diritto internazionale
giurisprudenza catania

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What is Transnational Law?
A Trip through a Still Unknown Land

2020-2.2

Fogli di lavoro
per il Diritto Internazionale

La Redazione di FLADI-FOGLI DI LAVORO *per il Diritto Internazionale*

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Testo chiuso nel mese di giugno 2020

FOGLI DI LAVORO *per il Diritto Internazionale* è *on line*
http://www.lex.unict.it/it/crio/fogli-di-lavoro

ISSN 1973-3585
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1. Some introductory remarks

It is commonplace, when speaking of Transnational Law, to start from a famous quote from Jessup seminal Storr Lectures 1956

«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 included, as are other rules which do not wholly fit into such standard categories»

Now we will precisely deal with what is to be intended by the words "other rules which to not wholly fit into such standard categories".

As Craig Scott rightly pointed out, Transnational Law should be considered merely as a proto-concept, which has been further elaborated by three different schools of thought, each one claiming to be a Transnational Law school, if not the only one.

Transnational law as "*transnationalized legal traditionalism*", in other words it would be the *law as we know it that must deal with various phenomena consisting of actions or events that transcend national frontiers, to which one might perhaps usefully add to actions and events something like relationships amongst actors*

Transnational law as "*transnationalized legal decisionism*" according to which it is "*understood as the resulting (institutionally generated) interpretations or applications of domestic and international law to transnational situations*"

Transnational law as "*transnational socio-legal pluralism*" which "*as being in some meaningful sense autonomous from either international or domestic law, including private international law as a cross-stitching legal discipline. Rather than focusing on Jessup's broad definition that sees transnational law as some kind of umbrella within which 'other [nonstandard] rules' fall alongside public and private international law, this approach sees these 'other' rules as the true – or at least the quintessential – transnational rule*s".

It is therefore difficult to answer this simple question: what is Transnational Law?

We have chosen to examine these different approaches through the analysis of some writings, each one of them advocating a different conception of Transnational Law.

Moreover, we would add another issue, which certainly Jessup couldn't know when he delivered his lectures, i.e. the issue of the interrelationship between Transnational Law and Global Society, where TL can be seen as a way of regulating the operation of global society.

In this connection, TL can also be seen as a novel way of attaining the aim of legal coordination of different legal orders, whether international, supranational or national.

Now, it is difficult to offer a thorough analysis of what Global Society should be intended to be. Nevertheless, from a legal point of view, three features can be detected, all of them relating to the role of the State in a global environment:

A fragmentation of the State, with its different apparatuses operating autonomously one from the other

Legal entities, such as international organizations, operating beyond the States, but capable of attaining directly the individuals exerting direct or indirect influence over them.

A prominent role of the judges within the State and beyond the State, cross-fertilizing their case law

All these features can easily be seen as fitting with TL, whichever conception of it one prefers.

I. Transnational Law. What for?

2. Peer Zumbansen, Transnational Law (2006)

This paper was originally conceived as an entry in an Encyclopedia of Comparative Law and aims at giving a brief presentation of what is to be intended by Transnational Law.

The author moves from the consideration of the unsatisfactory reconstruction and understanding of several problems through traditional approaches

Therefore, it starts from the assumption that you need a new approach to deal with problems which were not aptly investigated through traditional approaches

And Transnational Law is that new approach we are looking for. Jessup himself in his Storr Lectures spoke of his idea of a new approach, in order to explain the ways through which public and private international law, as well as all other rules applicable to legal relations beyond State borders could be presented in a homogeneous and unitary manner. Zumbansen develops his argument through four examples:

- The Lex Mercatoria
- The Law applicable to Transnational Corporations
- Public International Law itself
- Human Rights transnational litigation

These four examples are suitable because all of them are unsatisfactorily analyzed through traditional approaches based on the distinction between public and private law, international and national, State made rules and rules made by private entities. Transnational Law, on the contrary, sets aside all these distinctions and offers a unitary framework in which all these partitions blend together through the role of interpreters.

3. Gralf-Peter Calliess and Peer Zumbansen, Rough Consensus and Running Code: A Theory of Transnational Private Law

Calliess and Zumbansen focus on some issues drawn from Transnational Law practice: the regulation of corporations and their relations with civil society, regulation governing the practice of transnational merchant groups, governance frameworks for e-commerce between business and consumers, and transnational technical standard-setting, assuming that more significant than legislation by state authorities or international agencies is often the working out of regulatory practices in social (especially economic) interaction within networks of individuals, corporations, organizations and associations.

