CRIO WORKSHOP
CENTRE OF RESEARCH ON INTERNATIONAL ORGANIZATIONS

CRIO PAPERS

N°. 60

CAMILLE BRICOUT

TRANSNATIONAL LAW 2021. THE EUROPEAN MOMENTUM. A PAPER

© 2021 Camille Bricout

CRIO Papers A Student-Led Interdisciplinary Paper Series
ISSN: 2037-6006
The School of Laws
University of Catania
Villa Cerami I – 95124 Catania Italy

Series Editor
Rosario Sapienza

Editorial Staff
Federica Antonietta Gentile, Gemma Halliday, Giuseppe Matarazzo,
Elisabetta Mottese, Maria Manuela Pappalardo, Giuliana Quattrocchi

Graphic Project
Ena Granulo www.studioen.it

Camille Bricout (Catholic University of Louvain, Belgium) contributed this paper to the *Transnational Law 2021. The European Momentum* Course while in Erasmus at the School of Laws at the University of Catania

Introduction

The world is constantly changing. While states were originally motivated by the desire to establish sovereignty over as much territory as possible, this policy no longer makes sense. This political relevance no longer fits into the contemporary international game. Indeed, the time has come for globalization, individualism, digitalization of our interactions ... The territorial contours that may have been drawn by the Treaty of Westphalia are disappearing to allow other forms of world geography to emerge. Indeed, transnational flows are breaking up territories and recomposing spaces.[1]
In this article, the focus will be laid on the place of Europe in the midst of these flows.
The first part will explain the context of the emergence of transnational law. The second part will define what this law is or is thought to be. Finally, the core of the research question will be analyzed: Can the European legal order be characterized as transnational law?

Chapter I: Context

Transnational law was created in the context of the crisis of international law. The term "international" comes from the pen of Jeremy Bentham in his work "Introduction to the Principles of Morals and Legislation"[2]. International law appears as a fundamental process for regulating and challenging international violence, an indispensable common language, an instrumental technique at the service of states and all actors in international society[3].
In other words, international law was deemed to be something new, useful, as a utopia. Lawyers from all over the world were involved in the process of creating this public international law. It was created through a total analysis of what happened around them. At this period, Dionisio Anzilotti (whose opinion was shared by numbers of jurists) was convinced that law was what he had learned at the university. In this case, they just had to take the norm from the internally ordered states and try to test whether it worked when applied to international relations.
Then the first World War marked the crisis of international law. Everything crumbled into pieces and had to be rebuilt. The major efforts were made by states who generated a form of a legal order based on an international organization. The League of Nations was established and through the operation of the League of Nations, International law was again rebuilt. The legal nations tried to enforce international law which had been created in the second half of the nineteenth century, but states really had difficulties in coping with these norms. The result was the Second World War, which in some sense can be regarded as their prosecution of the First World War. Curiously: Public international law was established as a legal discipline in an attempt to avoid states indulging in a rearmament race but instead, it led to the two World Wars.
After the Second World War several ideas were put forward to solve the problems created by this crisis, which was a crisis of trust.
First, another experiment in international organizations was set up: The United Nations. At this time, other efforts were being made towards the establishment of the same result: a legal order

---

[1] M-C. SMOUTS, B. BADIE, *L'international sans territoire,* Culture & Conflits, 1996, available on https://doiorg.proxy.bib.ucl.ac.be:2443/10.4000/conflits.236, consulted on the 1 June 2021.

[2] D. BERNARD, *Histoire et philosophie des droits humains,* Lecture at the Human Rights Academy as part of the training offered by Amnesty International, Bruxelles, 24 février 2020

[3] E. TOURME-JOUANNET, *Le droit international,* Presses Universitaires de France, Paris, 2013, p. 3.

