Journal of Business and Economics, ISSN 2155-7950, USA
April 2021, Volume 12, No. 4, pp. 415-426
DOI: 10.15341/jbe(2155-7950)/04.12.2021/006

http://www.academicstar.us

The Influence of Civil Law and Common Law by Globalization and the Transnacionalization for the Formation of a New System of Law

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Abstract: The exchange between subjects of different nationalities, pressure international and national actors of different shades, especially the Judiciary so that they produce the necessary legal instruments to base, guarantee and mark the relationships that are forming. It is in this sense that the clash of historically diverse juridical conceptions, such as the two great families of law — Civil Law and Common Law, fierce by the urgency in the search for solution of conflicts often pioneering, imposes urgency in the creation of internationally respected regulations. This necessary legal regulation, national and international, between actors of different characteristics is once again subject to the inescapable mediation of international and transnational organizations. Therefore, the need to know the provisions of a new world legal order needs to be forged from a new common western legal culture, which should include civilians and commolists. The methodological aspects to be used in the study will be the basic bibliographical, from the examination of legal doctrine and published articles on the subject. The work will be done in two parts. At the outset, the formation and origin of Civil Law and Common Law will be analyzed. Finally, the influence of globalization and transnationalization will be analyzed in the formation of a system of mixed law.

Key words: judicial activism; common law; civil law; globalization; transnationalization
JEL code: K150

1. Introduction

The decision-making process of several actors, national and international, in the face of the interrelationship between countries, has undergone, without many realizing it, a major transformation. The consequence of this is the increasing use, by jurists, of decisive matters produces by national and foreign courts.

In this sense, the growing importance of Jurisprudence as a source of Brazilian Law, traditionally Romanistic, can be interpreted in many different ways. This visible evolution of the country's judicial methodology is due to the growing interrelationship between States that, over the past few decades, have contributed to overcoming certain dogmas and principles clearly unsuited to contemporary times.

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Thus, no one disagrees that Jurisprudence is the cornerstone of the Common Law system, while the Civil Law system is notoriously legicentric, a heritage fully enshrined in the Brazilian legal system.

It so happens that the "discrepancies", always highlighted by lawyers from all over the world when analyzing the importance given to Precedent and the Law, in the analysis of the two systems — Common Law and Civil Law, are being reduced it. With this, the balance of sources that previously constituted an equation considered immutable is altered, apparently leading to a modernization of law.

However, the transformations that have been occurring in the Law of the countries that make up the Civil Law family can not only be interpreted as overcoming dogmas and principles, but also as breaking paradigms that were completely ingrained in the past.

Such transformations occur, many times, due to the Commolization of Roman-Germanic Law or Civil Law, due to the phenomena of globalization and the transnationalization of Law, especially in relation to the transnationalization of judicial decisions capable of, with greater agility, resolve judicial conflicts within the States belonging to the Civil Law family.

In this sense, the discussion about the changes in Law and Society, as well as the question of the influence of globalization and transnationalization in today's world is urgent and necessary; this because, with the entry of new actors, national, international and transnational in the world scene, it brought about changes in the way of having and making the Law, all in an attempt to not leave unresolved conflicts resulting from the so-called "world exchange".

2. Historical importance of Common Law and Civil Law. Initial Considerations

The decision-making process in the Judiciary, inside the Civil Law system, has undergone, without many noticing, for a major transformation; the "proof" of this is the increasing use by Brazilian jurists of decisive matters[1] produced by the Courts, national and foreign.

Despite being aware that the Civil Law or, Romano-Germanic Law System[2], originates from written, formal, solemn law, it is necessary to verify why this growing use of jurisprudence by jurists belonging to so-called Western countries.

Jurisprudence, also called court decisions, or precedent, formed the foundation of the Common Law system, allegedly contrary to the Civil Law system, which is essentially legicentric. However, Jurisprudence today is also a widespread source in the Civil Law system, and in this system of law it means the dialectical pronouncement of the judges, as the French already said with a certain similarity in the merely formal plane. Jurisprudence should not be confused with a judicial decision, because while the judicial decision is the present towards the future, the jurisprudence is the past that informs the present. Sometimes, a judicial decision can constitute jurisprudence, but it is the succession of judicial decisions that will instruct the jurisprudence (Strenger Irineu, 2003, p. 122).

In addition to these discrepancies, always highlighted by jurists[3] from all over the world, when analysing the

[1] Decisive matters are understood as Jurisprudences and Summaries; Summary is not the jurisprudence itself and Jurisprudence is, therefore, the uniform and constant set of judicial decisions (judgedments), that is, of solutions given by the decisions of the Courts on certain matters (Gusmão Paulo Dourado, 1976, p. 155).

[2] Legal System, or System of Law, is an operational body of legal institutions, procedures and norms (Merryman John Henry, 1971, pp. 13-15).

[3] Jurists like David René in The Great Systems of Contemporary Law. São Paulo: Martins Fontes, 2014; Merryman John Henry in La Tradicion Romano-Canonic. Mexico: Fondo de Cultura Econômica, 1971; Soares Guido Fernando Silva in Common Law - Introduction to US Law. São Paulo: Revista dos Tribunais, 2000; and, Sèroussi Roland in Introduction to English and American law.

importance given to the precedent and the Law in the two systems of law, Common Law and Civil Law, a reduction in the dividing line between themselves, largely due to the globalization and transnationalization of judicial decisions.

