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GAETANO GRASSO

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The School of Laws
University of Catania
Villa Cerami I – 95124 Catania Italy

1. Wars in the globalised world, peace around the world is still far. Beyond the reach of the State

"Periods of happiness are the blank pages of history". Although Hegel's thought dates back to the 19th century, these words are still very relevant today.

Isaiah Berlin and other scholars of that time claimed that the 20th century was the worst that humanity has built in its history. It is difficult to dispute such a statement if we consider that the last century saw two world wars, the nuclear holocaust of Hiroshima and Nagasaki, the Nazi concentration camps and the extermination of over six million Jews.

It is known that where there is war there is denial of rights and the II World War was the greatest denial of human rights. Over the centuries, the aspiration to freedom has animated men of all times and civilizations. Freedom would remain a mere abstraction if precise rights were not claimed and the need has repeatedly felt the need to affirm human rights based on the needs of the period and the existing socio-political conditions, just think of the United States Declaration of Independence in 1776, the Declaration of the Rights of Man and of the Citizen in 1789 and in the last century the Universal Declaration of Human Rights, proclaimed on 10 December 1948 by the United Nation General Assembly.

In particular, Art. 1 of the Universal Declaration establishes: *All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*

The failure of the League of Nations project to prevent wars (both through the diplomatic management of conflicts and through arms control) and the distortion of the world order produced by the II World War has inspired the thought and action of many illustrious men. Thus, new foundations have been laid for a lasting peace, to reaffirm the denied rights, to redefine the geopolitical structures and to rebuild a new international legal order, capable of coping with the old problems, but also with the new ones that faced the horizon. Until the first half of the 20th century, International law had developed under the influence of European schools and aimed both at ensuring a continental order and at supporting the expansion of European powers. After the II World War International law took on a new guise and has undergone several changes. The States were deprived of the *"ius ad bellum"* contemplated by traditional International law. The attention of International law shifted to the rights of the so-called war victims and war was defined an international crime. The radical change in International law consists in the beginning of a global phase of International law, just think of the creation of the United Nations.

Furthermore, in this historical period, we are witnessing what is defined as an infinite transition between two models competing for the scenario: on the one hand the model of European International law based on the coexistence of sovereign States and on the other hand the American model based on the activities of the world organization.

Nevertheless there is also a third model that has carved out an important space for itself: some scholars speak of *"global constitutionalism"* without geographical and political limits and of *"infinite constitutions"* highlighting the universalistic character of human rights. This would be due to the crisis and the criticisms leveled at Nation States and their sovereignty from the point of view of the erosion of

government powers over the economy in favor of regulatory agencies and supranational institutions. There is also the growing role assumed by the fora of intergovernmental cooperation (G8 and G20) towards strengthening global governance of the economy. The law follows the market, losing its borders and the *regulae iuris* recedes from the publicistic dimension of the primacy of the law to the privatistic dimension of contracts and self-regulation. Constitutional globalization must also deal with a plurality of globalisations in progress and expressions of cultures and traditions other than the Western one (Chinese, Islamic, etc.).

The phenomenon of globalisation has raised the problem of the methods of coordination of legal systems and has somewhat reduced the role of international law, as the main tool in identifying legal norms suitable for governing various situations. About this, many scholars have given life to the cd. transnational models, looking for a solution, creating a new legal dimension, a right for the global society.

Therefore, the second post-war period was a flourishing period for the law and it is appropriate to list some important ideas and projects put forward more or less in the same years.

1.1 The Constitutions of the second post-war

Democratic-social constitutions were drawn up (Italy, Germany, France), which introduced the control of constitutionality of laws and pluralism was recognized. Some of these constitutions dedicate one or more articles to the war: the Italian Constitution in 1947, the Japanese Constitution in 1947, the Basic Law for the Federal Republic of Germany in 1949. We can grasp a strong message in some articles: the repudiation of offensive warfare, even if defensive warfare is implicitly admitted in the event of a military attack by a foreign country, as can be seen from art. 11 of Italian Constitution and from art. 26 of the German Grundgesetz of 1949. On the other hand, Japan's attitude (albeit influenced by the pressure from the United States) to solemnly and forever renounce war as the Nation's sovereign right is exemplary (art. 9).

While in 1947 States such as Italy showed themselves available to any limitations of their sovereignty (art. 11, paragraph 2 of the Italian Constitution: << *Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations having such ends* >>. On the contrary the allied States (United Kingdom, USA and USSR), as early as 1945 were thinking of dictating the rules to rewrite the geopolitical assets. During the Yalta Conference some important decisions were taken on the continuation of the conflict, on the future order of Poland and on the establishment of the United Nations.

1.2 The establishment of the United Nations and the rebirth of International law

After the Yalta Conference in 1945 a very ambitious project was madeto build common values on which to found the international community, seen as a community founded on the sharing of values. The main objective was to establish an international legal order to prevent another world war.

After several negotiations, in 1945 The United Nations was established by 51 Nations committed to preserving collective peace and security through international cooperation.

1945 is an important date for International law, because in this period the General Assembly of the United Nations was charged with *"encouraging the progressive development of international law and its codification"*, a task that the Assembly carries out mainly through the Commission of international law, its subsidiary body.