existing among states capable of generating obligations which were not limited to what their contractual nature of public international law could produce.
Around this time, Professor Jessup intervened and set the scene for a radical critical approach to things happening beyond the borders. He declared there are some issues which cannot be qualified as international in the traditional sense and which cannot be qualified as internal in the traditional sense, which he proposed to call transnational issues. We must look beyond the borders and consider that actors other than states could manage relations.
Another critical approach of international law, without complete awareness, was brought into Europe through the conclusion of two fundamental treaties: The European convention of Human Rights and the European coal and steel communities (the first European community). These treaties were not simply capable of generating reciprocal and mutual obligations between Member States, but they could generate obligations which were enforceable per se.
Furthermore, The European Court of Justice, in the case "Van Gen den en Loos" (1953), established the direct effect of the community legal order in domestic law. Indeed, the European treaties which had created the three communities should not be deemed as ordinary treaties capable of generating only mutual reciprocal obligations among state parties but capable of setting up a new legal order. Later, the European commission of Human Rights delivered an advice stating that the European Convention on human rights be capable of generating obligations which cannot be seen as mutual reciprocal obligations among the states.

Chapter II: Transnational law

Section 1: Notion of Transnational law by Jessup

The term "transnational law" is proposed for the first time by Professor Philip Jessup (later a judge on the International Court of Justice). He explains in its developments that human society has put a special emphasis on the national state, but we haven't reached the stage of a world state yet. He adds that it is difficult to analyze the problem of the world communitcommunity and the law regulating them because of the lack of appropriate words. Indeed, the word "international (law)" is not appropriate because it is limited to the relation of one nation to other nations[4].
Moreover, there is no equivalent to the term "droit des gens" used by Georges Scelle in English, which even turns out to be insufficient to describe the whole phenomenon he wished to discuss[5].
Regarding this issue, Jessup prefers the term "transnational taw" 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"[6].
This law is applicable to the complex interrelated world community which may be described as beginning with the individual and reaching on up to the so-called "family of nations" or "society of states." A transnational situation can involve individuals, corporations, states, organization of states or other groups[7].
It seems important because people form groups which we call families, clans, tribes, corporations, towns, states, international organizations, …

---

[4] P. JESSUP, *Transnational Law*, New Haven: Yale University Press, 1956, p. 1.

[5] J. RONDU, *L'individu, sujet de droit de l'Union Européenne*, Bruxelles, Bruylant, 2020, p. 33.

[6] « A basic introduction to Transnational law », available on https://www.law.berkeley.edu/phpprograms/courses/fileDL.php?fID=7587, consulted on the 4 June 2021

[7] P. JESSUP, *Transnational Law*, *op. cit.*, p. 2.

And as Max Radin says “anyone grouping cuts through and across other groupings, a fact which makes all social study so difficult”[8].
As regard the applicability of transnational law, we must avoid thinking in terms of particular forum. Jessup invites people to reflect on the dichotomies underlying international law while decisively moving onward to embrace a wider and more adequate view of global human activities[9]9.

Section 2: Several schools of thought

Transnational law, as put forward by Professor Jessup, gave birth to several different schools of thought which called themselves transnational law. There are several ways of speaking of transnational law, according to whether you wish to give the state a more or less important role in your analysis.
On one hand, the minority of schools of thought believes that transnational law is something which has nothing to do with the state.
A famous German scholar, Peer Zumbansen, claims that transnational law is composed of the interaction of private subjects (traders, corporations, private, …). People create networks among themselves and set rules to manage this network without state interference.
The point of departure is identical to that of Jessup who “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, including all other rules applicable to legal relations beyond State borders could be presented in a homogeneous and unitary manner”[10].
Peer Zumbansen equally raises the idea that a new approach is needed. He considers traditional approaches to be unsatisfactory in addressing several problems. Furthermore, he illustrates his point of view with various examples. First, he exposes a dispute among jurists about the Lex Mercatoria. The dispute concerned the existence and legal nature of the Lex Mercatoria as an autonomous legal order.
It opposed the traditionalists on one hand and the transnationalists on the other. This dispute highlighted the vulnerability of a position based on ‘official’ law, being those state-made norms and statutes, embedded in an institutionally sound enforcement environment[11]. Zumbansen repeats this exercise in other areas where the idea of transnational law has proven most fruitful and provocative. He speaks about the corporate governance, public international law and human rights to conclude that not all these topics are adequately addressed by traditional law.
Zumbansen also draws conclusions for a methodological understanding of transnational law[12]12.
On the other hand, most transnational lawyers believe that state intervention is essential. Indeed, private networking can generate rules, but states must enforce these rules. Transnational law is a form of law in which states are joined by other subjects: corporations, individuals, …
One such example is the idea of Shaffer and Croye, two American scholars, authors of a book called “From Transnational Law to Transnational Legal Orders”. They affirm that Transnational law is not exclusively or predominately a private lawmaking phenomenon and address the relation between public international law and transnational law ordering. They think that it is impossible to build legal orders without the jurisdictions of the state. Of course, private actors are central to the