And, it is in the face of this approximation between the Law of these two countries paradigms within their respective systems of Law, that thinking about harmonizing legal systems becomes feasible. In addition, due to the entry on the scene of other actors, international and transnational, that not only the States, altered the balance of the sources that before the 20th century composed an equation considered immutable, apparently leading to a modernization of the Law; modernization that takes place within the scope of a legally globalized era, composed of collective institutions, supranational and transnational entities.

As a result, English law or Common Law, has largely overcome the restricted domain of its territorial application, expanding the traditional way of viewing law for other peoples around the world; for this reason, it cannot be understood in opposition to the Law of other countries governed by the principles of Civil Law.

The greatest proof of this approximation said by Common Law and Civil Law is the mixed system used by the USA, where the written form, represented by the American Federal Constitution coexists side by side with the precedents. However, there is no interference or any other form of interference from one to the other.

Yet, to understand the stage in which English Law is today, it is necessary to analyse how it was formed. At the beginning of English Law formation, it was divided into four distinct periods. The first, and perhaps the cornerstone of the creation of Common Law as well it is known today dates from the 11th century, in the year 1066, with the conquest of Normandy by King William the Conqueror. The conquest of King William strengthened England's power, enriched by the administrative experience put to the test in the Duchy of Normandy; in effect, the Norman conquest puts an end to the tribal era on English soil, bringing into the interior of this country's territorial space the basic principles of feudalism, already widely observed in France, Germany and Italy. (David René, 2014, p. 315).

Even during this historical period, Anglo-Saxon peoples from Scandinavia and Central Europe settled in the present United Kingdom, which formed several kingdoms. In these, local customs prevailed, from which some written records still arrive. There was no common legal system across the country. The jurisdictional function was exercised by public assemblies, who judged specifically using ordeals. The monarchs of this period also adopted several rules, among which stand out those approved by Canuto, The Great (995-1035), king of England, Denmark and Norway (Vieira Dário M., 2018, p. 236).

Subsequently, the second period arises, the so-called post-conquest, which extends from the year 1066 to 1485, which really begins the insertion of Common Law in all England and in countries dominated by it. From then on, English Law, common to all of England, will be the exclusive work of the Royal Courts of Justice, also called the Westminster Courts (David René, 2014, p. 288).

The Royal Courts were, in fact, jurisdictions under Common Law, with universal jurisdiction. However, it was necessary, in the first place, to get them to admit the competence to act, before a dispute could be submitted to them on the merits. These procedural difficulties, expressed by the brocade called Remedies precede Rights, profoundly marked the development of Common Law (David René, 2000, p. 5).

Thus, Common Law before the beginning of the third phase of English Law, was considered coercive and stalked by a dangerous sclerosis due to the very accentuated formalism, which greatly dissatisfied the people.

São Paulo: Landy Editora, 2001; they are some that stand out when analyzing the law and the precedent.

These, dissatisfied with the decisions of Common Law turned to the royal crown to correct some excesses of this larger branch of English Law (Sèroussi Roland, 2001, p. 21).

Due to this Common Law formalism, the third period of English Law formation arises, which most influenced Common Law to take on the importance that is currently known, which initiates the rivalry between Common Law and Equity, lasting from 1485 to 1832.

Equity consisted of the remedies admitted and applied by a specific Royal Court, the Court of the King's Chancellor. Equity corresponded, in the 17th century, before the beginning of the third period, to a need. It was necessary to complete an overly formalistic and sclerotic Common Law, which Parliament was unable to reform (David René, 2000, p. 9).

And finally, the fourth period takes place in the first half of the 19th century, extending to the end of the 20th century[4], which is characterized by the socialist current, which seeks, above all, the state of social welfare (David René, 2000, p. 7).

Then, in the historical period comprised by the Welfare State, countries like England and France strove to create a new society with more equality and more justice. In this context, legislation and administrative regulation played a major role (David René, 2000, p. 11).

Thus, the Welfare State is, in the dialectic of legal equality and factual inequality, that the social state's task of acting in order to guarantee living conditions - in social, technological and ecological terms - which make possible an equal use of Civil rights divided with equality (Habermas Jürgen, 2001, pp. 83-84).

On the other hand, in Roman Law, this was succeeded by the Civil Law family system, whose evolution has been completed; in spite of this, the Civil Law system is by no means a copy of Roman Law, especially since many of the elements of the Civil Law family derive from sources other than ancient Roman Law (David René, 2000, p. 25).

The Civil Law family over time and, mainly, due to the Roman conquests in the first centuries of the Christian era, spread to the world the way of making the Law of the praetor of Rome, taking root this Law in the peoples dominated by them. The creation of the Civil Law family is linked to the renaissance that took place between the 12th and 13th centuries in Western Europe. This renaissance manifests itself on all levels; one of the most important aspects is the legal one. The Society, with the revival of cities and commerce, is again aware that only Law can ensure the order and security necessary for progress (David René, 2000, p. 31).