Subsequently, in 1948 the riots in Palestine for the proclamation of the State of Israel and the killing of Count Bernadotte and Colonel Sérot, led to the International Court of Justice in 1949 giving an advisory opinion on the case << *Reparation for Injuries suffered in the service of the United Nations* >>. The Court ruled on a subject dear to International law: the recognition of legal subjectivity to international organizations and the consequent legitimation of the State (of which the killed official is a national), to act internationally for the compensation of damages caused to the person of the officer.

In 1949, therefore, the problem of the qualification of the United Nations as a subject of international law arose. The positive response of the International Court of Justice put a fundamental point on the question: the United Nations is a subject of international law, the holder of international rights and duties even though it is neither a State nor a super State.

From 1980 the International Court of Justice pronounced another opinion, the subjectivity of international law was also recognized to other international organizations.

International organizations, especially the United Nations, have contributed to the economic and social development of the entire international community. The principles of a new order of economic relations between States were elaborated, inequalities in the conditions of economic and social well-being were reduced. In addition, the United Nations has implemented technical assistance, financing and economic reconstruction programs in many areas of the world.

In the area of human rights protection, important legislative acts have been adopted to promote minimum standards of respect for the main human rights and condemn serious violations of these rights (Universal Declaration of Human Rights, 10 December 1948).

There is substantial scholarly disagreement about the effectiveness of the organization as well as the policies that it has pursued and programs it has initiated in response to a succession of global crises, anyway nowadays almost 200 countries are part of the United Nations. When a State becomes a member of the United Nations, it decides to accept the obligations of the UN Charter, an international treaty that establishes the fundamental principles of international relations. According to the provisions of the Statute, the United Nations has four functions: to maintain international peace and security, to develop friendly relations between nations, to cooperate in the resolution of international problems and in the promotion of respect for human rights, to represent a center for harmonization of the various national initiatives.

1.3 Peace in Europe and ideas of European unity. A new legal order is born

On the *"European"* side, there is another ambitious project, that is the dream of a united Europe, a project that begins to take shape in the years 1945-1964. The new European structure is based upon two international treaties, open for signature only to European States: *ECHR* and *ECSC*, then the *EEC Treaty* and *Euratom Treaty*. European Union is a creation of the concept of integration without achieving a fusion of national sovereignty. As a matter of fact the Member States did not want to give

up the structure of their national State in favor of a European federal State. A compromise was needed to ensure more than mere cooperation between States, so it was necessary to determine the specific areas in which Member States were willing to voluntarily give up part of their sovereignty in favor of a higher-order community. The founding treaties of the ECSC, EEC and Euratom are the result of this compromise.

The ideal of a united Europe was the dream of many thinkers as early as the 19th century. Carlo Cattaneo proposed the advent in Europe of a great federation of free peoples; Giuseppe Mazzini founded the *Young Europe* in 1834.

The words of Victor Hugo, pronounced at the International Peace Congress in 1849, were partially prophetic: *<< A day will come when you France, you Russia, you Italy, you England, you Germany, you all, nations of the continent, without losing your distinct qualities and your glorious individuality, will be merged closely within a superior unit and you will form the European brotherhood >>*.

Nevertheless, in the first half of the 20th century, nationalisms, fascist and nazi dictatorships and world wars interrupted the dream of European integration. But already in 1941 Altiero Spinelli, an anti-fascist condemned to confinement by the Mussolini regime, had drawn up the *"For a Free and United Europe. A Draft Manifesto* "(also known as *"The Ventotene Manifesto"*), which inspired the European Federalist Movement in 1943, supporter of the principle that the states of the *"Old Continent"* should renounce a part of their sovereignty, in favor of establishing structures European federal ".

After the II World War, the inferior condition of Europe (compared to the two superpowers USA and USSR who emerged victorious from the conflict) and the desire for lasting peace led to look for a prospect of European unity. Political and State activity was almost exclusively based on national Constitutions and laws. The States established rules of conduct of a binding nature for the State itself and its organs, but also for the citizens. The economic and political decline have led to the revival of the idea of European unification. In this project of unification and in the attempt to lay the foundations for a lasting peace, prominent exponents participated including Adenauer, Churchill, De Gasperi, Monnet, Schuman.

In 1949 the Council of Europe was founded, a political organization that ensures human rights, democracy and the rule of law in Europe.

In 1950 the members of the Council of Europe drafted the *European Convention on Human rights*. This Convention established the safeguard of human rights in the Member States, but also a series of legal guarantees. Indeed, the European Commission of Human Rights (abolished in 1998) and the European Court of Human Rights can act for violations of human rights in the Member States.

The European Convention on Human Rights, signed within the Council of Europe in Rome in 1951, is the first document that recorded the will of the European peoples to make their own those rights that the United Nations had proclaimed as universal in 1948. The Council of Europe subsequently submitted the *European Social Charter* to the signing of the Member States in 1961, while the United Nations adopted the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* in 1966.

At the end of the II World War, six States (Belgium, France, Italy, Luxembourg, the Netherlands and West Germany) became aware that such devastating events should no longer repeat themselves and the consolidation of peace was the goal pursued by the nascent desire for European integration.

