

The Law of the Future and The Future of Law

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Global Problems in Domestic Courts

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We face an increasing number of problems that are essentially global in nature because they affect the world in its entirety: global cartels, climate change, crimes against humanity; to name a few. These problems require world courts, yet world courts in the institutional sense are largely lacking. Hence, domestic courts must function, effectively, as world courts. Given the unlikelihood of effective world courts in the future, our challenge is to establish under what conditions domestic courts can play this role of world courts effectively and legitimately.

1. Introduction

Lawyers are bad at predicting the future; they have enough work on their hands with the present. Despite frequent claims that law is proactive – it guides conduct – its substance is almost always reactive, a reaction to recognised social problems. The law lags. Moreover, the acceleration of all aspects of life (one of the key characteristics of globalisation) has led to a situation in which deliberative responses by lawmakers almost always come, if not too late, then at least with a considerable delay. This has long been true for legislators and courts (and has led to the turn to the executive in lawmaking). Moreover, it is true, increasingly, for executive action, too.

This inability of lawyers (and of the law) to predict the future is well-known, but it is neither trivial nor easy to overcome. It has a twofold implication for attempts to answer the question as to the biggest challenges for the law in the near future. First, although substantive problems are always new and often unpredictable, structural problems are relatively constant. We may not know what substantive questions the law will have to resolve in the future, but we can guess what structure many of these problems will have. In short, they will be global problems that transcend national boundaries (though in a particular way that I will discuss later). Second, to prepare the law for the future, we should first

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make sure it matches the requirements of the present. We do not know for sure what globalisation will bring in the future, but we do know that the law is structurally ill-equipped even for its present. Presuming that globalisation will continue, a law more adequately prepared for globalisation would be desirable in the future.

The biggest structural challenge for current law is well-known (and actually expressed in the background note) but not well understood: more and more problems are global, while our institutions are not. Although we have been aware of this challenge for considerable time, our responses have so far been insufficient. Supranational institutions, as one solution, will not be able to deal with all of these problems to a sufficient degree. Global legal unification will also remain incomplete. Networks are a fascinating, but at the same time slightly elusive, new concept. As a consequence, what we will be left with, for a large portion of global problems, is fragmentation, ensuring the need for domestic institutions, especially courts, to deal with these global problems. Where necessary, they have to do so in a unilateral fashion.

Fragmentation may be considered undesirable (though this is not certain), but to the extent we cannot overcome it we need to make the best of it. What we need are three things. First, we need a better understanding of what global problems actually are, how they differ from other problems that may or may not also be related to globalisation, and how they challenge current concepts of law. Second, we need a better understanding of the role that domestic institutions, in particular courts, can play in response to such problems, and thereby for the global legal system at large. Third, we need better criteria, both legal and political, for when and how domestic courts can perform these roles. In this brief position paper (based on a book I am currently working on) I will address these three aspects.

2. Global Problems

Globalisation creates a lot of new problems for the law, but many of those do not require paradigmatically new thinking because they fit in the traditional disciplines of either domestic law or international law.

Many problems are domestic in nature, which means that domestic law and institutions can deal with them in the same way as before. Recently, they have been helped more and more by comparative law –

they have realised that other countries face similar problems, and therefore may provide valuable inspiration – but this alone does not create any paradigmatic changes.

Other problems are international in nature: they concern various countries and/or their relations among each other. Much trade law is in this category. More perhaps than domestic problems, such international problems create new challenges to the law, because international law, the typical response to such problems, today covers a far broader array of issues than it did before. Again, however, what this requires is an extension of existing paradigms, not a paradigmatic change.

A paradigmatic change will be required, by contrast, for what I call global problems. Global problems are characterised by two qualities. First, they concern the world at large, not just one country or one region, or the relations between only a few countries (this does not mean that they necessarily affect everyone similarly.) Second, they cannot be separated into different sub-problems that can be solved individually. Rather, an adequate response has an effect on the whole problem.

We can distinguish different kinds of global problems, according to what makes them global (although the boundaries between these categories are not sharp, distinguishing them helps the analysis). Some problems are global by nature. Climate change may be a prime example. It is a problem that is global by nature not because the problem has been created by nature (in all likelihood it has not) but instead because the nature of our climate makes it so that solutions can never be only local. Other problems are global by design. Liability for internet defamation is a prime example here: the internet has been designed so as to be globally accessible, with the result that, without special software, content becomes accessible from anywhere. Here the global character of the problem is a consequence of the design of the internet – a redesign of the internet or its infrastructure, including software, can change the problem's character. Some problems, finally, are global by definition. Crimes against humanity, for example, are global because we decide to conceptualise them as such, as directed not against the individual victims (who may well be defined by territory or nationality) but instead against a global category par excellence, namely humanity at large.