Thus, between the 5th and 10th centuries, there was a series of penetrations, adventures and conflicts between the Civil Law and Common Law systems. This is because, each time a state structure started to be born, the old State Law revitalized. And so, in the Merovingian kingdoms, especially at the time of the Carolingio Empire, the Roman Law overcame German Law in a way. On the other hand, every time there was a dissolution of these embryos, these lineaments of states, the old Germanic Law triumphed and Roman Law fell into oblivion, having only slowly reappeared in the late 12th century and in the course of the 13th century (Foucault Michel, 2002, p. 58).

However, it is at the heart of the Civil Law system that Universities arise, and with them the diffusion of a

[4] In the figure of mass democracy of social states, the highly productive economic form of capitalism was submitted, for the first time in a social and more or less harmonized way, to the normative self-understanding of democratic constitutional states. But at the latest, since 1989, the public sphere has realized the end of that era. In countries where the welfare state, at least looking back, is perceived as an achievement of social policy, resignation has spread. The end of the last century was under the sign of the structural risk of socially domesticated capitalism and the revival of neoliberalism indifferent to the social (Habermas Jürgen, 2001, p. 64).

model of social organization, guiding the teaching of Law towards what is called positive Law, which has been and is maintained until today.

So, the university is a medieval invention and although there were schools in the Greco-Roman civilization it was only from the 11th and 12th centuries that the university started to be recognized. Naturally, it is very different from what is now called the university, having maintained only the autonomy of Western science (Lopes José Reinaldo Lima, 2000, p. 120).

Thus, Universities, contrary to popular belief, are not practical schools, but schools focused on the theoretical study of law, with philosophical and theological subjects at their core. The professor[5] was dedicated to teaching a method able to highlight the ground rules considered the most just, the most conform to moral, the most favorable to the good functioning of society. Not conceiving the teacher's role as describing existing practices, nor saying how in practice the rules he declared to be in conformity with justice can be made effective (David René, 2014, p. 41).

Thus, the glossers[6], as the first great school, had a more limited work in relation to the text. Although it was essential for them to know the entire text, the gloss is still a commentary on the text and follows its order; the glossers did not want use it in practical life, they just wanted to prove it as an instrument of reasoning the truth of authority (Lopes José Reinaldo Lima, 2000, p. 133).

But it is with the school of post-glossers or commentators[7], in the 14th century, that a new trend is manifested and a very different work is carried out, the Roman Law is properly purged, subjected to distortions; it lends itself to entirely new developments, while being systematized in its presentation, in a way that contrasts sharply with the chaos of Digest and the casuistic and empirical spirit of Rome's jurisconsults (David René, 2000, p. 35).

Then, finally, in the 17th century, a new Law school emerged, operating until the end of the 18th century, which intends to further systematize the teaching of Law in universities. This school was called a natural Law school (David, René, 2000, p. 36). The natural Law school completely renews the science of Law in its own methods, due to axiomatic tendencies and the appeal that the legislation makes. With regard to the substance of Law, its action must be considered in two areas, namely, private Law and public Law (David René, 2014, p. 47).

Furthermore, the modern natural Law wants to be a common sense Law, by which everyone can reach legal maxims. It is, however, dominated by competent knowledge, for the same reason that geometry, being evident once learned, is not evident to a mind not sufficiently trained. For this reason, this theoretical and abstract natural Law is not adequately mastered even by untrained jurists, lay people, municipalities or chambers judges, etc. It is a natural Law that, in fact, owned by scholars, teachers, bureaucrats, but above all literate who, little by little will penetrate the intellectual conditions for the advent of codes (Lopes José Reinaldo Lima, 2000, p. 219).

As for the matter of private Law, the natural Law school accepts the solutions reached by the post-glossers;

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[5] The role of the master is to cast doubt, as he provided easy explanations to obtain a clearer solution to the contradictions (Lopes, 2000, p. 121).

[6] The Glossers or Bologna school as it was also known, started at the University of Bologna, through the jurist Irnério. The glossers have this denomination thanks to the notes (glosses) — interlinear or marginal, that is to say: between the lines or the margins of the text — that they did to Justinian's codification. The glossers' school dominated in the 12th and 13th centuries (from 1100 to 1300). Among the most important glossers are: Irnério (as informed by the school's founder), Bulgarian, Martinho, Hugo, Jacó, Vacário, Azo (author of the most famous of sumas) and Acúrsio. It was they who made Roman Law the basis of modern private Law (Alves José Carlos Moreira, 2018, pp. 87-88).

[7] Post-glossers are called commentators because they have written long comments where they fused the norms of Roman Law, Canon Law and local Laws, giving rise to what was called Common Law. The most illustrious of the post-glossers was Bártolo, and, after him, his disciple Baldo. Also noteworthy were Paulo de Castro and Jasão (Alves José Carlos Moreira, 2018, pp. 87-88).

already, on the subject of public Law, the school of natural Law proposes models deduced from reason.

In this sense, then, public Law understands the rules and principles that govern legal relations in which one or both parties exercise sovereign powers; already, in private Law, the norms and principles that aim at relations between private individuals or between private individuals and public entities, but in which they intervene without such powers, the respective subjects being, therefore, in an equal position. In the first, it is said that the principle of legality prevails; in the second, freedom. In public Law, the criteria of distributive justice stand out; in private Law, commutative justice (Vicente Dário M., 2018, p. 144).

