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WHAT IS TRANSNATIONAL LAW?

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Introduction. What is International Law?

Before trying to analyze and explain what Transnational Law is, I would like to begin with the origins of International Law, the main reason why we can speak nowadays of a new legal approach called Transnational Law.

First of all, I would like to look back through the years, into the history, when International Law was created. The most relevant period for the creation of International Law is the end of World War II. We can´t say that there were not any other attempts before, to create a place in which nations will cooperate, for instance after World War I, with creation of the League of Nations an organization trying to curb invasions by enacting a treaty agreement providing for economic and military sanctions against Member States that used aggression to invade or conquer other Member States. At the same time, an international court was established (the Permanent Court of International Justice) to arbitrate disputes between nations without resorting to war. Nevertheless, the situation of international crisis demonstrated that nations were not yet committed to the idea of giving external authorities a say in how nations conducted their affairs.

The situation changed seventy-five years ago, after the cataclysm of World War II. Political integration began as an effort to forestall future hostilities, end pre-war enmities and forge a sense of common identity. There was a strong desire to never again endure the horrors of war endured by civilian populations. It was the time when United Nations as a new international organization was created. The creation of this organization is very important to further cooperation between states, because even the most powerful nations have recognized the need for international cooperation and supports and have routinely sought international agreement. Just to put it in the words of Matthias Reimann:

« When money from the Ford Foundation began lavishly to fund international legal studies programs, International law became a part of American law school's curriculum and was taught in what I call the classic model. It dealt only with a limited subset of international legal issues. It presented a fairly simple legal order and it portrayed a field with well-defined boundaries.[1] Originally, it focused only on the world of sovereign and formally co-equal nation states who make, follow or violate international law and who sometimes arbitrate in international tribunals. As time went by, two important elements were added:

1 *See* Reimann, From the Law of Nations to Transnational Law: Why We need a New Basic Course for the International Curriculum, at 399-401 (2004).

permanent international organizations and international human rights. Despite this addition, international law was still taught strictly as public international law, which means, that private international law was totally excluded. This is the big problem from the point of view of further development of Transnational Law, because it´s excluded not only all rules pertaining to transboundary transactions and disputes between private parties, such as individuals or business organizations, but also it focused only on limited range of actors, sources, principles, and dispute resolution mechanisms».

In terms of actors, it focused primarily on states and eventually on United Nations as their principal organization. The sources considered were those listed in the Statute of the International Court of Justice[2] and its coverage of dispute resolution mechanism centered around the procedure and disputes between states before the International Court of Justice. Moreover, the classic view saw public international law as a subject with well-defined boundaries which presumed a fundamental difference between international and domestic law. As we can see, transboundary transactions and disputes among private parties were still rare and most practitioners never faced them.

It is not new, that in the last half-century, the global legal order has undergone enormous change. Numerous fields lying beyond the traditional law of nations have developed, matured, and become more important. The boundaries between public international law and other areas have disappeared and the world legal order has become more complex and diversified. Of the many areas that have risen the importance in the last decades, some take part of public international law, some are completely outside of its scope and some straddle its borders.

For instance, private international law as a field of international law gained big importance in the last few decades. Back in time, transboundary transactions and disputes between private parties were exceptional enough to treat them as not existed or leave them in the hands of a few experts but the phenomenon commonly labeled ´globalization´ has changed that dramatically. Big role in its development plays European Union as integration which created common market between Member States and permits free movement of persons, goods, work and capital in order to facilitate communication and cooperation between states and individuals. Moreover, we live in the age of electronic communication that have turned the private side of international law

2 Art. 38(1): treaties, customary international law, general principles, judicial decisions, and the opinion of leading scholars.

from a backwater into a vast and highly prominent field of enormous practical importance.

