis of global rules.

At a different level, even when they are not subject to global law, Courts often use either foreign law without even quoting it, or cite foreign / global law as well as foreign / global judicial decisions for the sake of argumentation and as an ingredient that enriches the legal reasoning, or they use foreign case law as precedents (in this case, precedent is not an instrument to ensure consistency, but only a connecting device).

The explicit use of foreign decisions concerns a *small group* of states – all *common law judges* and *English speaking countries* (South Africa, Namibia, Canada, Israel, Australia and Ireland) – with the notable exception of the US Supreme Court, which almost never quotes other courts, but is the most quoted among the foreign courts. But – as it has

been noticed – "Courts don't do what they say and they don't say what they do". As a consequence, the practice of referring to foreign case-law is likely to be much more popular than that.

Moreover, on the European continent, national courts are bound by the Strasbourg and Luxembourg courts. Not only their decisions impose European rules and principles on national courts, but they are also a vehicle for the circulation and the free movement of judicial decisions and foreign law all over the continent. European courts *collect* and *select* the legal tradition of the member states, and *circulate* it.

This practice poses a major problem: how to avoid the cherry-picking danger? How to avoid an arbitrary use and abusive mis-interpretation of foreign case law? Moreover, it raises a democratic difficulty: why should a judge apply rules and legislation that originated in a different country?

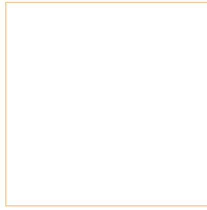
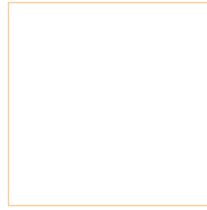
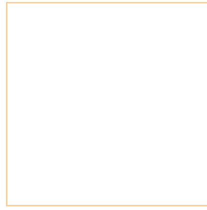
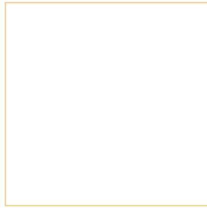
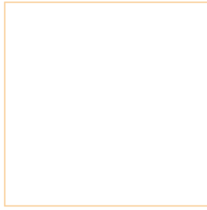
A relevant point of access of global law in courtrooms is through common principles: judges do not only decide cases, they also develop concepts. Judges take part in the legal globalisation process of developing and borrowing general principles and setting judicial standards. A good example of this is the proportionality test, which from the Prussian courts was transplanted into European law, and thence into French, Italian, and British judge-made law. Nowadays, the proportionality test is a pervasive standard used in all sorts of controversies related to administrative, constitutional, international, European law, and even in criminal law (which is one of the domestic branches of law still carefully protected from global influences).

Another spreading idea is the interpretation "in conformity to" or "according to": it requires judges to construct statutes and other written precepts so that they are consistent with higher binding principles – be they constitutional, or European or supranational legal principles. This method of interpretation has had great success because it is able to avoid conflicts among legal orders and among courts. It is now very common in many European countries, it is a mandatory principle in EU law and it is also familiar to the US judicial practice ("avoidance" in the US language).

In order to develop judicial transnational connections, interpersonal contacts matter, and this is the reason why judicial networks mushroom: national courts are developing the practice of translating their decisions into an accessible language, they organise bi-lateral or multi-lateral meetings, and they negotiate agreements for common interpretations of legal concepts and set up associations of courts, such as the "common interpretation" of the European texts approved in the Skouris – Costa agreement. Moreover, one should not overlook the forming of integrated, epistemic legal communities, encompassing clerks and referendaires, lawyers and advocate generals, private practitioners, law professors and states' advisors, NGOs and *amici curiae*, acting as influential bridge-builders.