Therefore, the universities proposed a solution, which would be to put Roman Law into effect[8]. However, another solution can be imagined, that is, to develop a new Law based on existing customs or, in the absence of such customs, on a jurisprudential basis (David René, 2014, p. 47).

Thus, it can become a complete Law and adapt it; or you can build something new as the need arises. The second solution is the one that prevailed in England, where another system was built, that of Common Law.

It is seen, therefore, that Common Law and Civil Law underwent countless changes until they reached the stage they are at today. From a global evolution that took place in the middle of the 20th century, and that was called globalization, the world as it is known today was "flat"[9] and, the world flatting did not happen only in the economic, political and sociocultural areas[10], it took place, also, in the legal part. Thus, something unthinkable before the 20th century has been happening gradually, which is the possibility of creating a new system of Law with nuances of civil law and common law, thanks to the globalization and the possibility of transnationalization of Law.

3. The Influence of Globalization and Transnationalization of Law[11] in the Possibility of the Emergence of a New System of Law

The globalizing process, although still detested by some, is recognized by almost everyone. This is because the world has become smaller due to immediate communications, which disseminated information and standardized certain behaviors, just like a global village.

And, the exchange, growing every minute, between subjects of different nationalities, puts pressure on jurists from all over the world to produce the legal instruments necessary to support, guarantee and guide the contacts that are being formed. Furthermore, the central role of words, already so viscerally relevant within a single national legal order, is now extraordinarily multiplied by the phenomenon more often cited than understood the

[8] It is necessary to take into account that also in England the Roman Law and the Canon Law were taught until very late: in Oxford, for example, only in 1758, under the impulse of William Blackstone, began to privilege the teaching of English Law. Simply, the relevance of university Law education was then in England completely different from what it had in the European continent. Whereas, the jurists based in the European continent received their training mainly at the University, the English jurist were predominantly trained in the exercise of the legal professions — which still happens today, because in England any university degree is accepted as sufficient qualification for access to Law, although it has not been obtained through attending and passing a Law course. However, the fact that Roman Law was taught in English universities does not mean that the reception of Roman Law took place in England. (Vicente Dário M., 2018, p. 106)

[9] The idea of using the expression "flat world" was due to the book by Thomas L. Friedman — The World is Flat: A brief history of the 21st Century.

[10] Citing Paulo Márcio Cruz, when he talks about how to rethink Democracy, he says that it will only be possible through the plurality of cultures that demand that freedom be lived in the service of social inclusion and equality, both lived in the service of difference (Cruz Paulo Márcio, 2014, p. 16).

[11] Nevertheless I shall use, instead of "international law," the term "transnational Law" to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are includes, as are other rules which do not wholly fit into such standard categories (Jessup Philip C., 1956, p. 2).

globalization (Ghirardi José Garcez, 1999, p. 307).

In this sense, the tendency of the globalizing process, of the grouping between nations, is opposed to the exacerbation of nationalisms. The reality, however, is that the globalizing process is not only the new dogma of economists, but it is mainly the new rationality of international[12], transnational[13], multilateral institutions and national states.

The globalization and the technological advances are the result of intensified competition between companies. Unaware borders, this is manifested by the growth of mobility of some production factors, especially the capital. The work factor, on the other hand, is impregnated with absolute immobility. The time of the big migrations is a turning point in the history of humanity. The men can move only temporarily — seasonal workers and tourists — as the national and international systems impose severe restrictions on their mobility (passports, entry and stay visas, proof of subsistence, residence permit and goods in the country of origin) (Seitenfus Ricardo, 2004, p. 186).

It is for this reason that this new stage of development of the national state took place in the face of the phenomenon known worldwide as Globalization[14], which brought with it transnationality[15], through a State more linked to other actors, national and international, and not only to nation-states, breaking with old paradigms and giving rise to new relations of power and competitiveness.

Thus, the globalization appears, according to this typology, as a network of localized globalisms and globalized localisms, which would give rise to cosmopolitanism[16] (Arnaud André-Jean, 1999, p. 27). The cosmopolitan man, no longer able to escape from the coexistence and the partnership established between the globalized nations, in opposition to the local coexistence, made the production of a Community Law inevitable.

And, in the face of global designs that sought to manage the world, such as colonial Christianity in the 16th century or imperialism in the 19th century or the recent neo-liberal and military globalization, the cosmopolitanism has claimed the basic moral that "neither nationality nor borders of states, has moral relevance in relation to justice issues" (Santos Boaventura de Sousa; Garavito César A. Rodríguez, 2007, p. 18).

Moreover, with the emergence of EU Law today called Union Law (for now, only practiced in the European Union, and which day and night live with the conflicts between the Civil Law and Common Law) in today's globalized and transnational world, there is a legal concept that is not exclusive to each State, to be the common instrument for resolving disputes between different States, between States and citizens of another State and

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[12] The term international institution refers to the bodies that make up international society — States and international organizations (subjects of Law) and the rules of Law that govern their behavior (international Law). A concept more focused on the legal aspect, but, in fact, the term institution can still include other entities that are not provided for by the international legal structure or have an indefinite status (Carvalho Evandro Menezes, 2007, p. 45).