Robert Schuman, one of the fathers of European unity, sensed that the lack of total control of energy and steel would lead to no more declaring war. On this principle, the European Coal and Steel Community (ECSC) was born.

1) The ECSC Treaty (established in 1951 by the Treaty of Paris) was ratified by Italy with Law N.766 dated 25 June 1952, starting the gradual process of European unification. The fundamental objective was the establishment of a common market in the coal and steel sector, which would first of all create *a de facto solidarity* between the States, with the establishment of common foundations for economic development, in order to ensure the most rational distribution of these goods to the highest level of productivity, while at the same time protecting the continuity of employment. The common market is assumed to be the space in which these aims can be achieved.

From the juridical point of view, the community appeared from the beginning as a body of international law not attributable to simple institutional unions, since it presented, especially in the competences for the implementation of the principles of non-discrimination and the protection of free competition, the characteristics of a supranational subject, that is, of a subject that compressed and limited the sovereignty of the Member States.

At the political level, the ECSC is the first expression of the prevalence, in the construction of European unity, of the *"functional"* conception, according to which << *Europe will not be made all at once, or according to a single plan* >>. Instead, the opposing *"constitutional"* vision, which advocated the immediate creation of a federal-type organization, was not accepted, since the times were not ripe.

The process of European unification continued with the subsequent creation of two other distinct communities.

2) The EURATOM (EAEC, established in 1957 by the Treaty of Rome) was created in order to coordinate the research programs of the Member States for the peaceful use of nuclear energy. As a matter of fact, in a context characterized by a generalized lack of traditional energy sources, the six founding countries of the European Communities opted for nuclear energy in order to achieve a greater degree of energy independence.

The primary objective was to contribute to the development of the European nuclear industry, allowing all Member States to benefit from the use of atomic energy for civilian purposes, guaranteeing security of supply and a small margin of risk for the population.

This community, aimed at creating the nuclear common market, also has legal personality since, as established in art. 101 of the founding treaty, it may conclude, within the scope of its competences, agreements or conventions with a third State, an international organization or a citizen of a third State.

3) The EEC (established in 1957 by the Treaty of Rome), as a complex international organization, with the characteristics of institutional unions and typical elements of supranationality, has assumed the role of protagonist of the European integration process. This community, according to art. 2 of

the founding treaty, promotes (through the establishment of a common market and the gradual approximation of the economic policies of the Member States) a harmonious development of economic activities in the community as a whole, a continuous and balanced expansion, a increased stability, an ever more rapid improvement in the standard of living and closer relations between the participating States. To achieve these aims, the action of the community, according to the treaty, involves the abolition of customs duties and quantitative restrictions on the entry and exit of goods, the establishment of a common customs tariff and a commercial policy, the elimination of obstacles to the free movement of persons, services and capital among the Member States, the establishment of a common policy in the agricultural and transport sector, the creation of a system designed to ensure that competition is not distorted, the application of procedures that allow the coordination of the economic policies of the Member States and to remedy the imbalances in their balance of payments, the approximation of national laws to the extent necessary for the functioning of the common market, the establishment of a bank European Investment Fund intended to facilitate the economic expansion of the community by creating new resources.

In particular, the Treaty establishing the EEC provided for the customs union between the signatory countries and a common customs tariff for imports from other countries, an objective that was effectively achieved on 1 July 1968 when the European Common Market became operative.

For the first time in the EEC Treaty provisions are laid down for a common social policy, especially in the employment sector (equal pay, social security for workers, accident protection) and the establishment of a European Social Fund is envisaged, in order to improve the possibility of employment for workers and to contribute to the improvement of their standard of living. Already in this treaty there are the elements for the passage from the simple economic unity to the more complex political and social unity.

Among the three Communities, the EEC was undoubtedly, for the broader purposes of the founding Treaty, the one within which the greatest developments in the integration process between the Member States took place. Since 1992, the expansion of the objectives and powers of the EEC, from the original economic sphere to the political one, also determined the new name of the European Community (EC), formally adopted with the Maastricht Treaty. At the same time, the same Treaty established the European Union (EU), which, in this initial phase, was however conceived not as a further organization with legal personality (international organizations), but as a stable mechanism of intergovernmental cooperation between States Members of the EC, for the coordination of policies relating to foreign affairs and for cooperation in justice and home affairs, matters not included (in that historical period) within the competence of the Community institutions.

1.4 Philip Jessup and the Storr Lectures

Last but not least, new currents of thought arise in parallel with traditional international law. I refer to several groups of scholars who, starting from the famous *Storr Lectures on Jurisprudence* by Philip Jessup, have analyzed and highlighted the peculiar characteristics of Transnational Law.

The parallel project of a new school of thoughts started around 1955-1956, when Professor Philip Jessup held the *Storr Lectures* at the Yale University.

Professor Jessup introduced the term *"Transnational law"* to legal studies and elaborated on the challenges that this new perspective poses to legal practice, domestic and international.

It should be noted right away that Philip Jessup was not interested neither to create a new law category, neither a new group of scholars, neither further classification of transnational problems and further definitions of transnational law.

