

The Globalization of Law and The Dialogue of Judges

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Abstract

The globalization of law has led to a convergence of national laws and jurisprudence, allowing for the recognition of universal principles. This research investigates how national judges can influence transnational legal systems and push national legislators to adopt them. Comparing legal systems from politically distant countries and jurisprudence from similar groups, such as the European Union and the USA, the study found that these transformations sometimes give judges authority that exceeds legislator authority.

Keywords: Globalization, Universality of Law, Comparative Law, National Judge, Foreign Jurisprudence.

INTRODUCTION

The globalization of law is a complex phenomenon involving convergence between state laws, recognition of general principles, and cross-border flows of law. This has led to the dismantling of state legal spaces and has created complex paths that may pass through or bypass states, affecting non-identical constructions of law. (). Globalization of law has led to a legal revolution, with judges playing a crucial role in domestic and international legal systems, expanding sources beyond the legal system to include foreign legal systems, treaties, and jurisprudence. () Globalization of law has led to the creation of numerous legal systems that constantly intersect with foreign systems, promoting mutual legitimacy. (). Globalization has significantly impacted the world of law, leading to a need for a rethinking of the national judicial system and jurisprudence. It is not limited to national law but also involves the internationalization of national judicial systems and borders. ().

François Ost and Michel Van de Kerchove emphasize the importance of specific legal theories for understanding cultural contexts, utilizing a comparative approach to comprehend globalization of law. (). Therefore, comparative law presents new perceptions and skills in terms of unifying the law and even validating the importance of national solutions. It appears here that the “globalization” of law and the gradual penetration of legal systems are reinforced by the advancement of supranational legal systems. It gives full legitimacy to this new approach (), despite the criticism directed at the globalization of law in the absence of a coherent and harmonious epistemological structure. The globalization of law indicates a decline in state sovereignty and discretionary power and also limits the influence of parliamentarians or national representatives on policies and law. Legal rules have become more dynamic. Rights move from one national sphere to another. The globalization of law has led to the regulation of the circulation of money, services, capital and information between countries. The law has become “devoid of nationality. ()”

The movement of rapprochement and dialogue between judges in the world finds its basis in legal, economic and social justifications. Countries that share a similar value system and a similar level of development are willing to find effective solutions to situations that raise similar problems despite their different national laws. The bet on judges remains high, especially in the field of human rights, in answering all of society’s questions, such as the death penalty, euthanasia, and others. It also remains in some new areas, such as environmental law, to reconcile individual rights with the requirements of sustainable development. In this area, UNEP has encouraged the dissemination of jurisprudence through the establishment of a database. European Union judges have established an association called the Forum of European Union Judges in Environmental Law use comparative law to make decisions on technical topics like construction, housing, health security, and public

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security, increasing their powers and influence in contemporary democracies. (). This research explores the role of national judges in separating national law from foreign laws in the era of globalization. It examines the extent to which judges can influence transnational legal systems and maintain a clear separation from international laws that don't align with societal values. The study also explores the trend towards globalization of law through judges' new roles.

METHOD

Globalization has shifted the focus of comparative law to become more practice-oriented, focusing on analyzing mutual influences between systems and evaluating solutions. The comparative approach's legitimacy is enhanced by close interactions between national legal systems, ease of access to legal information, and the role of supranational bodies. Further development of tools for comparing and interpreting foreign legal knowledge is necessary. (8, &())

Globalization has reduced distances and time, because of the emergence of new information technologies and advances in communication networks.() This made comparative law “a distinctive reference tool for perpetuating the globalization of law, which will not be a globalization of unification, but rather a globalization of harmonization”().

The research uses a comparative approach to analyze the legal systems of countries in the European Union and other leading countries. It analyzes laws, jurisprudence, and opinions to understand communication and legal separation in the era of globalization. The study also examines the role of national judges in establishing communication bridges and influencing legislative changes.

RESULTS & DISCUSSION

The National Judge in an Era of Globalization of Law

In the era of globalization of law, judges have become active in producing laws, despite the principle of separation of powers. This has led to judges contributing to the establishment of legal rules that national law lacks, affecting the traditional concept of separation between the judiciary and legislative authority.