[13] Despite being made up of large collectives of shareholders and managers, who have resources that exceed those of many nation-states, that operate globally and control the delivery of essential public services to survival of important population masses, transnational corporations are considered to be subject to rights and are treated as such by both national and international Law (Santos Boaventura de Souza, 2010, p. 91).

[14] The so-called "globalization" is one of the most fascinating communicational phenomena in human history. The world is becoming, to paraphrase Marshall Mcluhann's famous expression, a "Global Village". The social systems that until then were partial and separate, due to the technological impossibility of human communication on a large scale, started to merge into a mega global system (Carvalho Cristiano, 2005, p. 301).

[15] The expression "transnationality" is semantically ambiguous. It is often used to refer, comprehensively, not only to transnational orders, institutions and problems in the strict sense, but also to international and supranational orders, institutions and problems (Neves Marcelo, 2018, p. 84).

[16] The significance of the cosmopolitan character of man, comes from his characteristic of not living segregated or isolated from his fellow men; on the contrary, humanity has always revealed the need to form communities as a spontaneous tendency. Thus, the considerable exchange that, in all orders of life, has been established between all the men who form the rudimentary international society has given rise to legal rules that regulate it (Strenger Irineu, 2003, pp. 27-28).

between citizens of different States.

It can be said, then, that the globalization process, creator of a global Law no matter whether due to a Civil Law or Common Law system, once born from the interconnection between the economic, social and political systems of the different national states, it can no longer be seen as a simple opening of borders and the generation of a common world space but, rather, as a new way of being within the Law itself, involving the most different sectors, affected by the internationalization of Laws, especially the Human Rights, the regional integration[17] and the economic globalization[18].

Thus, the role of new actors in the current world scenario, specifically national and international jurists, who are active participants in this globalizing process, is to be prepared to locate logical mechanisms for resolving the controversies that arise from the proposed disputes not only among citizens of the same State, but also of disputes between different World Communities, different nations, or conflicts between people from different countries.

However, this position was not always this way. The application of rules of international law by the judges reveals, in general, ignorance of this branch of law and, more than that, misunderstanding about its effectiveness. In the past, it was considered by many to be true "legal perfumery", which is why, in Brazil, it was removed from the mandatory curriculum of law schools, and few law schools in the country maintained the teaching of international law, despite the imprudence of those responsible for formulating the minimum higher education program. Many Law professionals graduated with the idea that branch means nothing but mere poetic exercise on the ideal Law that could, with the improvement of international relations, in a distant future, regulate the coexistence of nations. As judges endowed with this vision, they became responsible for the formation of jurisprudence on matters of international repercussion (Magalhães José Carlos de., 2000, p. 13).

However, it is important to emphasize that despite this new world scenario, the State remains strong and the proof of this is that neither transnational companies nor supranational institutions have the normative power to impose, on their own, within each territory, a political or economic will (Santos Milton, 2009, p. 38).

However, the transnational legal plan may promote the existence of a Solidary Law aimed at the realization of human rights; most likely, the intensification of discussions around a Global Social Contract for the satisfaction of basic needs, aimed at eliminating the illegitimate socio-economic inequalities between classes, genders, ethnicities, regions and nations be one of the solutions to be taken into account for the formation of this new global order (Cruz Paulo Márcio, 2014, pp. 59-60).

In addition, transnational legal regimes will — as is already beginning to happen — penetrate into national spaces hitherto closed[19]. Law professionals will be called upon to actively participate — often outside state control

[17] The integration processes are of an economic nature and, at first, essentially commercial. However, they can reach a wide range of issues, including resizing some structural and dogmatic elements of the organization of the State (Seitenfus Ricardo, 2004, p. 194).

[18] The globalization and the increasingly intense economic and human interconnections between societies; the growing seriousness of ecological issues; democratization and new notions of political legitimacy; the continuous increase in the number of transnational economic agents and the emergence of a dense and increasingly active civilian transnational society; the decline in the use of military force on a large scale among the main states, concurrently with the parallel expansion of several other forms of social violence; and the extent of the challenge that the State faces to be a legitimate and effective foundation in building the international order — all these processes inexorably led to the belief that the international order had been recreated and reconceptualized. Thus, more and more, it is considered that the order involves the creation of international norms that deeply affect the domestic structures and organization of States, invest individuals and groups of States with rights and duties, in addition to seeking to incorporate some notion of common good global (Hurrel Andrew, 1999).

[19] It has become common these days are two types of society, "open" and "closed". In the first type, it is said that there is a vast field favorable to personal decision, in which the individual takes responsibility for his own acts, whereas in the "closed" society there is a tribal or collectivist model, in which the community is completely dominant and the individual counts little or nothing (Arnaud André-Jean, 1999, pp. 166-167).

— in the construction of transnational and supranational regimes, as noted above. And, on certain occasions, these actions will affect the power and the owner legitimacy of national states and their legal fields (Arnaud André-Jean, 1999, p. 21).

As a result, the transjudicialization[20] has produced another relevant effect on law, which is judicial activism[21], since the Judiciary, when it expands the possibility of applying international law on national law issues, may create mechanisms almost to administer justice, extending the limit of powers inherent to it.