With the *Storr Lectures* he wanted to focus the attention on the existence of several problems which he defined *"transnational situations".* All that was being told regarding the subjects of private international law and public international law was not all that was happening. He wrote that there were some issues which can not be qualified into a traditional sense. These situations are very difficult to be identified and analyzed through the traditional concept of the traditional international approach.

That's why he wanted to make this distinction: << *the problems to be examined are in large part those which are usually called international, and the law to be examined consists of the rules applicable to these problems* >>. The term *"international"* may generate confusion, because << *it suggests that one is concerned only with the relations of the Nation (or State) to other Nations (or States)* >>. The term *"international"* is inadequate to describe the problem of the << *complex interrelated world community* >> which do in fact transcend national boundaries.

Jessup highlighted the gaps between private and public international law and the need to adapt the law to cross-border problems.

Transnational law is thus taken << *to include all law which regulates actions or events that transcend national frontiers* >> and transnational situations may thus involve << *individuals, corporations, states, organizations of states, or other groups* >>.

Jessup tried to contrast what was going on at the United Nations with the States that were actors, going beyond the borders of the single States, but nevertheless having as actors entities different from the States which with or without the States were capable managing relation among them.

The Nation-States are not being able to cope with many among the most important problems in our globalised world, such as regulation of the global economy, problems of world security, environmental threats, etc.

Before going to define what is Transnational Law, we have to compare the statement of Professor Jessup to the statement by the Court of Justice in Van Gend & Loos judgement.

Professor Jessup wasn't interested to define in which way transnational law should be defined. He was interested to assert that several transnational situations exist, which need to be analyzed with an approach which must go beyond the traditional categories such as: public international law, private international law, internal contrasting the international law.

On the contrary, the Court of Justice was interested to assert that a new legal order has been created. It was useful for the Court to point up the idea of a new legal order was established.

It is possible to speak of Transnational Law, the European momentum, because we can find a common thread: Jessup's transnational situations were more or less the same legal issues that the European Court of Justice had to confront.

2. What is Transnational Law?

<< 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 >>.

According to Professor Roger Cotterrell, *<< the new term is "transnational law", widely invoked but rarely defined with much precision >>.*

The definition is very wide and there is a conceptual controversy around the words *"other rules which do not wholly fit into such standard categories"* and several scholars tried to explain what is Transnational law.

First of all, the term *"Transnational"* in reference to legal or law-like phenomena that exceed the domestic sphere seems to be adequate, since the prefix *"trans-"* suggests "across", "beyond" and "through".

In an article published in the German Law Journal in 2009, Professor Craig Scott made an important contribution to answer the question. He considered Transnational law as a proto-concept and he offered a very insightful conceptual discussion in which he distinguishes three conceptions of transnational law (traditionalism, decisionism, pluralism), arguably siding with the third.

The first conception makes reference to the law that regulates transnational phenomena of any kind, considering that it is made up of rules, principles and/or standards and related decisions and other juridical acts located in one of two kinds of legal systems: public international law or the State law.

The second conception makes reference to a sort of "law in the result" in terms of the legal decisions that are gradually building up with respect to transnational problems, taking into account that it is the domestic law and the interstate law that create the set of norms that may be thought of as rules of decision and they also bestow authority upon certain actors to exercise a power of decision that leads to some kind of resolution of a transnational issue, problem or dispute.

These two conceptions accommodate the obvious fact that there are legal phenomena going on across, or through, or beyond borders, but they do not question the central position of the State, either by reference to domestic law or interstate law. Things are different, however, according to the third conception, that Scott himself calls *"transnational socio-legal pluralism"*. This conception *<< sees transnational law … as being in some meaningful sense autonomous from either international or domestic law >>.*

In the third conception there is an obvious connection with the literature on legal pluralism, as Scott underscores. The third conception questions the very definition of law. Infact it differs from the previous two for the independence from the State law and this transforms the conceptual controversy into a full-fledged confrontation. There is marked resistance on the part of legal scholars to accept a (transnational) conception of law that escapes the fundamental principle of state monopoly.

Professor Peer Zumbansen tried a systematization in several works. In an article published in 2006, originally conceived as an entry in an Encyclopedia of Comparative Law, Zumbansen briefly

presented a summary of his ideas concerning Transnational law, starting from the main idea of globalisation.

Although the term *"globalisation"* had not yet entered the Lexicon at the time of Jessup's lectures, Transnational law is rapidly growing field of legal study. Traditionally concerned with comparative and international aspects of private and commercial law, Transnational law has been and continues to be of particular importance to legal practice (in law firms, corporations and the judiciary). Nevertheless, Transnational law also describes a new methodology: studying legal issues such as human rights, property or sustainability across and beyond Nation States, it offers new insights into the legitimacy of the nation state, the concept of the sovereign State and how this concept can be advanced to meet global challenges. Key areas of interest are theories of global governance and an emerging field of global constitutionalism. According to Zumbansen, the main feature of Transnational law is the fact that it is not a territorial order and even if the State is involved in some of these legal developments, again the territoriality is not relevant as a core element. Transnational law is *"a lens"* through which particular relationships between national laws become visible.