The most salient example of area that is impossible to assign to either public or private international law realm, is European Union Law. It contains elements which transcend both. This area of law contains elements of public international law[3] which are interconnected with the regulation of markets and private relationships as well as administrative and procedural matters. The blending of public and private international law has, in fact, created new order, that is, by now, *sui generis*, especially because it is considered as law made and enforced by a body above sovereign nation states and binding upon them.[4] Several other new fields of law could be considered as mixed areas which exceed international law and present core transboundary issues too. For instance, regulations of cyberspace, international investment and intellectual property regimes.

The rise of new areas has not only broadened the range of international legal issues, it has also changed the character of the world legal order. Legal actors in international law have become more numerous than ever. States and international organizations have become much larger and heterogenous, intergovernmental organizations have multiplied as well. What is even more significant is the multiplication and rise of non-state actors and individuals. Plainly irrelevant in the classic law of nations, individuals have advanced from objects of protections under humanitarian and human rights law to actors with their own rights and responsibilities.[5]

Today, the main jurisdictional area is no longer just the relationship between states as we have seen in classical approach of public international law. Instead, we are dealing with new actors, such as individuals, business organizations, non-state actors exercising their rights in private litigation. Yet, as with the new actors and sources, there are also numerous institutions that lie outside the purview of classic public international law.

In times when international law was created, it may have seemed clear that public international law deals with the law-applicable among states and intergovernmental organizations, while private international law concerns itself with transboundary relationships between private parties (individuals and businesses). In theory, this distinction remains true today but in practice, the distinction becomes more and more pointless.

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3 For example: international organizations, supremacy issues, treaties, etc.

4 *See* Reimann, op. cit. at 403 (2004).

5 *Ivi*, at 404 (2004).

From the Classical Approach to Transnational Law

As we can see, society is changing rapidly. From day to day we are facing new problems, new opportunities and from the legal viewpoint also new legal categories. For many scholars, a new term has seemed necessary to indicate new legal relations, influences, regimes and systems that are not those of nation state law, but, equally, are not fully grasped by extended definitions of the scope of international law. The new term is ´transnational law´, widely invoked but rarely defined with much precision.[6]

Transnational Law often refers to extensions of jurisdiction across nation state boundaries, so that people, corporations, public or private agencies and organizations are addressed or directly affected by regulation originating outside the territorial jurisdiction of the nation state in which they are situated, or interpreted or validated by authorities external to it. According to the international lawyer Philip Jessup, transnational law is *´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´* (Jessup, 1956, p.2).[8] Several questions arise regarding the relationship between classical legal disciplines and transnational law. First of all, does this law still rely fundamentally on nation state law and international law, or does it entail a new relationship between law and state? Is transnational law primarily made up of rules applying directly across national borders, or is it mainly coordinating regulation harmonizing or linking substantive rules that may differ between states?

Before answering these questions, we have to deal with the bigger problem. According many scholars, transnational law is a new legal field, but for the others it is not.

I would like to paint a whole picture about it by analyzing main issues.

Lawyers often quickly make judgments as to what is and what is not law in such a motley regulatory mix. They judge on the basis of common understanding about the concept of law, probably of thinking about law as the ´law of nation state´. In connection with this definition, the international law is then only projection of the sovereignty of nation states, which authorize the making of treaties and international conventions.

However, the range and variety of regulation operating beyond nation state boundaries may now have become so considerable and its impact so

6 *See* Roger Cotterrell, What is Transnational Law? at. 2 (2012).

8 *See* Peer Zumbansen, Transnational Law, at 738 (2008).

substantial that a different view is needed. To invoke an idea of transnational law is to suggest that law has new sources, locations and bases of authority.[7] As I said before, society and the world is changing rapidly, and it is not enough to focus only on traditional meaning and understanding of what law is. If we do so, we are limited to classical legal disciplines and we are not going anywhere. We have to try to find new ways, new approaches by which we are adapting to a new society.