Meeting people is a powerful form of judicial dialogue; probably a more effective kind of dialogue than simply quoting cases or using procedural devices. This explains the blossoming of judicial networks:

- in Europe, some of them are created by the European legislature (EJN – European Judicial Network; Eurojust; European Judicial Network for civil and commercial matters, Council of Europe's Consultative Council European Judges, for example);
- others are created by the judiciaries themselves (the conference of European Constitutional Courts; International Association of Supreme Administrative Jurisdictions; Associations of the Councils of States and supreme administrative Jurisdictions of the European Union);

- some are established by para-judicial bodies, such as the European Network of Councils for the Judiciary, or by barristers, for example the Council of Bars and Law Societies of Europe;
- many others are hosted by academic institutions that set up forums where judges and academics meet in order to create bridges between research and practice.

Developing transnational legal communities as epistemic communities implies recognition that the law is not only national or domestic; that there is another layer of law that is common to a majority of national legal orders; that there is a trans-nationalist canon, based on some common, shared principles, the rule of law and procedural democracy (notice and comment, duty to give reasons judicial review); and that the line between national and transnational is blurred, in spite of many differences in the degree of acceptance of this body of law at national level.

Globalisation and Judicial Reasoning

Focusing more specifically on judicial reasoning: is this unavoidable impact of globalisation affecting judicial reasoning and sentencing?

To address this question, two elements are relevant: legal education and legal culture of judges on one hand, and judicial decisions addressees on the other.

It is a fact that, generally speaking, the most senior judges, who are at the top of the supreme courts, were educated neither in international, European, comparative nor in global law. Is this a barrier or a brake slowing down the globalising process? Is this fact compensated by the community of people (clerks, lawyers, academics) that works around the courts?

Legal education follows different traditions. As noticed, one can find more transnational judges in common law in English-speaking countries: is this just a matter of language or does it reflect a fundamental divide in legal education traditions? Continental legal education is founded on codes and has a systematic, rational approach. Anglo-Saxon legal education is instead based on cases and has a problematic approach as regards reasonableness. The latter appears to be more suitable for judicial globalisation.

As for *judicial decisions addressees,* for whom do judges write their opinions? What is their audience? Is it other judges, political actors in their national system, the parties affected by their decision, the academia, the media, the global arena? The audience of a judicial decision accounts for the style of sentencing and affects the different models of judicial opinions: separate opinions, French-style short sentencing as opposed to narrative and argumentative German and American styles, numbers of *obiter dicta*, decisions strictly connected to the *petitum* or enriched with general principles and the like, are all elements that are under discussion along with the impact of globalisation on courts' activities.

Policy Recommendations

Judicial globalisation is an inevitable fact. What should a national court, acting on the global stage, do? There are two possibilities: every judge can stick to an import/export activity of rules and case-law from and towards the global arena; or he/she can contribute to developing transnational values and principles. In the first case, judges act as passive recipients of transnational law/global standards. In the second case, judges become actors and agents in the global judicial community. In fact, the globalising process enhances judicial discretionary powers, because it allows them to interact with other foreign colleagues or with global courts by means of formal and informal dialogues. Furthermore, it encourages the development of general principles, distilling the basic rules of global governance from the specific

cases brought before the bench, and although it develops common standards, it leaves room to adjust global law to the national context.

There are prices to pay, one of which is the following: As the global space is highly fragmented, there are many self-contained legal orders (the law of trade, the law of the sea, the law of environment). It is therefore necessary to establish not only vertical links, (between domestic and global legal systems), but also horizontal links (between global legal orders). The development of general principles can serve this purpose.

Are the American concepts of exceptionalism and imperialism a danger for judicial interaction? Recent Supreme Court nationalistic jurisprudence should not be considered as the rule, but as an exception, as the majority of American courts are as open to the reception of foreign law as courts of other countries. And American imperialism may in the long run appear less threatening, because if the US government and legal community want to export certain basic principles, they are obliged to submit themselves to the same rules. America is contributing too much to the education of the entire world legal community to simultaneously refuse to follow the basic principles that it are teaching (or attempting to teach) the world.

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