3. A Global Problem by Nature: Global Markets

One type of global problems by nature concerns global markets. A good example from the law of antitrust is the *Empagran* decision of the US Supreme Court, rendered in 2004. Several producers of certain vitamin products, most of them European, had fixed prices worldwide and made billions of dollars in profits. The US plaintiffs sued in the US and received considerable payments under a settlement. The interesting case was brought not by US consumers but by consumers from countries like Ecuador and the Ukraine, who had also suffered injuries from inflated prices, and who sued the cartel members in a US court in a worldwide class action. Foreign plaintiffs, foreign defendants, and foreign markets – should US courts have jurisdiction?

Worldwide price fixing is a global problem by nature, because, given the current conditions of global markets, it cannot be territorially confined or split up. Where we have truly worldwide markets, participants in cartels must necessarily fix prices worldwide because if they fix them only for specific national markets, the consumers in those markets will purchase their products elsewhere, and this arbitrage will make the cartel ineffective. In this sense, the cartel participants in the *Empagran* case did not, nor in fact could they fix prices individually for individual markets; they raised prices globally because the global character of the market in vitamin products forced them to do so.

Much of the debate concerned the question whether the US had any interest, thus asking essentially whether the global cartel was a domestic problem or not. The defendants pointed out that the U.S. had no interest in regulating foreign markets. The plaintiffs on the other hand argued that US consumers would benefit from these claims by foreign plaintiffs, because these claims would enhance the deterrent effect on the cartel, which would otherwise remain undeterred. Defendants focused on the specific plaintiffs with their injuries; plaintiffs focused on the whole event of the cartel and its effects on the US economy. Both agreed, however, that the connection to the US was crucial, and both ignored the rest of the world. This was inadequate. After all, some countries such as Canada and Japan, as well as the European Commission – had levied high fines on the cartel. With regard to these countries, there was obviously additional deterrence for cartels. Other countries, by contrast, had not.

Along these lines, Europeans invoked international law and relations and submitted *amicus curiae* briefs in the litigation, arguing in essence that jurisdiction of US courts would interfere with their sovereign interests – even though all countries agree that, in substance, price fixing is illegal. They argued that each country should deal with the effects on its own local markets and that private suits to enforce antitrust laws were against European culture. The Supreme Court essentially followed these complaints (although with a twist to be mentioned later) and rejected the claim. The problem with this argument is that it presumes that the cartel can be divided into territorial subparts, and this seems doubtful. Europeans point out that the task of US antitrust law is to protect US consumers, not to regulate foreign markets. But what if the protection of US consumers requires the regulation of foreign markets? Worse, what if there is no difference between foreign and local markets at all, because we have only one global market in vitamins? Moreover, the European countries that submitted *amicus curiae* briefs argued successfully against US hegemonialism. However the result of their intervention was that plaintiffs from Ecuador and Ukraine were unable to recover their damages anywhere. One could well describe this as a different kind of hegemonialism, this time over developing countries that do not have the infrastructure to prosecute global cartels and that rely on the first world to do this for them.

In the end, both approaches appear inadequate, because they do not capture the global character of the problem. The domestic approach must fail because it ignores the degree to which the cartel has effects outside the United States. The international approach must fail because it requires separability of the cartel: the United States can leave the regulation of the European part of the cartel to Europeans, only if such a separate part exists; this however, is doubtful.

4. A Global Problem by Design: The Review of UN Security Council Resolutions

An example of global problems by design is the review of resolutions by the UN Security Council. Such problems are global by design because their global nature follows from the design of the Security Council as a global institution. Such resolutions create international law, so the Security Council can be understood as a kind of global legislator. However, judicial review of its decisions is not provided under

international law. Early ideas to give review competence to the International Court of Justice (the most obvious candidate) were rejected by some of the permanent members of the Security Council.