[8] Ibidem, p. 4

[9] P. ZUMBANSEN, « Transnational Law », *Encyclopedia of Comparative Law,* Jean Smits (ed.), 2006, p. 738.

[10] M-M. PAPPALARDO, « What is Transnational Law? A trip through a Still Unknown Land », *Fogli di Lavoro per il Diritto Internazionale*, 2020, p. 5.

[11] P. ZUMBANSEN, « Transnational Law », *op. cit.*, pp. 740-742.

[12] M-M. PAPPALARDO, « What is Transnational Law? A Trip through a Still Unknown Land », *op. cit.,* p. 5

development and application of transnational law but it is not law properly speaking if the jurisdiction of the state has not been involved directly or indirectly. Indeed,

"Public international law and institutions are needed to address transnational problems, in conjunction with private international law and private norm-making, even if this may about strong opposition due to internal power frames' resistance"[13].

Section 3: Notion of Transnational Legal Order

Two American scholars, Gregory Shaffer and Terence C. Halliday have developed another theory: Transnational legal order theory.
Their concept is that law can no longer be studied through a methodologically nationalist perspective involving a sharp dichotomy of international and national norm development and practice. Their developments and practices intertwine and call for empirical study[14]14.
In this context, the transnational legal order must deal with a social science perspective and not only a merely intellectual one. It must encompass bewildering of social problems and their relation to law. Indeed, the internal process of lawmaking and the very substance and form of international law was considered as a black box and the social scientists can constructively open up this box[15].
Reflecting normative and material interests, actors at different levels of social action engaged in transnational legal ordering process often thought of this process as a mix of cooperation, competition and conflict[16].
However, they consider transnational law to be more than simply a method. They consider it possible to create the existence of several autonomous, which can be defined as transnational legal order. Rather that analyzing the (motivated) field of international legal relation, one can detect the existence of several one autonomous from the other legal orders, which can be defined as transnational. One of the main examples of transnational legal order is the sport legal order. Almost every scholar is prepared to admit the existence of a legal order in matter of sport which is autonomous. There are private subjects, states, and international organizations in a traditional sense, all involved in legal positions which are intending to the management of the international sport events

Chapter III: European legal order as an example of transnational legal order

Section 1: European legal order

The European legal order was adjuvated by the European Court of Justice in the Judgement "Van Gend en Loos" (1963). This case represents a genuine revolution in European law. When the European Court of Justice delivered this judgement, it was under pressure by the European Commission. The position of the Commission was developed by Gaudet with Leendert van der Brug and Gerhard Beber. Gaudet proposed a system to ensure the enforcement of European law in the national legal orders and the uniformity of interpretation and application. Those aspects were essential for the legal security of citizens and economic actors, so essential for the common market. According to his position, the direct effect and primacy of international law would be based on an interpretation of the European Economic Community Treaty by the European

[13] Ibidem, p. 9

[14] G. SHAFFER, T-C. HALLIDAY, « International Law and Transnational Legal Orders: Permeating Boundaries and Extending Social Science Encounters », *Chicago Journal of International Law,* Vol. 22, n°1, p. 16.

[15] G. SHAFFER, T-C. HALLIDAY, « International Law and Transnational Legal Orders: Permeating Boundaries and Extending Social Science Encounters », *op. cit.*, p. 8.