Conceptually speaking, judicial activism is the attitude of the members of the Judiciary to, through extended interpretations, extend the jurisdictional limits established for the exercise of their powers; meaning the judicialization of functions hitherto seen as typical of the Executive and Legislative powers (Bodnar Zenildo & Cruz Paulo Márcio, 2016, p. 1343).

This phenomenon has been gradually giving an intense role to the Judiciary, making the Civil Law closer to Common Law[22] (not exactly like the English Law system, but especially with North-American Law) with an evident gradual process of matching primary sources of Law between the rules and judicial decisions, as previously analyzed in this article (Bodnar Zenildo & Cruz Paulo Márcio, 2016, p. 1343).

Thus, it can be considered that it is with the advancement of the globalizing process that the legal systems of Civil Law and Common Law started to communicate much more with each other, verifying the flaws and, at the same time, trying to remedy them, generating a kind Commolization of the Positive Law[23].

Historically, the first demonstrations on judicial activism took place in the early 19th century, in the United States of America, in 1803 in the Marbury v. Madison case, where the Supreme Court headed by Judge Marshall

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[20] We could cite a multiple of cases in which supreme courts have relied on foreign law and precedents in order to apply their own constitutions, from the Canadian Supreme Court to the South African Constitutional Court, to the German Constitutional Court to the Spanish, Italian, Austrian Court, and so on. In many of these cases the use of foreign law has been disputed within those courts. (…) In the famous Lüth case (1958), the FCC applied the guarantee of freedom of expression — article 5 of the Basic Law — to repeal an injunction issued by a German court against a German politician who had called for a boycott of a movie made by a producer who formerly made Nazi propaganda movies. The decision cites Cardozo´s statement according to which freedom of expression is "the matrix, the indispensable condition of nearly every other form of freedom". It also cites article 11 of the French Declaration of the Rights of Man and Citizen: "The basic right to freedom of expression, the most immediate aspect of the human personality in society, is one of the most precious rights of man". The Federal Constitutional Court of Germany (FCC) is widely cited, and also frequently cities courts and refers to foreign law. Very recently, a majority opinion made an extensive appeal to foreign law that elicited criticism from minority. The decision in question was about the constitutionality of new financial disclosure requirements for members of parliament, and found that the new requirements were constitutional. The court argued that the public interest is transparency outweighed the privacy interest of members of parliament, and claimed that this conclusion was in line with international legal developments. Accordingly, the decision cited the law of the United States, Poland, Italy, Sweden, Norway, Switzerland, Spain, arguing that the German regulation under review was legitimate in light of all such foreign laws. The minority opinion, in contrast, claimed that the disclosure requirements under review violated political representatives' independence, and argued against the use of foreign law in the decision (Moreso José Juan; Valentini Chiara, 2019, p. 3).

[21] We might define "activism" in any number of different ways by focusing on a court's willingness to strike down laws, to depart from the authority of text, history, and/or precedent, to announce sweeping rules or reach out to decide issues not properly before the Court, or to impose intrusive remedial orders on political actors. Each of these judicial behaviors comports with our intuitive sense of judicial "activism", yet often these different definitions will cut in opposing directions when we try to use them to describe actual rulings. This fact makes the term readily manipulable, with the result that participants in both academic and political debates generally use "judicial activism" as a convenient shorthand for judicial decisions they do not like. "Activism" is a helpful category in that it focuses attention on the judiciary´s institutional role rather than the merits of particular decisions (Young Ernest A., 2002, p. 1141).

[22] The common law develops by way of the published reasons of the judges, moving by analogical reasoning and analysis from an earlier point, as expressed in earlier judicial opinions, to a later point, to a later point. It is in that sense that judges today, in Australia as elsewhere, live in a world in which international law plays an increading role and impinges on the judicial perceptions of reality and justice (Kirby Michael, 2008).

[23] To paraphrase the article "The Commolization of Positive Law, Judicial Activism and the State Crisis", by Zenildo Bodnar and Paulo Márcio Cruz.

found the mandamus filed by Marbury against Madison unconstitutional to take him to the post of Justice of the Peace, who had been appointed by the previous President Adams. So, timidly, the control of constitutionality began to appear, the American Supreme Court found the rule that upheld the mandamus filed unconstitutional, justifying that did not have this competence provided for in the Constitution, and cannot extend such effects, except for the Constitution itself (Leal Mônia Clarissa Hennig, 2011, p. 224).

It is important to note that the institute of judicial activism is closely interlinked with the control of constitutionality exercised by the American Supreme Court[24].

Already in Brazil, the control of constitutionality began with the emergence of the Republic, under the influence of Rui Barbosa, it abandoned itself the European influences and became attached to American ideas, providing the incidental and diffuse control through Decree nº 880/90 and, later, in the Constitution of the Republic of 1891 (Campos Carlos Alexandre de Azevedo, 2014).

It is seen, then that the judicial interference in the other Statal Powers predominantly occurs through the extensive interpretation of the magistrate when applying the rule to the specific case, since the decisions are rendered based on solipsisms, with democracy being subject to the personal convictions of the Judges and Courts (Streck Lênio Luiz, 2015, p. 23).

