Judging and Globalization

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1. The judicial function has traditionally been considered as a "national" or "domestic" function.

However, there is no doubt that judges worldwide face common issues. An increasing number of disputes brought to the bench have a "global side", such as: disputes related to people's mobility and immigration; disputes related to foreign investments; and disputes involving global environmental issues. Moreover, in recent decades new international tribunals were established [including the European Court of Human Rights and the Court of Justice of the European Union].

It seems that Constitutional and Supreme Courts all around the world are recently more affected than other branches of government by the globalizing process.

From the methodological point of view, Judge–Made–Law enjoys a number of qualities appropriate for a global context. Most important are its great flexibility and the fact that it can establish and adapt general priciples.

2. Judges use general priciples to facilitate and justify "gap-filling" in the absence of a statute. They develop other general principles (such as the proportionality principle) in order to resolve conflicts between two sets of norms or conflicting interests. General principles help judges to adjust the law in the face of changing circumstances.

Judge-Made-Law is therefore suitable to the needs of globalization. Globalization requires harmonization (without overlooking diversity), standardization (without disregarding pluralism) and generality (without ignoring singularity).

In identifying and applying a general principle to resolve a dispute, judges necessarily make new law. I believe that a dynamic jurisprudence of general principles will facilitate inter-judicial dialogue, learning and borrowing.

3. One may argue that the use of foreign law is not a "necessary good". Indeed, scholars have submitted several main critiques of the use of foreign law.

According to **the first critique**, the use of foreign law could very well mean that national courts end up adopting legal rules that are based on a set of values and norms that are foreign to the local national setting, including its historical, cultural and social context. The critique is especially true with regard to "The Trans-national Model" – as legal norms have developed in certain unique settings, they are suspected to

be inappropriate in different national settings. That said, this critique can also be made towards "The Inter-national Model", given that it too involves using values and norms that may be foreign to the local and national context.

The second critique, while also focusing on the different settings that characterize each and every nation, raises a wholly different concern. This concern – often associated with scholars belonging to a group known as the “TWAIL (Third World Approaches to International Law) Critical School” – assert that judges applying foreign law will tend to look for precedents in like-minded legal systems, which share common core values and ideals. Thus the use of foreign law may prove as a catalyst towards the creation of a legal hegemony – in which Liberal Democratic values take a central role – while other communal, traditional or religious values are inevitably left out. The result, critics fear, is an "imperial" or "colonial" form of human rights *discourse*, which fails to provide *substantive* rights to minority groups on the national or local levels. It should be noted, that from the stand-point of this critique, the legal hegemony may also take over International institutions or norms, thus the critique can be applied to both models of comparative law, and not only the Trans-national one.

4. With all due respect, it is my opinion that Supreme Court judges as well as Constitutional Court judges should regard

concepts such as "**dignity**" and "**equality**" as shared concepts among all human beings, and they should not hesitate from judicial citations of foreign law in these matters.

I believe that national judges construing provisions in national law, may look beyond narrow national interests to the mutual interests of all nations. Moreover, in my opinion in respect of domestic constitutional law; a national judge facing a question regarding the interpretation of the constitution may construe the provision in a manner most consistent with modern constitutional law. This is due, as I have mentioned, to the common fundamental values shared by most western democracies.

I am not unaware, of course, of the critiques aimed at this approach. There are, however, several possible counter-arguments that, in my opinion, ultimately award the use of foreign law the upper-hand.

First, Judicial use of foreign law does not necessarily dictate the adoption of foreign norms. The mere reference to and discussion of the way a certain matter is approached in foreign courts is important in and of itself: it sharpens analysis of legal rationales and critical thinking; it may aid in distinguishing why a certain foreign norm is actually *inappropriate* in the national context; and, most importantly, it

enhances and promotes the awareness of human rights discourse.

This intrinsic value of the use of foreign law can be seen in the landmark Israeli case dealing with an appeal to the Israeli Supreme Court against the intention to privatize prisons. In this case, the Israeli Supreme Court elaborately discussed the relevant norms in the US and England – where private prisons are legal – only to emphasize why this practice should be deemed illegal in Israel.

Second, the critique concerned with over expansion of judicial discretion seems to be relevant only so long as a judge decides to adopt a foreign norm "as is", solely because it was implemented successfully by a like-minded court. This, however, is rarely the case. As the case law of the Israeli Supreme Court has shown, time and again, judges should and do in fact adopt a critical approach to foreign law, resorting to it only if the rationales and values embodied therein are appropriate in the domestic context. The use of foreign law does not necessarily entail a blind adoption of what "your friends" from other Supreme or Constitutional Courts have to offer, but rather a non-binding critical consideration of the pro's and con's of what they have to offer. In the process of consideration, a national court is responsible to take into account unique domestic circumstances, including the existence of minority groups and

matters with particular religious or cultural significance. Foreign law should be treated as a *proposal* or source of *inspiration*, and not necessarily as legal *authority*.

Third, at the very least, there seems to be no appealing reason not to employ foreign law in matters which are not purely constitutional. These include environmental issues, technological dilemmas and transnational financial disputes. True, it may be said that these matters directly affect basic human rights – such as the rights to property and privacy. In spite of this, I believe it is fair to say that the functional aspect of such matters – often involving large transnational organizations and necessarily entailing some degree of international cooperation – justifies considering the norms adopted by like-minded courts. Applying foreign law in these subject matters may lead to more unified and efficient solutions to problems on a global scale, thus cutting the costs borne by every member of the global community.

5. To conclude, if we truly believe that the modern constitutional world shares a common core of fundamental values – namely human dignity and equality – then *foreign law* is no longer truly *foreign*, and should instead be viewed as a proposed solution based on a shared ideals. The substance and rationales of the proposed solution are in this sense far more important than its geo-political origin.