[16] Ibidem, p. 14

Court of Justice. This solution constituted "a solid and coherent legal basis for the establishment of the common market, thus constituting an original legal order drawing with a teleological approach from what the legal service itself in its position in the Bosch case had called the constitutional elements in the EEC Treaty"[17].
When the ECJ judged the case, it took a clear stance on the nature of European law. It resolved two problems in international law: the lack of uniform application of European law by national courts across the Member States and the lack of primacy granted to international law in several Member States. The second issue was already regulated in 1964 by the case Costa v. E.N.E.L. but the system was fragile due to its dependency on cooperation from national courts through the preliminary reference system. Accordingly, the full effects of the judgment were felt after the Single European Act of 1986[18]18.
The judgment represented a decisive step forward in the construction of Europe. It was an important step in the distinction of European law from what was perceived as traditional public international law. This process was completed when the Court identified the European legal order as a new legal order in Costa v. E.N.E.L. The weaknesses of this public international law were the lack of uniform interpretation of European law and primacy. The question of primacy was not settled at once, but there were several indications that the primacy of European law over national law would emerge. "In this sense, the Van Gend en Loos judgment constituted a revolution in the case law of the ECJ and a final endorsement of the constitutional approach to European law, long promoted by the legal service". The new European legal order also constituted a new enforcement system in the member states. This system had a considerable weakness namely that the application and uniform interpretation of European law depended entirely on the cooperation of national courts with the ECJ[19].
It was not until the 1970s and 1980s that the courts of the Member States cooperated and the case law of the ECJ was able to invalidate national legislation contrary to European law and to develop the doctrines of constitutional practice that have shaped the European legal order[20].20

Section 2: Various features

It is possible to compare the European legal order and the transnational law on different points. The European legal order as described in the Van Gen and Loos judgment indicates us features which prima facie could imply that we are facing something translational. We can underline three aspects.
First, as is known, the European Union exists at the regional level while the Transnational law, generally, relies on issues at the international level, but both to deal with problems which go beyond the reach of a single state. Indeed, the European legal order is always dealing with issues which can be described as transnational because they go beyond the reach of a single state. The issue always needs two or three more states, so two or three legal orders involved.
Both refer to cases which have elements of transnationality or Europeanness. We can illustrate this argument with the "Rottmann" case. It is a case about a man who lost his Austrian nationality to acquire German nationality. During the investigations it was discovered that this man had been pursued in Austria for a criminal offence and that he canceled it to obtain German nationality. Because of this, the German authorities have withdrawn the concession of this nationality.

---

[17] M. RASMUSSEN, « Revolutionizing European law: A history of the Van Gen den Loos judgment », *International Journal of Constitutional Law,* Vol. 12, n°1, 2014, p. 152.

[18] Ibidem, p. 136
[19] M. RASMUSSEN, « Revolutionizing European law: A history of the Van Gen den Loos judgment », *op. cit*, pp. 155-156.

[20] Ibidem, p. 160

The German judge brought the case before the court as a preliminary ruling to ask what would happen to the European citizenship. During the discussion before the Court,
Germany put forward an important agreement. It said there was no link with the European law because it was a German national man who had violated German law and had been sanctioned by German authorities. The Court admitted that European Union law was about issues which are related to more than one state. Nevertheless, the Court asked to ensure the respect of the principle of proportionality, a European principle which applies everywhere.
Second, the European legal order, as the Transnational law, is not only about states. It deals with issues which concern individuals, not only states. The substantive issues of course related to individuals, mainly at least. Indeed, most of its cases directly concern individuals. The state is involved whether as a legislator or as judge but on the first plane there always exists the individual.
Another feature is the fact that, the European legal order, as well as the Transnational law is essentially a judge-made law. As we know, Jessup asked judges and lawyers to change this way of reasoning when discussing issues of transnational law or transnational nature. Along with transnational law, European Union law is a judge made. The European legal order and the transnational law approach always have to do with issues which are discussed in judgments.