In the book *"Rough Consensus and Running Code: A Theory of Transnational Private Law"* published in 2010, Gralf-Peter Calliess and Peer Zumbansen developed a theoretical framework of transnational legal regulation, analyzing the different law-making regimes currently observable in the transnational field. Borrowing a concept of norm creation that was first developed in the context of Internet standards, Calliess and Zumbansen introduced the idea of 'Rough Consensus and Running Code' (RCRC), suggesting that << *a dynamic process of consensus building and code evolution can adequately capture the interdisciplinary, intricate nature of contemporary transnational lawmaking* >>.

They highlighted a new perspective on the role of law in global governance. By taking legal pluralism as a point of reference, they developed an innovative theory of transnational legal regulation, focusing on the fact that nowadays National States have a very limited role. In their words: << *we understand transnational law above all to demarcate a methodological position rather than to identify a perfectly map-able doctrinal field* >>. This method is then confronted with two major case studies: consumer contracts and corporate governance.

Several scholars argue that for all those matters that get away from the territorial and personal delimitation imposed by States and between States, it is necessary to affirm a new type of law, which in the present case could be Transnational law.

The proposal of a Transnational law that regulates actions and events that transcend national borders is still valid, indeed it appears even more current, and therefore to be used for the purposes of a configuration of the legal space beyond the States, in which new actors move, with relationships that are regulated regardless of the traditional mechanisms of international law, but which presuppose National law.

In contrast with the main argument in Zumbansen theories, some years later, in an article published in 2017, Gregory Shaffer and Carlos Coye approve the development in Transnational lawyering, which was for the first time put forward by Jessup, but they think that it is impossible to build legal orders without the jurisdiction of the State. They assume that of course private actors are central in driving the development and application of international law, as when they participate in law making

that is eventually incorporated into public international law, when they bring claims before national Courts derived from International law. What they stress is that you can not properly speak of law if the jurisdiction of the State has not been involved directly or indirectly and they use a set of examples which are drawn from legal practice, in which (at least in their opinion) a series of transnational legal orders can be detected operating through a process which starts from the private. The private being the starter of the legal process (for instance for a claim) but to be considered a legal order, even transnational, always need a State exercising its jurisdiction and those organizing a public function of what has been elaborated.

Shaffer and Coye argue the possibility of theorizing *transnational legal orders: << The term transnational legal ordering refers to the transnational construction, flow, settlement, and unsettlement of legal norms in particular domains. 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" in these domains >>.*

Public international law interacts with Jessup's other two components of transnational law: private international law and "other rules." Public international law has a central role in the concept of transnational law, both empirically and normatively, permeating State boundaries through formal as well as informal processes.

Therefore, the main issue of territoriality of State legal orders, of non territoriality of Transnational orders and of the role of the State in this panorama is solved in two different ways: according to Zumbansen it is possible to build a non territorial order through simply private free intercorse; according to Shaffer and Coye the role of the State is necessary.

Several scholars have argued the idea that Transnational law can coexists with a system based on State jurisdiction and on State made law, because you can have non territorial disputes, but you still have jurisdictional territorial set of norms and Courts which are made to enforce the law. So, the conclusion of this reasoning could be that States have elaborated set of rules which exist to allow the coexistence of this system of States. Both Public International law (through which jurisdiction of States can coexist through treaties or customs), and Private International law (a set of rules that explains which State law you should choose to norm a set of situations) complete the legal framework of Transnational law. But besides, beyond this system, which is territorial in nature, there is a vast possibility of norm creating agencies, which are not State made, which are made by private or have emerged through these intercorse which exist beyond and beside the State system.

According to Professor *Rosario Sapienza* this is the way to order the issue of Transnational law. Transnational law is not International law nor is it capable of substituting Public International law, it is another thing. It is a set or rules, existing through procedures which can subsist without the State, but not against the State.

Professor Sapienza has a different idea from Zumbansen and Shaffer-Coye: he asserts that Transnational law can be made without the State but also with the State. Anyway the point is not if you need States to build Transnational law, the point is that all these legal norms are still existing, Transnational law exists and it is compatible in principles with State legal orders. When you have a conflict between Transnational law and Public International law or rather the system of State based law being internal or international, this is the issue: it always comes to State jurisdiction to solve these issues.

In conclusion Transnational law is very wide, a category in which it is practically possible to include in it almost everything. In particular it's possible to state that a legal order can be transnational, when it relates to cases involving subjects, people coming from two or more States with legal intercorse among them with or without cooperation of the States.

It is possible to consider the European Union a non territorial body of law, which is one of the main features of Transnational law.

3. Is it possible to speak of European Union Law as a legal order, which can be described as transnational?

It is now necessary to define the legal nature of the European Union, specifying right away that the idea of a European legal order was put forward not before 1963, when the European Court of Justice delivered the most celebrated Van Gend & Loos judgement. Therefore, only in 1963 The European Court of Justice states the idea of the existence of a new legal order at European level, which is regarded as being autonomous and distinct from the International Law but also from the internal legal order of the Member States.