The Judge's Bypass of the National Legal System

The Constitutional Court of South Africa issued a preliminary ruling on the death penalty in *Sc Makwanyane et autres*(), in which it opposed the death penalty for the offenses subject to it even though the law permitted it. The Constitutional Council considered that no matter how terrible these crimes are, the prisoner's dignity and life cannot be infringed. They are rights available to all South African citizens. In it, the Constitutional Court cited judicial precedents from Zimbabwe, Tanzania, Germany, Bermuda, the United Kingdom, Canada, India and the United States.() It also cited the ruling of the Supreme Council of Canada in the case “*Kendler v. Canada (Department of Justice)*”, dated Sept. 26, 1991, which stated that “the dignity of the individual is the essence and cornerstone of democratic government”().

The Constitutional Court of South Africa unanimously found the death penalty to be incompatible with the 1994 Interim Constitution. This 243-page ruling, which contains no dissenting opinion among the eleven judges, abolishes the death penalty, while 453 convicts await their sentence. The court held that criminal legislation providing for the death penalty for crimes of premeditated murder, robbery or attempted robbery with aggravating circumstances, kidnapping, child abduction, and rape was unconstitutional(). It did not comment on the application of the death penalty for the crime of treason in wartime. In November 1997, the National Assembly approved a law amending the Penal Code that provided for new penalties for 453 prisoners sentenced to death and whose sentences were deemed unconstitutional in 1995. It also repealed all provisions of other legislative texts authorizing the death penalty. Thus, the constitutional judge pushed his openness to international laws and jurisprudence¹³. The legislator decided to amend the Criminal Code to make it compatible with foreign legislation and jurisprudence regarding the death penalty().

In a subsequent ruling dated July 27, 2012, the Constitutional Court considered it illegal to deport detainees to another country without obtaining guarantees that they would not be convicted of the death penalty. The South

African government wanted to extradite Jerry Fall and Emmanuel Tsepe to Botswana. The South Gauteng High Court had blocked the deportation due to the risk of the death penalty the prisoner would face. The Constitutional Court of South Africa confirmed this approach and considered that deportation could not take place unless Botswana provided reliable guarantees that the death penalty would not be carried out().

On Nov. 28, 2019, the African Court on Human and Peoples' Rights ruled in a landmark ruling that the application of the death penalty as a mandatory penalty is grossly unjust, as it deprives the accused of the right to be heard and presented with mitigating circumstances. Reviewing the case brought by Tanzanian death row prisoner Ali Rajabu against the Government of Tanzania, the Court also ruled that the mandatory application of the death penalty does not respect due process guarantees and violates fair trial standards, preventing courts from imposing a sentence commensurate with the crime committed().

The Influence of the American Jurisprudence on European Jurisprudence

The research will approach the Perruche() incident due to its importance in highlighting the mutual influences between judicial jurisprudence emanating from different legal schools, and the reactions of jurisprudence and civil society organizations towards this decision.

The Facts of the Perruche Case

Ms. Perruche sought compensation for her fetus's genetic disease, "Rubéole," after an error in medical tests led to symptoms. The Evry Court initially compensated the parents but refused to compensate the child. The French Court of Cassation later ruled that the child was not harmed by the medical error, but the French Court of Cassation rejected this decision, referring the case to the Paris Court of Appeal to determine the compensation amount. The case highlights the ongoing legal battles surrounding genetic diseases and medical errors. (). France has not yet issued a judicial ruling that recognizes compensation for a disabled child for medical diagnosis errors. Previous rulings required compensation for the child's family due to a causal relationship between the medical error and the harm caused by abortion. The Council of State compensated the Quarez family in 1997. ().

The French Court of Cassation made its decision based on both the report of the Attorney General (Jerry Sainte Rose) and the Counselor (Pierre Sargos). Both of them relied on American jurisprudence to strengthen their proposal. In such controversial issues, there is not always an effective rule. The goal behind referring foreign decisions is to search for concrete solutions and justifications for the principle, and sometimes to search for a kind of legitimacy that is not granted by the national legal system(). The French Court of Cassation followed the approach reached by the advisor (Pierre Sargos) in his report, which considered that the error that must be compensated for is the one that resulted in a disability that will cost the child suffering throughout his life, in addition to the costs and constraints of treatment. Compensation is not for the child being born disabled, but for the difficult life of the child himself.