Section 3: European legal order as a transnational legal order

The last part consists of analyzing whether the European legal order could be an example of transnational legal order. Indeed, Transnational law has no territorial localization while the European legal system only exists on the European territory. Furthermore, it is difficult to speak about a transnational legal order when we are talking about something created by the state through an international treaty.
Certain scholarly approaches have defined the European Union as a Federal state or an International organization, but the treaties make no mention of that. In my opinion, one can say that the European Union is a network, or a network of networks. Indeed, the European field can be regarded as a kind of global environment, as a transnational legal order. It can be a legal environment capable of creating links between states.

(a) European Judicial Networks

A network is defined by Tanja Börzel as "a set of relatively stable relationships which are of non-hierarchical and interdependent nature linking a variety of actors, who share common interests with regard to a policy and who exchange resources to pursue these shared interests, acknowledging that cooperation is the best way to achieve common goals"[21].
Law and social science are taken as an interest. For both, the core feature of a network is the same: the existence of interlocking and non-hierarchical relationship between various actors. However, they use network as an instrumentalist fashion in a different way. While social scientists rely on it to relate and interpret a social reality, the law designs it as a structure in which the relevant actors are connected through a series of interrelated legal rights and obligations. In other words, the law thus actively creates networks that exhibit a higher degree of institutionalization than the social science version. Social science and the legal approach are not mutually exclusive. Indeed, applied to the idea of judicial network, network participants are grounded on both formal legal rules that mandate interaction and informal connections which are grounded in the mutual trust and respect[22].

---

[21] M. CLAES, M. DE VISSER, « Are you networked yet? On dialogues in European Judicial Networks », *Utrecht Law Review*, 2012, p. 101.

[22] Ibidem, p. 102

To explain why the European system is a network, we can speak of the networks among judges and courts. Indeed, there exists an idea of "transnational judicial communities". Meaning that "judges from different legal systems share common beliefs, values and a self-perception and understanding of their role in the legal system and in society. Judges may share a common interest in the intrinsic value of legal concepts and in the quality of the legal argument and so transnational dialogues may also flow naturally"[23].
The judges come from different backgrounds, are themselves very different but naturally get on well together. From these transnational judicial communities, judicial dialogues can be observed at the European level.
First of all, there exist horizontal European networks. Some of them are created by the European legislature (European Judicial Network, Eurojust and the European Judicial Network in Civil and Commercial Matters) and others by the judiciaries themselves (for example the Network of the Presidents of the Supreme Judicial Court of the European Union, the Association of the Council of State and Supreme Administrative Jurisdiction of the European Union, Association of European Administrative Judges…). The first ones aim to facilitate and enhance judicial cooperation in the relevant field. The second start from pre-existing mutual trust and a mutual perception among participants of belonging to the same transnational judicial community, so the mandates of these networks vary. To achieve their aims, some dialogues must take place.
This could take the form of regular face-to-face meetings, but judicial interactions could also rely on sophisticated IT facilities. Finally, it should be mentioned that there is collaboration between the European institutions and networks created by judiciaries, and this can take the form of providing financial support.
The horizontal European networks exists but it is pertinent to explain that there are several reasons for which judges cooperate with each other in judicial networks. On one hand this is for practical reasons and on the other, not to be left behind in the face of other courts uniting. The practical incentive is the pressure of globalization for the actors involved in the judicial business. The authority incentives concern the purpose of borrowing or enhancing the participating court's autonomy. It can take several forms. Judges could want to exercise judicial leadership in a changing institutional setting. It can be interesting for judges involved in networks that seek to cooperate with the European institutions (influence the European agenda according to their domestic interests). Some judges can use their participation in a transnational network to build their credibility outside their own legal system. Indeed, the principles of European law of direct effect and supremacy increase the relevance of ordinary courts. They can also take part in judicial networks for reason of international profiling. Other factors explain the creation and the success of the networks: the language, judges are citizens and representatives of their countries (so conversations are both legal reasoning and the judge's will), the prominence of personalities (so important personalities of small Member States can become leaders).
The rise of this horizontal judicial network has normative implications for the more vertical relationship between national judiciaries and the CJEU. Fist, judges in our constitutional traditions are the mouthpiece of the law, so they must be independent. The networks require a change in legal thinking, a "paradigm shift". It is possible to find in the European Union an element in this sense: The constitutional pluralism discourse. The idea is to move from final authority to a more non-hierarchical and cooperative approach. Networks will then have the potential to increase the dialogical qualities of the relationship between the European and the national courts. Indeed, networks offer to judges the possibility to discuss face to face (without to consider the other participants of the legal debate) which can avoid misunderstandings or other blockages. In this respect, networks contribute to building mutual respect between courts from different legal orders and it is only under this condition that a pluralist conception of European constitution can flourish[24].