Calliess and Zumbansen identify twelve possible generic governance mechanisms, ranging from state law, courts and legal sanctions through tripartite arbitration and bilateral negotiation to reliance on social, relational (especially contractual) or corporate norms, and hierarchical corporate control, stating that what will be optimal or possible depends on the nature of transactions and relations between those engaged in them.

They use this map of governance mechanisms as a toolbox from which tailor-made solutions for the governance of cross-border commerce can be structured even if through non-legal rules.

They start from the assumption that whether transnational law should be regarded as "law" in the traditional sense is not central in their analysis

Transnational governance regimes that take on the function of the stabilization of normative expectations, which in Luhmann systems theory is typical of a legal order can develop into legal systems, but this is not necessary from their point of view.

They describe the way transnational processes take form, borrowing from the concept of "rough consensus and running code" (RCRC), which refers to a process of global technical standard-setting and rule-making for the Internet, embodied in the long-established "request for comments procedure" in which technical experts, network designers, system operators, researchers and Internet enthusiasts with varying degrees of technical experience engage in collective deliberation and experimentation aimed at producing agreed technical standards for the operation of the Internet.

Now, they think that things can work in the same way for transnational intercourse between private subjects, developing rules of conduct in their practice and then abiding by them. One might think of transnational networks of community as the ultimate source of their own legal regulation but, equally, as being subject to legal regulation created in other such networks that impinge on them.

In these ideas about types of community and their regulation two aspects are especially important here: first, thinking in this way suggests that all relations of community are based on a degree of mutual interpersonal trust among their members (which gives them some stability); secondly, all have regulatory needs (for "justice" and "order") that may or may not give rise to law in the form of institutionalized doctrine of some kind.

The socio-economic networks in which Calliess and Zumbansen's examples of transnational private law develop (e.g. transnational merchant law, corporate governance regimes, e-commerce arrangements, standard-setting organizations or associations) can easily be thought of in this way. So it is possible to envisage a kind of paradigm shift in legal inquiry provoked in part by the development of transnational law: a shift away from a limited nation state focus and towards a new emphasis on the law-creating potential of complex, interpenetrating networks of social relationships of community.

A major issue for these regimes is their legitimacy (their recognition and acceptance as established) and authority (their capacity to bind those subject to them). So it is important to ask where their authority and legitimacy can come from if they cannot appeal to the democratic foundations on which municipal law is usually assumed to rely. Most writers find these guarantees in an unstable mix of

(i) the politically established authority of municipal law and international institutions,

(ii) social sanctions having varying degrees of authority rooted in the nature and organization of the regulated population, and

(iii) considerations of mainly economic necessity and self-interest among the regulated

Alongside familiar kinds of law-creating or law-interpreting agencies (courts, legislatures, administrative agencies, international organizations)

other agencies increasingly take part in shaping transnational regulatory doctrine.

A space has been created, outside the normative reach of municipal authorities and international agencies established by treaties or conventions, for new agencies to elaborate the emerging ratio of transnational law.

Examples are commissions of private law experts drafting new model laws available for adoption in national law, European law or through the choice of transacting parties. For most networks of community the coercive authority supporting their regulation will be seen to come partly, as suggested above, from the internal structure of the network concerned.

Clearly this is an image of self-regulation, consistent with the experience of participants in many such networks and also with many current assumptions about the limited utility of external (e.g. state) regulation.

A focus on transnational private law tends to direct attention to internally generated regulation in communal networks. But it is vital to note that networks of community do not exist in isolation. Their members are usually members of other networks, and networks of community may exist within (or in the field of influence of) larger or more powerful networks, or in complex articulation with other networks. So the regulatory authority that operates will usually be a mix of internally and externally generated regulation.

Again there is no need to think in terms of rigidly bounded communities confronting each other. The appropriate image is rather of intersecting (but fluid and frequently changing) networks of social relations of community. So sources of coercive authority in any given network may be varied.

Transnational networks will, more often than not, be subject anyway to the regulatory authority of states, of international networks of states and of other non-state networks.