It is known, in turn, that there is no perfect impartiality, the Judges use their own experiences, prejudices, moral sense, passions, resentment, jealousy, concerns, phobias, fears, irrational feelings, even if, unconsciously, to compose the decision. However, it must be ensured that will always find legal reason for the way of deciding/pretence, especially in the panprincipialism[25] era, which culminates in the destruction of the interpreter's expectation of behavior (Rosa Alexandre Morais da, 2015).

In this sense, there seems to be, based on an embryonic rule, applied to the increasingly complex situations of life and society, the development of a powerful construction of justice, which invades all areas of existence and extends in the various expressions of Law, of rule, of judiciary, within the scope of the so-called commutative or retributive, distributive, legal justice, until reaching other universal Laws of the human person and peoples (Zagrebelsky Gustavo & Martini Carlo Maria, 2006, p. 56).

That said, judicial activism, national or international, is embedded in the core of national jurisdictional activity, which can, if well used, serve, extraterritorially, to facilitate the application of Law in different states, making the national Law more agile and capable, as required by the global and transnational world that is now a reality.

Therefore, the globalization and the transnationality can be considered as indispensable institutes within the State, and even outside it for the construction of a new system of Law, perhaps global, based on the families of

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[24] The reconstitution of social order was to be accomplished by the subordination of law to alternative, non-legal methods of resolving disputes based on past cultures and new technologies. Every major initiative taking place within the judiciary today is designed, directly or indirectly, to accomplish this one great vision of utopian dreamers. Activists in the judiciary have accepted the reconstitution of the social order as the goal of the judicial branch by redefining the judicial power. Consequently, we have a concept of law as the multifaceted, coercive techniques of social engineering in the hands of judges (Williams Frank V., 2007, p. 127).

[25] Pan-principalism, just look at what has been done in the name of the “opening” of civil Law, the values to be discovered by digging-under-the-general-clauses and the unbridled construction of “principles” that has nothing normative as “happiness, affectivity and the over-affect of the dignity of the human person”, by which today it is possible to decide in any way. In the name of “principiological openness”, principles such as polyamory were created, to recognize the relationship of stable union for the concubine to compete for the deceased's inheritance; principle of responsible parenthood, for which responsibility starts from conception until parenting of children is relevant; (all of this can be good ... but the judiciary does not have the key to the safe; and more: some are served and the rest are watching ships; that is the difference between ad hoc attitudes and public policies!) (Streck Lenio Luiz, 2015, p. 25).

Civil Law and Common Law, in view of this public arising from Judicial Activism.

4. Conclusion

The Law, a cultural product, is always the result of a certain culture, for this reason it cannot be conceived as a universal and timeless phenomenon (Grau Eros, 1998, p. 17). As part of the Law that aims at the formal concretization of the State's jurisprudential provision, procedural Law does not escape the necessary contextualization.

Indeed, in a world of globalization characterized, among other factors, by the increasing complexity of interpersonal relationships, in particular legal ones, the legal community must turn to the design of a "process" capable of serving the globalized world as it is today (Bueno Cássio Scarpinella, 1999, p. 217).

For this reason, the growing exchange at every moment between subjects of different nationalities puts pressure on the jurists from all over the world to produce the necessary legal instruments to support, guarantee and guide the contracts that are being formed. It is in this sense that the clash of historically diverse legal conceptions, like are the two large families of Law, heightened by the urgency of resolving conflicts that are often pioneering, imposes urgency in the creation of internationally respected regulations.

That way, there is no denying, then, that the approach and harmonization between the two big existing systems of Law (civil law and common law), due to the decisive influence of the globalization process and the transnationalization of Law, gave rise to a new vision how Law should be studied and put into practice; judicial activism is an example of this.

Thus, the contribution given to the Law by the new actors, national, international and transnational, when solving conflicts previously thought out, provides a vision of how different systems can be, through the formulation of new rules, live harmoniously, even reaching, in the future, a new system of Western law, with nuances of Civil Law and Common Law.

References

Alves José Carlos Moreira (2018). "Direito romano", *Rio de Janeiro: Forense* (18ª Edição Revista), edição digital.

Arnauld André-Jean (1999). "O Direito entre a Modernidade e Globalização", Rio de Janeiro: *Renovar*.

Bodnar Zenildo; Cruz Paulo Márcio (2016). "A commolização do direito positivo, o ativismo judicial e a crise do estado", *Revista Novos Estudos Jurídicos*, Eletrônica, Vol. 21, No. 3, Set-Dez.

Bueno Cássio Scarpinella. (1999). "Processo Civil e Globalização: Notas de uma Primeira Reflexão", in: Sundfeld Carlos Ari, Vieira Oscar Vilhena (Coord.), *Direito Global*, São Paulo: Max Limonad.

Campos Carlos Alexandre de Azevedo (2014). "Dimensões do ativismo judicial do Supremo Tribunal Federal", Rio de Janeiro: Forense: VitalSource Bookshelf Online.

Carvalho Cristiano (2005). "Teoria do Sistema Jurídico", São Paulo: Editora Quartier Latin do Brasil.

Carvalho Evandro Menezes (2007). *Organização Mundial do Comércio — Cultura Jurídica, Tradução e Interpretação*, Curitiba: Juruá Editora.