The legal nature of the European Union has been clarified with the two famous judgements pronounced by the Court of Justice respectively in 1963 (Van Gend & Loos) and in 1964 (Costa v Enel). Although these judgments originally referred to the previous European Economic Community, they still retain their validity even today with regard to the current structure of the European Union. Even the Plaumann judgement pronounced in 1963 still retains its validity today. These three judgements set a framework of rules which are never changed.

1) In the *Plaumann* judgement**,** a German importer from non-EU countries challenged a Commission decision addressed to the German Government refusing authorisation to partially suspend the collection of customs duties. The Commission argued that non-addressee individuals could not bring an action for annulment.

The Court held that persons other than the addressees of a decision can claim that it concerns them individually only if that decision concerns them because of their particular qualities or because of a factual situation that characterizes them compared to anyone else and, therefore, distinguishes them similar way to the recipients. Several proposals were made to reconsider this criterion but the Court has consistently maintained this approach. This ruling laid the foundations on which the interpretation of the legitimacy requirements established in art. 263 paragraph 4 of the TFEU is based:

<< Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures >>.

The Plaumann formula is still valid on the interpretation of the requirement of individual interest in the action for annulment.

<< Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of

these factors distinguishes them individually just as in the case of the person addressed. In the present case the applicant is affected by the disputed decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practised by any person and is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of the addressee >>.

2) The *Van Gend & Loos* judgment defined the fundamental features and principles of the community order, outlining a systematic reconstruction.

On the effectiveness of Community law in the internal legal systems of the Member States, the doctrine is divided into two conflicting approaches. One conception attracts all the legal phenomenon produced by the creation of communities in the traditional context of the relationship between State law and International law. For this theory, the direct applicability of Community law concerns the derived rules, which have internal significance for the will of the Member States to adapt their own legal system to them and only by virtue of the persistence of this will through adaptation techniques.

On the contrary, the concept put forward by the autonomist doctrine highlights the profound difference between the community legal system and the norms expressed by other traditional international organizations. This concept underlines the full autonomy of Community law in its spheres of competence, in which the Member States have renounced legislative intervention except to the extent provided for by the Treaties. The jurisprudence of the Court of Justice has developed along the lines of this autonomist vision.

The Van Gend & Loos was a Dutch company that had imported a chemical substance from Germany into the Netherlands. The company filed an action against the Netherlands customs authorities for imposing an import duty on a chemical product from Germany which was higher than duties on earlier imports. The company considered this an infringement of art. 12 of the EEC Treaty, which prohibits the introduction of new import duties or any increase in existing customs duties between the Member States. An appeal against payment of the duty was brought before the Dutch Tariefcommissie, and Article 12 was raised as an argument. The Tariefcommissie referred two questions to the Court of Justice under Article 177 of the Treaty:

1) Does Article 12 of the EEC Treaty is directly applicable within the territory of a Member State? In other words, on the basis of Article 12 EC, can nationals of a Member State lay claim to individual rights which the national courts must protect?

2) If so, does the application of the 8% duty on uroformaldehyde constitute an illegal increase under Article 12 of the EEC Treaty?

The Court found that the European Community constitutes a juridical order of a new kind in the field of International law and in favor of it the Member States have renounced, albeit in limited areas, their sovereign powers. This legal system recognizes as subjects not only the Member States but also their citizens, attributing to individuals both obligations and subjective rights that the national Courts were required to protect.

Already the doctrine of that time (Paolo Gori and Alberto Trabucchi) had underlined how the sentence constituted the first step to overcome the barrier of the particular sovereignties of the individual

States. Subsequently, the doctrine recognized the sentence as the cornerstone of the construction of the European legal order.

This judgement represents the conclusion of a process previously initiated by the jurisprudence.

- Judgment of 23 February 1961 (cases 30-59): the Court, with reference to the ECSC, while not expressly speaking of a partial renunciation of the Member States of their sovereign powers, had stated that the attribution of certain powers to the Community institutions had withdrawn the same powers from the Member States, establishing (with reference to the pursuit of common goals within the common market) that the institutions of the Communities had exclusive competence.
- Judgment of 23 April 1956 (case 7 and 9/54): the suitability of the Treaties to establish directly applicable rules is recognized, with reference to Article 4 of the Treaty, declaring that the provisions contained therein are in themselves complete and immediately applicable.
- Judgment of 16 December 1960 (case 6/60): establishes the direct application of the Community provisions, attributing to individuals (with reference to the Protocol relating to the privileges and immunities of Community officials) a right, albeit limited, recognizing their protection through appeal to the Court itself and not to the national judge (Article 16 of the Protocol). The same judgment contains the principle of the primacy of Community law over those of the Member States. Again regarding to the ECSC Treaty and the Protocol, the Court stated that having been ratified, they have the force of law in the Member States and prevail over domestic law. However, this primacy does not imply the invalidity or non-application of domestic law: if in a judgment the Court finds that a legislative or administrative act of the bodies of a Member State is in conflict with Community law, according to art. 86 of the ECSC Treaty, the State must revoke the act and repair the illicit effects that may have derived from it.
- Judgment of 6 April 1962 (case 13/61), concerning the EEC Treaty, defines the relationship between domestic and Community law. They are two distinct and different, independent legal systems.
- Judgment no. 778 of 7 November 1962 of the Italian Council of State: anticipates the Court's conclusions regarding the direct effect of the provisions of the Community treaties, stating, according to Article 31 of the EEC Treaty (which prohibited the introduction of new restrictions on intra-Community imports and measures with equivalent effects) that with the ratification and execution of the Treaty, Article 31 had been transposed by the Italian law, so that the citizen directly injured by a refusal to import from a ministerial circular, can assert the defect of the provision and the circular on which it is based, adding that no law had been enacted authorizing this limitation after the EEC Treaty came into force.