4. Shaffer and Coye, From Transnational Law to Transnational Legal Orders (2017)

This article has two main targets: first, it responds to theorists who conceive of transnational law either exclusively or predominately as a private lawmaking phenomenon, and second, it addresses the relation of public international law to the concepts of transnational legal ordering and transnational legal orders. The main issue, therefore, is that we should shift our conceptual analysis from transnational law as a body of law addressing transnational problems, to transnational legal ordering and transnational legal orders, so as to capture these processes' deeper political, social, and legal implications. By transnational legal orders we mean a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions

The main contention of the paper is to show that public international law has become a much more central component of transnational law and transnational legal ordering since Jessup wrote, and now increasingly permeates State boundaries through formal as well as informal processes

Formally, public international law permeates national boundaries

a) when it has direct effect in national legal systems,

b) when it is enacted by state legislatures in statutes or

c) adopted by state regulators as administrative regulations,

d) when it shapes national courts' interpretation of national law

Informally, public international law also has significant effects through

(a) iterative processes engaging international organizations, soft law norms, indicators, information-sharing, expert consultation, peer review, and

(b) other technologies of governance that facilitate social interaction and produce and diffuse knowledge, norms, and practices that transnationally shape law and legal ordering

Private actors are central in driving the development and application of international law, as when they participate in norm-making that is eventually incorporated into international law, when they bring claims before national courts derived from international law, and through their practices that apply and interpret these norms.

Also central is the role of Inter Governmental Organizations (IGOs) in these processes. IGOs now play a much more significant role in establishing norms, procedures, peer review mechanisms, dispute settlement, and other forms of intergovernmental interaction, coordinating resources and expertise

The development of IGOs has also empowered International Non Governmental Organizations (INGOs), who are their frequent interlocutors and partners. These international organizations have been active in creating soft law, which aims to shape national law and practice. Such soft law affects governance of areas traditionally seen as strictly domestic, such as e.g. financial regulation, consumer protection, and law enforcement. Accurately measuring the amount of soft law is impossible, but there is general consensus that it has been on the rise for some time, with some arguing that it has become more important than hard law.

Transnational legal orders often, if not typically, encounter strong resistance. Such resistance arises because of transnational legal ordering's deep implications within states, especially when involving public law. Contests often and typically arise because of a transnational legal order's successes. Its institutionalization raises awareness that the stakes are high.

Within national legal systems, legislatures and courts have sometimes raised screens to the legal effects of public international law. But still it is important to retain a public law element to transnational legal ordering because otherwise, the concept of transnational law, as conceived by Jessup, risks becoming disconnected from the public sphere.

Public international law and institutions are needed to address transnational problems, in complement with private international law and private norm making, even if they can bring about strong opposition due to internal power frames' resistance.

II. Is Transnational Law **Law** after all?

5. Detlef von Daniels, The Concept of Law from a Transnational Perspective

Detlef von Daniels is a legal philosopher and according to him the development of a concept of law from a transnational perspective is a way to save jurisprudence as a philosophical discipline.

Since a conceptual study of law has been so central to legal philosophy (insofar as it has aimed to develop philosophical theories of the nature of law), the issue is whether legal philosophical explanations of law can cope with the new (or newly prominent) phenomena of transnational law, or whether its ignoring of these phenomena undermines the whole legal system that the philosophers have built.

In other words, can the concept of law, endlessly refined and disputed in legal philosophy, be made to embrace legal transnationalism; that is, law no longer understood as being mainly State law?

Von Daniels claims Habermas and Hart as references for his research, though his arguments are mainly indebted to Hart teachings.

Nevertheless, though Hart's concept of law is widely understood as "the union of primary and secondary rules", Von Daniels thinks that a regime of primary (obligation-imposing) rules alone could amount to "law"

According to Von Daniels, the union of primary and secondary rules is needed to institutionalize and develop law with elaborate agencies and practices (and not just in the nation state, but also in sub-national and transnational contexts) but it is not essential for the existence of law.

Transnational Law can thus be seen as a law in embryo form made only of primary rules provided that these rules are multilateral, decisive and justice apt. Cotterrell puts forward two critical remarks on Von Daniels thesis. The first one is that Von Daniels arguments are not compatible with Hart teachings, which, on the contrary, are firmly based on the assumption that primary as well as a secondary rules are necessary to qualify a system of rules as a legal order.