The concept of community is essential in order to make sense of what transnational law is. However, it is very rare for a rigorous concept of community to be put forward in this context. Socio-legal scholars are used to thinking of the social mainly as ´national society´. But if we would like to see if transnational law is related to social relations extending across the borders of national societies, it may be better to see the social in a way that avoids these national connotations. Relations of community need to be seen as much more varied, flexible, fluid and changeable than is envisaged in most appeals to ´community´.[8] Community can be seen in different ways, for example, social relations of community (contractual relations). Community can also refer to social relations based purely on affect (emotional attraction), or on a shared environment (for example of language, history, custom). It is obvious that the different kinds of social bonds imply different regulatory needs and problems. Moreover, if we would like to think about community in different way, for instance, as a social network of interpersonal relations in which rules can be made and by which the rules are generally accepted, there must be some minimum degree of stability, this means that degree of mutual interpersonal trust among their members is needed and secondly, community needs some kind of regulations to live by.

As most writers on transnational law regimes emphasize, a major issue is legitimacy of these regulations (their recognition and acceptance) and authority (their capacity to bind those who were 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. Where can transnational law find its legal authority and legitimacy or, more broadly, its practical guarantees of effectiveness?[9] In traditional

7 *See* Cotterrell, cit.at 4 (2012).

8 *Ivi* at 19 (2012).

9 *Ibidem* at 21 (2012).

legal orders, we can find these guarantees in politically established authority, social sanctions having varying degrees of authority rooted in the nature and organization of the regulated population, and considerations of mainly economic necessity and self-interest among the regulated. To conclude mentioned above, authority, enforcement and law-making process in traditional community/society is effective because is based on mutual agreement between state and individuals consent to state authority in return for which the state undertakes to prevent people from mistreating others, and to safeguard good order and the basic means by which individuals can live good lives.

In the national context, both *voluntas* and *ratio* are essential elements of law as components of its overall authority: the former as law´s political authority, the latter as what might be called its moral authority – its resonance with shared cultural understanding.

The question may arise: How might the *voluntas* and *ratio* of transnational law be identified? Rather to answer to this question, I would like to focus on something different. I would like to look back, into the history, when traditional law was made. Before the law was established, there was no *ratio* as well as *voluntas*. Society was in the same situation as we are facing today. There were no rules and our ancestors had to find a way to create law which would be binding and enforceable. We cannot simply say that transnational law cannot be a law in the proper sense, because modern community has no *voluntas* or *ratio*. We have to find a way to create something new which help us to adapt to the new requirements of this world.

Transnational Law as a New Legal Discipline?

Before answering the question put above, I would like to analyze a specific dimension of the progressive transformation of the territorial/nation-state law. To do so, I am going to examine the impact of the globalization process, because the legal fragmentation produced by it leads us to reconsider the traditional concepts of territory and frontier. As I said multiple times, but in my opinion, it is very important to underline it, the ground of legal phenomena is not any more represented by the ´frontier´ but by common interests, those issues and needs which go beyond the mere territorial borders. This cross-border relevance implies the necessity to move from the idea of law as a unitary phenomenon, to a concept of law as something generated by a system of co-operative relations among different actors, provided with a different legitimacy

or with a legitimacy which cannot be understood as a traditional one, which we have inherited from the tradition of the nation-state arena.

As written by Benhabib, *´´we are like travelers navigating an unknown terrain with the help of old maps, drawn at a different time and in response to different needs. While the terrain we are travelling on, the world society of states has changed, our normative maps has not´´*[10] The progressive complexity in intergovernmental relations is reflected in the difficulties met by lawyers who are trying to analyze this new phenomenon. In the current era of globalization, it becomes crucial to understand not only how law works, but also how the relationship between individuals and state has been changed.