[23] Ibidem, p. 100
[24] M. CLAES, M. DE VISSER, « Are you networked yet? On dialogues in European Judicial Networks », *op. cit.*,

The rise of judicial networks is important for the conceptualization of the European legal order as a composite legal order. The CJEU must show its engagement in these judicial networks. It is important in this new environment in which national courts are adopting a pro-active approach in debating their relationship with the CJEU. The Court must support the "bottom-up initiatives" and take the lead if necessary[25].

The European system corresponds to the definition of network because it is a set of common institutions aiming to drive members states towards common aims and interests, even if it is necessary to leave aside the perspective of a normative state. Networks permit an increase in the qualities of dialogue and a relationship between the European and the national courts[26].

(b) The open method of coordination

The Open method of coordination can exemplify that the European Union is a network of networks. It is one of the new forms of European governance. It was created in the 1990s by the Commission. The European Union developed the open method of coordination because it is aware that in some issues it is practically impossible to reach the result with the adoption of an act. Indeed, the open method of coordination (OMC) is a form of soft law. It is a form of intergovernmental policy-making that does not result in binding European legislation and does not oblige European countries to introduce or change their laws[27]27.

Thus, the OMC is a departure from the classic Community method. It also turns its back on the demands for uniformity that were emphasized with the Van Gend and Loos and Costa v. E.N.E.L. rulings in order to accept the diversity of situations in the Member States. The most important element to emphasize is the "open" character of this process. Indeed, it involves the participation of many political, economic and social actors at European, national and local levels[28]28.

On the other hand, given the absence of binding effects, there is little room for the Community judge (this has been highlighted by several critics of this method). The European Union has developed ways of adopting rules which are not simply a recast of the community methods. Accordingly, it is possible to conclude that it is a new experiment which cannot be put in relation with the traditional community approach.

Conclusion

This work was introduced by the Treaty of Westphalia and the borders it established. Transnational law, which has emerged in the midst of a crisis of international law, has escaped these boundaries by proposing a new and complex assemblage of levels, structures, and organizations that cannot be clearly defined[29].

---

p. 113.

[25] M. CLAES, M. DE VISSER, « Are you networked yet? On dialogues in European Judicial Networks »,*op. cit.*, p. 113.

[26] Ibidem, p. 112

[27] EUR-LEX, *« Open method of coordination »,* available on https://eurlex.europa.eu/summary/glossary/open_method_coordination.html, consulted on the 2 June 2021

[28] A. ILIOPOULOU, «La méthode ouverte de coordination: un nouveau mode de gouvernance dans l'Union européenne», *C.D.E.*, 2006/3-4, p. 315.

[29] A. DUVAL, « Lex Sportiva: A Playground for Transnational Law » in *The Future of Transnational Law / L'avenir du droit transnational*, 1e edition, Bruxelles, Bruylant, 2014, p. 363.

Transnational law has thus arrived on the world scene by breaking pre-established frameworks. It understood that national and international law were too rigid to respond to all the interactions that were being established at the speed of light in a wide spatial spectrum. Moreover, many legal scholars (among others) have been looking at transnational law, attaching importance to this new reality and trying to provide a framework for it.

In view of all the observations that have been made, the time has come to answer the question as to whether the European legal order is a transnational law. Common points were raised, and different networks were defined, so that the answer is obvious: yes.

Indeed, as there is no exact, unanimous and actual definition of transnational law, the study has managed to show sufficient elements to describe the European legal order as transnational law.