The Van Gend & Loos ruling introduces important new developments:

a) the systematic construction of the community order,

b) the presence of some fundamental principles of Community law which will later be developed by jurisprudence, becoming central.

This judgement qualifies the Community system as a new kind of legal system in the field of International law, in favor of which the States have renounced, even if in limited areas, their sovereign

powers, and recognizes as subjects, not only the States members, but also their citizens, giving them subjective rights, regardless of the rules of the Member States.

In other words, there is no adaptation of domestic law to Community law or the transformation of Community law into domestic law, as this would lead to the fragmentation of Community law. The latter is autonomous with respect to state law and this autonomy is confirmed by the removal from internal judges of the interpretation of Community law (Article 177 of the EEC Treaty) in favor of the Court of Justice.

Regarding to the relationship between Community law and that of the Member States, the principle of the autonomy of Community law should not be understood as separateness and distinction, since it would be contradictory to state, on the one hand, that the rules of Community law belong to a separate legal system and different from the internal one and, on the other hand, that such norms produce effects in the internal system.

The implicit configuration given by the Van Gend en Loos judgment will be corrected by the Costa v. ENEL judgment (in which it is declared, reaffirming the autonomy of Community law, that it is integrated into the legal system of the Member States and the national courts are required to observe it.

Thus the primacy of Community law over incompatible State law, even if later, is justified.

This qualification of superiority will be consolidated by the subsequent jurisprudence of the Court, in particular by the judgment of 13 February 1961 (Wilhelm) and, even more explicitly, by the judgment of 9 March 1978 (Simmenthal).

The Court affirms the invalidity of State laws in contrast with previous (directly applicable) Community provisions, which have the effect of preventing the valid formation of new national legislative acts if incompatible with Community rules.

In any case, what is the competence of the European Court of Justice to decide this question?

The Belgian Government argued that the question was one of whether a national law ratifying an international Treaty had prevailed over another law, and that this was a question of national constitutional law which lay within the exclusive jurisdiction of the Netherlands court. The Netherlands government supported this position, arguing that the EEC Treaty was no different from a standard international Treaty, and that the concept of direct effect would contradict the intentions of those who had created the Treaty. It warned of the possibility of states refusing to cooperate if the European Court of Justice decided that a Treaty Article could indeed be invoked by individuals before National Courts.

Starting from the assumption that the direct effect of a Community law depends only on Community legislation itself and that the question concerned art. 12 of the EEC Treaty, it was for the Court of Justice to interpret this rule and decide whether it was suitable for attributing rights to individuals, as provided for by Article 164 of the EEC Treaty.

Furthermore, since the Court was called to give a preliminary ruling, the sentence was capable of determining the application of the Community provision by the national judge.

The Court, while ruling on the interpretation of art. 12, implicitly judges Dutch law to be contrary to art. 12 which, in execution of a Protocol signed between the Netherlands, Belgium and Luxembourg in 1958, had increased the import duty. The Dutch Government opposed the admissibility of the question, arguing that it involved a judgment on an alleged violation of the Treaty, therefore it should only have been referred to the Court by means of an infringement procedure, by the Commission or by a Member State, in accordance with articles 169 and 170 of the Treaty.

The Court observed that if the only guarantee against violations of Community law was reduced to the only infringement procedure, the individual rights of the administrated would remain without direct judicial protection.

Furthermore, the supervision of individuals constitutes an effective control on the Member States compliance with their obligations, which is added to that entrusted by articles 169 and 170 to the Commission and the Member States.

For the Court, the infringement procedure and the alternative use of the reference for a preliminary ruling represent complementary tools for monitoring compliance with the obligations deriving to the Member States from Community law.

Moreover, the direct effect responds to two interrelated objectives: to prevent the rights of individuals (not entitled to an infringement procedure) from being deprived of judicial protection and, at the same time, to strengthen control over compliance with the law community.

The Court does not expressly rule on the question of the primacy of Community law over the rights of the Member States, but assumes that it is directly applicable to provisions of domestic law which are in conflict with it.

The Court affirms that the subjective right arises from the Community legal system, regardless of the rules issued by the Member States, but in the Van Gend & Loos case, Dutch rules existed that preclude the right not to suffer import duties, deriving from Article 12.

After declaring that this right arises directly from art. 12, without the need for a national law, it was necessary to resolve the question whether the subjective right could be protected within the legal system of the Member State, despite a rule of this legal system contrast with the recognition of this right.