Globalization as such, has a very big impact on modern law. Law has been affected by globalization in the sense that is has been forced to change its nature and context without however abandoning its function. Thus, if globalization implies the end of traditional understanding of law, then it may be suggested that only a transnational perspective allows jurists to understand the current legal dynamics.[11] Among the many understandings and concepts imposed by different authors about what Transnational Law is, I am inclined to the definition put forward by Zumbansen who said, *´´TL could be understand as a methodological lens through which we can study the particular transformation of a legal institutions in the context of an evolving complex society´´* A methodological lens through which it is thus possible to study law which presents itself as more open, not confined to the territory of a nation-state, horizontal and multilevel.

The extension of political actors, all equipped with rule-making power leads to a progressive proliferation of legal norms. States are at the same time affected by the aggregation processes induced by the supranational level (EU integration) and by intrastate devolution processes (decentralization etc.), which, from a broader perspective, prompt us to question the validity of the territorial limits of state-government action.[12] Globalization processes determine a territorial fragmentation of the field. Place becomes a ´mobile scenario´ of law, since it acquires different shapes and forms according to a logic, already written, by the concept of ´frontier´, but by that of common interests, needs and problems that transcend territorial borders.[13] This is a crucial point which leads us to question the meaning and function of territory. Does law still need

10 *See* Russo, Globalization and Cross-Border Cooperation in EU Law: a Transnational Research Agenda at 4 (2012).

11 *See* Russo, op.cit. at 6 (2012).

12 *Ivi* at 8 (2012).

13 *Ibidem,* at 9 (2012).

a spatial foundation? We can see that the model of modern cooperation is no longer based only on territorial element but on the possibility of creating a set of networks in which the distinction between internal and external blur.

Basically, the idea is that the change in relations between different institutional levels does not necessarily cause a loss of power and control by the state, moreover, in my opinion, the role of the state, as a main actor in rule-making process remains crucial. It is true and inevitable that we have lot of different actors, even non-state actors, which are capable of creating rules. Private subjects are capable of building a new legal regime, we can see it for instance on an example of business companies, which create internal norms and they are binding for those subordinates to these companies, but in broader sense, it is only the state, who can create norms in public interest, enforceable and followed. Simply said, it is practically impossible to think of law without the role of the state, state plays always a role in these models, even in business companies, because state is seen as a source of legitimacy and legal certainty. Non-state actors cannot substitute the role of the states because without them and their intervention it is impossible to enforce law.

A Tentative Conclusion

Through the years, we have seen many changes in the area of law and scholars, judges, lawyers etc. had to adopt new thinking and new approaches. Today, we are facing new problem, which is definition of Transnational Law. Rather to answer question what Transnational Law is, I focused on analyzing various problems interconnected with it. I started my thesis by analyzing the history of International Law. Mainly, because I think that through this legal field we can see why we need a new legal approach. I continued by pointing out whether we can speak about Transnational Law as a new legal branch and if not, why. Starting from the explanation of community, as something which undergone a big change during the years, arriving to the analysis of legitimacy of law-making process in the societies.

In the last few decades, we are witnesses of a new phenomenon called globalization. Thanks to that, we have to deal with new issues, which have arisen because of transnational cooperation between states, but mostly between individuals. In this part of my thesis, I tried to explain why it is so important to think differently. Traditional thinking of states strictly defined by borders and strictly seen as solely actors in the field of lawmaking process has changed. And even if I think that the state plays crucial role in creating norms and in enforcement of them, there is no doubt that in the area of law-making

process there are also different non-state actors capable of creating them. We can see that traditional approaches are not enough, and, in my opinion, this is the main reason why Transnational Law as a new approach has been created.

Nevertheless, for now, I assume, that we can´t speak about Transnational Law as an autonomous legal discipline and a new legal field with subjects, sources and mechanisms of enforcement. It would be better to see Transnational Law as an approach to law rather than a specific legal branch. There is still a long way to create an understanding that TL is a legal field and maybe that time will never come.

But do we need Transnational Law as a new legal field? Is it not enough to have it as a tool to understand and to try to explain different phenomena in this world?

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