The consequence is that such a review can only be provided, if at all, by domestic courts. This became urgent especially with resolutions that froze assets of individuals assembled on a list of presumed financiers of international terrorism. Because these resolutions did not provide these individuals with recourse, some of them appealed instead to domestic courts in various countries, and to the Court of First Instance in the European Union (*Kadi*). The *Kadi* case is an example for both the potential and the conceptual limits of domestic courts when faced with this problem (for purposes of this analysis, the Court of First Instance and the European Court of Justice as an appellate court can be understood as quasi-domestic courts). The Court of First Instance effectively denied that domestic courts were competent to review resolutions of the Security Council, except implicitly. The European Court of Justice, by contrast, presumed that it was possible to review such resolutions insofar as they had been transposed into domestic law, thereby ignoring their supranational character. Both approaches map well on a distinction between the international law and a domestic law paradigm, but both seem similarly incapable of grasping the specifically global character of these resolutions. The opinion of the Advocate General came closest to a global approach when he spoke of a situation of legal pluralism between domestic, European and international law. What is lacking from his analysis as well as from most commentary on the decisions is a proper conceptualisation of the global legal system in which domestic courts act effectively as review courts.

5. A Global Problem by Definition: Human Rights Violations

An example of global problems by definition is human rights litigation. If a Nigerian woman living in Nigeria with her Nigerian husband is stoned to death because of alleged adultery with another Nigerian, this seems to be an affair entirely internal to Nigeria. Indeed, ‘internal affair’ is the exact codeword governments traditionally use to oppose any intervention by foreign journalists, politicians and courts. But of course we reject such claims in the human rights realm, and we do so with an argumentative trick. We change the victim’s status from (local) citizen to (global) human. We turn the perpetrator from an enemy of the victim to an enemy

of the world, a *hostis humani generis*. We raise crimes from the localised crime of murder to the globalised crime against humanity. Murder would have to be prosecuted according to the territorial laws. A crime against humanity on the other hand is by definition deterritorialised, simply because humanity transcends all territoriality, except (perhaps) that of the globe. The *colère global*, to paraphrase Durkheim, the global outrage over a crime, turns a territorial event into a world event.

One of the oldest federal statutes, the so-called Alien Tort Statute, gives federal courts jurisdiction for “a tort only in violation of international law”. This statute lay dormant for nearly 200 years until it was revived in 1980, and turned into a main jurisdictional basis for human rights violations. The statute gives something akin to universal jurisdiction, which means that human rights violations from all across the globe can be carried before US courts and are in fact carried there. Universal criminal jurisdiction over human rights violations is currently much discussed, and often favourably – although the International Criminal Court is often preferred as a venue, domestic courts are considered to play a role, too. The American Alien Tort Statute is special, however. First, it applies to private plaintiffs, so plaintiff lawyers rather than state attorneys decide about prosecution. Second, it has been applied not only against government officials (who are frequently immune from lawsuits), but also against corporations that collaborate with governments. Thereby, many multinational companies have been turned into potential defendants against such claims.

Not surprisingly, this basis of jurisdiction is now under severe criticism both in the U.S. and elsewhere. Human rights violations taking place elsewhere are not domestic US problems and they do not create significant US interests (beyond such secondary interests like the interest in being a good citizen of the world). It would seem easier to find international law solutions, but only *prima facie*. First, the country that is primarily interested, is often the country whose government committed or at least took part in the human rights violation. Second, and perhaps even more importantly, international law solutions tend to leave decisions over whether human rights violations are adjudicated to governments, and governments, for reasons of international relations, will often be unwilling to inquire.

6. The Role of Domestic Courts

Local events can be dealt with by domestic courts in accordance with domestic law; international events as events between nations can be dealt with by international courts, established by and under international laws. Global problems, however, cannot be dealt with adequately by domestic or international law, at least in the ways in which we traditionally understand them.

One response to global problems has been the creation of truly global courts, the International Criminal Court being a prime example. Even if we assume such institutions to be normatively desirable (and doubts exist on this, particularly in the United States), it seems clear now that, at least in the short run, we will not have a sufficient number of such institutions. International criminal law is a good example: the vast majority of cases under the jurisdiction of the ICC are dealt with (if at all) by domestic courts.

A second response has been closer cooperation – sometimes called networks – between courts. Such networks can, to some extent, substitute for true global courts by bringing everyone in. At the same time, networks face high coordination problems once the number of involved courts becomes great – as will often be the case with global problems. Moreover, networks fail where different countries differ either in their substantive perspectives or, perhaps even more often, in their desire to be active (a free-rider problem).

This suggests that much of globalisation will continue to be handled, quasi-unilaterally, by domestic institutions, in particular domestic courts. I say continue, because domestic courts already deal with such problems. Frequently, however, they feel the need to deny the global character of these problems. The Supreme Court decision in the *Empagran* case shows this clearly. In holding for the defendants, the court assumed explicitly that the cartel's effects on the US were separate from the effects on foreign markets, but we know of course that these effects are not independent from each other. The court rested its decision on facts that are demonstrably wrong, but the court had to do so in order to conceptualise the problem of global cartels. Only the fictitious compartmentalisation of global markets made it possible to reconcile global cartels with traditional approaches to jurisdiction. Obviously this

does not make the problem go away, and indeed the problem may well reach the Supreme Court again.