Cebrián, Alfonso Villagómez et al. (2011). *Ativismo Judicial e Déficits Democráticos: Algumas Experiências Latino-Americanas e Europeias*, Rio de Janeiro: Lumen Juris Editora.

Cruz Paulo Márcio (2003). "Fundamentos do Direito Constitucional", Curitiba: *Juruá Editora*.

Cruz Paulo Márcio (2014). "Da Soberania à Transnacionalidade: Democracia, Direito e Estado no Século XXI", Itajaí: Univali Editora.

Cruz Paulo Márcio (2009). "Direitos fundamentais e transnacionalidade: um estudo preliminar", in: Cruz Paulo Márcio, Stelzer Joana, *Direito e transnacionalidade*, Curitiba: Juruá Editora, pp. 173-200.

David René (2000). *O Direito Inglês*, São Paulo: Martins Fontes.

David René (2014). *Os Grandes Sistemas do Direito Contemporâneo*, São Paulo: Martins Fontes.

Foucault Michel (2002). *A verdade e as formas jurídicas* (3rd ed.), Rio de Janeiro: Nau Editora.

Friedman Thomas L. (2005). *O Mundo é Plano: Uma breve história do Século XXI*, Título original: *The World is Flat: a Brief History of the Twenty-First Century*, Rio de Janeiro: Objetiva.

Ghirardi José Garcez (Coord.), Sundfeld Carlos Ari and Vieira Oscar Vilhena (1999). *Direito Global*, São Paulo: Max Limonad.

Grau Eros. (1998). *O direito posto e direito pressuposto*, São Paulo: Malheiros.

Gusmão Paulo Dourado (1976). *Introdução à Ciência do Direito* (7th ed.), Rio de Janeiro: Forense.

Habermas Jürgen (2001). "A Constelação Pós-Nacional", Título original: *Die postnationale konstellation: Politische Essays*, Ensaios Políticos, Tradução de: Márcio Seligmann Silva, São Paulo: Littera Mundi.

Hurrel Andrew (1999). *Sociedade internacional e governança global*, São Paulo: Lua Nova, No. 46.

Ianni Octavio (2002). *Teorias da Globalização* (10th ed.), Rio de Janeiro: Civilização Brasileira.

Kirby Michael (2008). "Transnational Judicial Dialogue, Internationalization of Law and Australian Judges", *Journal of International Law*, Vol. 9.

Jessup Philip C. (1956). *Transnational Law*, New Haven: Yale University Press.

Lopes José Reinaldo Lima (2000). *O Direito na História*, São Paulo: Max Limonad.

Magalhães José Carlos de (2000). *O Supremo Tribunal Federal e o Direito Internacional uma análise crítica*, Porto Alegre: Livraria do Advogado.

Merryman John Henry (1971). *La tradición jurídica romano-canónica*, México: Fondo de Cultura Economica.

Moreso José Juan and Valentini Chiara (2019). "Judicial Dialogue as Wide Reflective Equilibrium: in the Region of Middle Axioms", in: *Artigo científico apresentado no IVR World Congress 2019*, Lucerna, pp. 1-46.

Neves Marcelo (2018). *Transconstitucionalismo* (5th ed.), São Paulo: Martins Fontes.

Rosa Alexandre Morais da (2015). "Deus me livre de ser julgado pelo bom senso", accessed on 24 fev. 2019, available online at: http://www.conjur.com.br/2015-nov-20/limite-penal-deus-me-livre-julgado-bom-senso.

Santos Boaventura de Sousa and Garavito César A. Rodríguez (Eds). (2007). *El derecho y la globalización desde abajo-Hacia una legalidad cosmopolita*, Rubi (Barcelona): Anthropos.

Santos Boaventura de Souza (2010). *Descolonizar el Saber, Reinventar el Poder*, Montevideo.

Santos Milton (2009). *Por uma outra globalização: Do pensamento único à conscientização universal* (18th ed.), Rio de Janeiro/São Paulo: Record.

Seitenfus Ricardo (2004). *Relações Internacionais*, Barueri: Manole.

Sèroussi Roland (2001). *Introdução ao Direito Inglês e Norte-americano*, São Paulo: Landy Editora.

Streck Lenio Luiz (2015). *O Que é Isto – Decido Conforme Minha Consciência?* 5. ed. e atual. de acordo com as alterações hermenêutico-processuais dos Códigos, Porto Alegre: Livraria do Advogado Editora.

Strenger Irineu. (2003). *Direito Internacional Privado* (5th ed.), São Paulo: Editora LTr.

Tassinari Clarissa (2015). *Jurisdição e ativismo judicial: Limites da atuação do judiciário*, Porto Alegre: Livraria do Advogado Editora.

Young Ernest A. (2002). "Judicial activism and conservative politics", *University of Colorado Law Review*, Vol. 73, No. 4.

Vicente Dário Moura. (2018). *Direito comparado: introdução, sistemas jurídicos em geral* (4th ed.), Vol. 1, São Paulo: Almedina.

Zagrebelsky Gustavo and Martini Carlo Maria (2006). *La exigência de justicia*, Traducción de Miguel Carbonel, Madrid: Minima Trotta.

Williams III and Frank V. (2007). "Reinventing the courts: The frontiers of judicial activism in the state courts", *Campbell Law Review*, Vol. 29, No. 3, p. 591.