The Court of Cassation recognized a disabled child as a subject of rights and compensation for damages resulting from their disability, allowing them to live in conditions respecting their human dignity. However, the court acknowledged potential risks, such as divorce or death, and suggested a special compensation ruling for the child.

The Reactions to Perruche's Decision

Perruche's decision sparked reactions from legal actors, politicians, civil society organizations, and doctors. The Parents Against Disability Phobia Association filed a lawsuit against the Ministry of Justice for moral damage and a decision that discourages families from supporting children with special needs. The National Ethics Advisory Committee, upon Minister of Employment and Solidarity's request, emphasized society's responsibility towards disabled children and the integration of persons with special needs into French society, highlighting the undiscovered causal relationship between medical errors and disability. ():

The principle of compensation for the existence of a causal relationship between the medical error and the damage;

Failure to compensate a disabled child because it is not possible to recognize the child's right to be born without a disability because that would restrict the right of families to keep their fetuses despite their knowledge of the possibility of his being born with a disability;

National Solidarity must guarantee that families who wish to keep their embryos have the right to health and social care.

Perruche's decision sparked a strong reaction from the medical community. This matter contributed to accelerating the issuance of the decision of March 4, 2002 against the decision of the Court of Cassation. It is called the Anti-Perruche Law regarding patients' rights. The first paragraph of Article 1 of the aforementioned law stipulates:

“No one can claim compensation for being born with a disability. The child claims compensation if the medical error directly results in the disability or increases its seriousness, and measures that would reduce the disability are not taken.”

The responsibility of the hospital towards the family arises due to an error in the medical diagnosis during pregnancy because it did not reveal the possibility of the child suffering from a disability. In this case, the family demands compensation for the damages they have sustained, and this compensation does not include the special costs of the disabled child. The latter are borne by National Solidarity. This article applies to all lawsuits filed except those that were decided on the basis of the principle of compensation.”()

Perruche's decision can be assessed as harsh. Not only is there the absence of a causal relationship between the medical error in diagnosis and the harm caused to the child, according to Article 1382 of the French Civil Code, but also due to the difficulty of assessing the harm caused to the child and compensating for it.

If it is undisputed that the child suffers from a disability, it is morally difficult to accept that disability is a basis for compensation. The difficulty is not limited only to the absence of a causal relationship between the medical error and the damage, but rather that in order to compensate the injured person, the damage he suffered as a result of the medical error must be greater than the damage he could have suffered in the absence of this error. In other words, in this incident, the child's family would have had one of two basic options in the event of a correct diagnosis. Either Mrs. Perruche continued the pregnancy, in which case the medical error did not change anything. The second option is to abort the pregnancy, which will result in greater harm to the child because it will not be born in the first place. Therefore, the medical error in diagnosis was necessary for the child's existence (). The French Court of Cassation, based on American jurisprudence, previously stated that compensating a disabled child was impossible and limited to the family. This led to a law that ended the application of this jurisprudence in similar cases, suggesting the judge played a motivating role. ().

Globalization of Law and Strengthening the Role of Judges

The law has evolved to include foreign influence and international movement, with the judiciary playing a crucial role in protecting individual rights. However, some trials prioritize political aspects over legal ones. Factors like openness to non-governmental organizations and the amicus curiae procedure have influenced the judicial debate, making it more political than legal.

The Principle of Universal Jurisdiction of the Judiciary and the Primacy of the Political Aspect Over the Legal Aspect

Judicial accountability outside territorial jurisdiction allows a country to exercise authority over crimes committed outside its borders. Classical judicial rules like territorial jurisdiction and nationality are used, while less classical rules like negative personalism and universality are used when the crime raises international concerns. This approach allows states to follow up on crimes without directly involving human rights violations.