The reason for such redefinition of the global character is our uneasiness with unilateral extraterritorial adjudication. We have long rejected unilateral action by domestic courts as illegitimate, and we still feel it to be inferior to international agreement or adjudication by supranational courts. As a consequence, the main concern in unilateral adjudication has been devoted, usually, to constraining it. Given that such unilateral adjudication will, in the foreseeable future, remain the predominant legal response to globalisation, this is unsatisfactory. We will need a better theory of when and how such adjudication is possible.

If global problems require global courts, how can domestic courts play a role? Semantically, we must distinguish two very different aspects of 'global' that are often confounded. One is the institutional, or constitutional, aspect. In this sense a global court is a court that has been set up by the world, a court of the world. Of course the world in its entirety is unable to set up the court, which is why we have recourse to international treaties or the United Nations as a kind of second best. I call these courts international courts, because they are founded on international law. But there is another aspect of 'global' in world courts, and it concerns the scope of application, the 'reach' if you will, the jurisdiction. Here, a world court is a court for the world. This aspect is analytically different from the first one, though of course both may coincide. Thus the International Court of Justice is a world court also in this second sense; its jurisdiction is worldwide. However, the reach of domestic courts on the other hand can be global, too. If it is, these courts act as world courts.

7. Challenges

How can domestic courts adequately respond to these challenges? Short of actual solutions, this paper can list the areas in which we will require rethinking.

One area concerns the discipline that will have to bear much of the burden from these problems: conflict of laws. Conflict of laws, as traditionally understood, deals with relations between different legal systems and the localisation of problems in one of these systems. It determines the competent courts and the applicable law on the basis of

connecting factors that connect a set of facts more closely to one country and its laws. For global problems, however, we are frequently faced with either universal or ubiquitous jurisdiction. Universal jurisdiction is jurisdiction that, in principle, every country's courts can exercise. Ubiquitous jurisdiction can be defined as jurisdiction that is based on factors that connect a problem to every country, for example accessibility of a website. Neither universal nor ubiquitous jurisdiction fit well in the traditional criteria, and we may have to develop new approaches. One example can be found in Article 6(3)(b) of the Rome II Regulation, which allows a court, under certain conditions, to apply its own law on unfair competition even to the claims of plaintiffs who purchased on other markets. Although the provision is far from perfect, some of the criticism it has received seems unjustified: if the provision does not fit well with traditional private international law, this may be a sign less of the provision's inadequacy and instead of the discipline's inadequacy.

Notably, extraterritoriality is not a helpful criterion to assess such adjudication. If global problems could be separated into territorial components, each court could adjudicate a neatly defined territorial space, and the problem of extraterritoriality should not occur. Global problems, by contrast cannot be so separated. Global cartels are global because they transcend boundaries and territories – price changes in one country necessitate price changes in other countries. Human rights violations are global precisely because we define them as such; we emphasise the deterritorialised interests of humanity at-large over the territorially confined interests of the specific victims or their perpetrators. In short, because world events are deterritorialised, they do not involve the territorial interests which would trigger complaints that territorial sovereignty is infringed. Without territoriality there is no extraterritoriality.

Another area concerns institutional requirements. Traditionally, domestic courts are expected to deal with domestic problems, either under their own law or under foreign law – they lack a global perspective. We have made progress towards such a perspective. For example, the increased use of comparative law shows an increasingly global awareness on the part of judges. However, more will be needed. We will need doctrines that detach the judicial task from the furthering of domestic political interests. We will need courts with an understanding of the implications their decisions have for governance – not just domestic or

international, but global governance. What helps courts in this regard is their relative independence. After all, the legitimacy of courts lies not in their direct accountability to the electorate but in the quality of their decisions, if necessary, against political pressure.

This last point leads to a third challenge. Accountability to the electorate prevents the other branches of government – the executive and especially the legislature – from truly globalizing; in the end they are expected to protect the interests of their voters over those of others. This suggests that democratically made law on the national level can lack legitimacy on the global sphere. The traditional response to such lack of legitimacy is for courts to limit application of domestic law to areas for which the domestic lawmaker has both jurisdiction and an actual regulatory interest. This process is inadequate – it either leads to the application of a law that is, at least potentially, equally parochial, or to the dismissal of a claim for lack of regulatory interest of any concerned government. The alternative for courts will be to develop transnational law on their own, even in deviation from domestic rules of substantive law and of private international law.