The second one is that this view of law in embryo form made of primary rules that are multilateral, decisive and justice apt is subject to critical

remarks because each one of these three claimed marks of the legal is difficult to accept when you assert that they are features capable of distinguishing legal rules from moral or etiquette rules.

6. Nowrot, Transnational Law and the Process of "Softification" of Public International Law (2018)

The paper starts from the realization that processes of formal law-making are at present in the international system frequently replaced or at least supplemented by soft-law processes i.e. steering instruments that are not directly legally binding such as hard law is (i.e. the rules generated by formal law-making processes) but nevertheless often quite rigorously adhered to by the respective actors and thus most certainly not entirely devoid of normative value and effectiveness.

This realization is shared as you may recall by Shaffer & Coye (2017)

Now, these developments in international law-making processes, amounting to the substitution of formal through informal means of law making, often devoid of a formal coercive value, can be traced up to Jessup seminal work on Transnational Law. He contended in fact that adequately describing and conceptualizing the evolving normative structures beyond the state may "require that old concepts be constantly re-examined with a mind unfettered by blind acceptance of traditional classifications and labels" (Jessup, Columbia JTL 1960, 1). The paper analyzes mainly the issue of the effective perception by Jessup of what we call now "soft law". Interesting issue, of course, but off topic for our inquiries.

Much more interesting for us will reveal studying if those emerging areas of "transnational law" – first and foremost perceived to be characterized by an increasing blurring of the boundaries between hard law and non-binding steering instruments – can legitimately be regarded as

1) an approach appropriately reflecting the normative realities in the present international system, and,

2) as a desirable guiding idea for the future evolution of transboundary steering regimes.

Now it is simple to observe that some branches of public international law, such as e.g. international criminal law and the legal regime on the use of force, are quite immune to tendencies of softification of law and transnationalization of the regime.

This can be related to the frequently rather severe consequences that these steering regimes and especially their violations have for individuals (with regard to international criminal law and the regime governing recourse to force) as well as for political communities as a whole (like in the case of the use of force) and ultimately also for the violator and its population themselves (being for example subject to measures taken in exercise of the right of self-defense). Now, this means that the appropriateness of these processes of both softification and transnationalization of international law just depends on several circumstances. Much more preferable is a differentiated approach, always the best answer to most legal questions, most certainly including the ones related to a proper perception of the role and functions of transnational law in the global normative order.

III. Do we really need a Transnational Law Approach?

7. Matthias Reimann, From the Law of Nations to Transnational Law

The paper aims at answering two questions: 1) Should we provide students with a more comprehensive course as an introduction to the international law curriculum? 2) Can Transnational Law teaching provide such a comprehensive approach?

Answers are sought through an historical analysis on the development of international law teachings. The starting point is an analysis of the situation existing when, in the fifties, international law curricula were first developed in American Law Schools. In those years, Public International Law served as an introductory course to legal issues in the international community. And it was taught as the classical Law of Nations, offering a picture of the norms applicable to interstate relations. Things have changed and we no longer live in such a world. And the paper outlines the changes that have occurred in the meantime. Over the last few decades, we have witnessed: the rise to prominence of many other international subjects, a growing complexity of the international scene, as well as an increased blurring of the lines between public international law and other fields. Reimann thinks that Public International Law has offered a too limited approach to all these new issues and therefore he advocates the creation of a new course. And this course should be the Transnational Law course providing a general overview of those problems. What should such a course look like more concretely? At a minimum, it needs to deal with:

the major actors (state and non-state),

the most salient sources (of public and private international law) and their effect in the domestic legal order,

the leading principles (especially of international jurisdiction and cooperation),

the most important dispute resolution mechanisms (again, both public and private)

8. Let's wrap it up! A tentative conclusion

We're at the end of our trip through that unknown land called Transnational Law, where we have seen at work three groups of voyagers, three main schools of thought:

Those who believe that TL is a new legal field, mainly structured through non State made laws, for the benefit of private actors on a transnational stage;

Those who believe that though being mainly structured for the benefit of private subject, TL still needs State and State made law as a comprehensive framework capable of guaranteeing legitimacy and effectiveness;

Those who believe that TL can only exist through Transnational Legal Orders, sets of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions

But, what is more, we have met with the idea, shared by schools of thought 2 and 3, that TL simply is another, updated way of presenting the main problems of Public International Law, sort of 2.0 of it. This is what we call a Transnational Law Approach.

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