Universal jurisdiction of national courts is a principle of international law that allows a state to exercise jurisdiction over certain crimes committed outside its territorial borders on the basis that they are considered matters of concern to the international community when there is no other judicial basis to pursue. In the last decade, global judicial prosecutions have been opened in several Western European countries (particularly in

Belgium against foreign citizens who are allegedly responsible for international crimes committed in their countries of origin. Foreign prosecutors or investigative judges attempt to pursue these cases, often with the help or pressure of human rights NGOs and victims' groups. Since the end of World War II, more than 15 countries have exercised universal jurisdiction to investigate or prosecute persons suspected of involvement in crimes condemned under international law. Among these countries are: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, the Netherlands, Norway, Senegal, Spain, the United Kingdom, and the United States of America. Other countries, such as Mexico, have also received people for trial under universal jurisdiction).

The role of judges in protecting individual rights has been strengthened through lawsuits against war crimes committed by foreign figures. The Pinochet case marked a shift in international crimes enforcement, as these crimes were not within local jurisdiction. Since 1996, Spanish courts have accepted lawsuits for Chilean military repression. The arrest of dictator Pinochet in London in 1998 was made possible by incorporating universal jurisdiction from the Convention against Torture. In Belgium, the Pinochet case led to a review of the 1993 law, which grants courts the power to prosecute war crimes. In 1999, the law was amended to allow prosecution of war crimes, even for non-Belgian citizens. This law raised objections from the Belgian Ministry of Foreign Affairs, threatening global relations. (). The law in question led to numerous lawsuits against heads of state, ministers, and political figures in the Democratic Republic of the Congo, including President Kabila and Minister of Foreign Affairs Yerodia. The International Court of Justice ruled against Belgium's arrest warrant, arguing that the universal jurisdiction of national courts is contrary to international law. The court based its decision on the principle of immunity for heads of state and ministers. ().

In 2001, lawsuits were filed against Israeli Prime Minister Ariel Sharon and Defense Minister Amos Yaron for war crimes, crimes against humanity, and genocide in Lebanon in 1982. The Belgian Court of Appeal ruled that prosecution was impossible if the accused were not present on Belgian soil, but the 2003 law allowed prosecution regardless of the accused's location. The Belgian Court of Cassation ruled that the case against Sharon and his Minister of Defense was not accepted due to immunity, and referred the case to the indictment chamber. However, the Court of Cassation abandoned the case, stating there is no international rule justifying universal jurisdiction in the absence of the accused. (). This makes political considerations override purely legal considerations, with Belgium submitting to both American and Israeli pressure().

The Pinochet, Sharon, and others cases demonstrate that the political aspect often prevails over the legal aspect during trial phases, as individual convictions or non-convictions can lead to legal complications. This is evident in war crimes against humanity, where individual collective responsibility is often political. Professor Arendt argues that many lawsuits for crimes against humanity cannot be expected to recognize political responsibilities for reconciliation. (). Universal jurisdiction of national courts is justified due to international law condemning crimes like genocide, war crimes, torture, and enforced disappearance, requiring all countries to investigate and prosecute responsible individuals.

The Role of the Amicus Curiae Procedure in the Globalization of the Judiciary

The amicus curiae procedure() allows a third party who is a party to the case to intervene to express his or her point of view in writing to the clerk of the court to defend the public interest. It is a procedure specific to the American judiciary. It found its way to the European Court of Human Rights. This procedure has been resorted to in recent years in the USA in all cases related to the death penalty by activists who write their memorandums to discourage American courts from implementing the death penalty, especially on minors and the psychologically disturbed, by providing statistics on the implementation of this punishment in the world(). In 2005, the US Supreme Court sentenced a Mexican minor to the death penalty, citing the European Union's memorandum. The court considered it unconstitutional to sentence a minor to the death penalty, citing the UN Convention on the Rights of the Child 1989. Despite the USA not ratifying the convention, the court deemed it unacceptable for Somalia and the USA to be among the only countries not to have ratified it. ().

CONCLUSION

The global approach to economic, social, and moral issues has evolved, making it crucial for judges to understand the legal approaches of their counterparts in other countries. Traditional concepts of Supreme Judicial Councils have evolved, balancing domestic law with international law. The Arab judiciary, while prioritizing national law, is not immune to these changes. The globalization of the economy and global cooperation will lead to the Arab judiciary providing economic solutions to disputes under foreign laws and addressing issues that conflict with national laws and values.

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