The issues were distinct and the Italian Council of State with the judgement of 7 November 1962, in affirming the direct effect of art. 31 of the EEC Treaty (prohibition of introducing new quantitative restrictions on imports), had noted that there was no legislative provision that, after the entry into force of the Treaty, had authorized, for a consolidated commodity, the imposition (with a provision ministerial) of a limitation such as the one in question. The Council of State concluded that a legally protected position of individuals must be recognized, specifying: in the absence of a law that authorizes such limitation.

The Court of Justice, being in the presence of a State law, subsequent to the entry into force of the EEC Treaty, ordered that the right not to pay the duty established by this law was protected by the Dutch judge.

It is clear the duty of the National Court to disapply its law if it conflicts with a directly applicable provision of Community law. This primacy will be explicitly stated in the Costa v Enel judgement.

Community law is framed in the field of International law, first of all because there is a complex of rules that regulate relations between the Member States. Furthermore, it is reflected in internationalistic concepts and legal categories (for instance responsibility of the Member States for violation of obligations deriving from the European Treaties, committed by Regions or other local bodies, which are imputed to the State to which they belong).

The internationalist imprint that marks European integration is manifested in the *"dependence"* of the Union on the will of individual member states in certain sectors, such as the admission of new members; the procedures for revising the treaties; the withdrawal.

Another important point of the Van Gend & Loos judgment concerns the interpretative method of international treaties applied by the Court to ascertain whether art. 12 was immediately productive of subjective rights for individuals. The Court, within the framework of an objective interpretation, underlines the aim of the EEC Treaty, namely the identification of a common market, the functioning of which directly affects the subjects of the community and it goes beyond an agreement that is limited to create obligations between the contracting States and, therefore, the recognition of the suitability of the treaty to confer rights on individuals.

This is the interpretative method expressed by art. 31 of the 1969 Vienna Convention, according to which a treaty must be interpreted in good faith following the ordinary meaning to be attributed to the terms of the treaty in their context and in the light of its object and purpose.

The judgement also outlines the definition of the "*useful effect"*, as a general principle of Community law, according to which every rule must be interpreted in order to achieve its objective in the most effective way.

This profile emerges already when the Court rejects the argument according to which the breaches of the Member States could be asserted with the infringement procedure. But in this case, the Court found that the individual rights of the administrated would remain devoid of direct judicial protection. A different interpretation should be preferred which is useful for the protection of the rights that arise from Community law. Furthermore, it states that recourse to articles 169 and 170 would risk being ineffective if it were to intervene after the execution of an internal measure adopted in violation of the provisions of the Treaty.

Regarding to the elements necessary for a Community law to confer rights that can be protected before national Courts, it must be a rule that has a clear, precise and unconditional content, the issue of which is not subject to the issuance of further acts by the Member States or of the European institutions and that it is oriented to confer rights on individuals, even if only implicitly.

In conclusion, the Van Gend & Loos judgment establishes the arrangement of Community law and it is based on 3 aspects: the direct effect, the primacy and the reference for a preliminary ruling.

This judgement must historically be recognized as having the authorship of the essential and distinctive features of the EU legal system as regards the legal evolution of European integration and the principles that represent its cornerstones.

3) In the *Costa v Enel* judgement, the European Court of Justice set out its position in more detail. The case concerned an Italian law that sought to nationalize the electricity production and distribution industries, trasnferring the assets of the electricity undertakings to the national electricity board Enel. As a shareholder of Edison Volta, one of the companies affected by the nationalization, Mr. Flaminio Costa considered that he had been deprived of this dividend and consequently refused to pay an electricity bill for the amount of 1926 lire. In proceedings before the arbitration Court in Milan, Mr. Costa justied his conduct claiming that the nationalising act breached Community law. The national judged referred a request for preliminary ruling to the ECJ. The Italian government submitted that the request of the national judge is absolutely inadmissible inasmuch as a national Court is obliged to apply national law and cannot avail itself of the EEC Treaty.

In this judgement, regarding to articles 53 (which prohibits States from introducing new restrictions on the establishment in their territory of citizens of other Member States) and 37 (which in matters of monopolies requires each State to refrain from any discriminatory measures against citizens of other Member States), the Court of Justice reaffirmed the principle of the immediate effect of the provisions of the treaties which impose an obligation to abstain on States.

Furthermore, the Court of Justice supports the principle of the direct applicability of Community law with that of the supremacy of the Community law over the national law, even if it is later and of constitutional rank.

Therefore normally the provisions of the treaties, which have the tenor and purpose indicated by the Court of Justice, unfold immediate effects guaranteeing private rights against the Member States, to which the mandatory content of the provision is directed. In this sense, the effect of the provision has been defined as vertical, that is, the relationship between the state-authority and the private sector.

Moreover, the Court of Justice has also recognized a horizontal effect on some provisions of the treaties, in the sense that they have full and complete effect not only between the State and the private sector but also in relations between private individuals. Provisions which by "their nature" assign rights or establish obligations for private individuals have this effect.

In the light of Van Gend & Loos and Costa v Enel judgements, we can identify several elements which together typically characterise the special legal nature of the EU.

In the Van Gend & Loos judgement the Court established the principle that Community law is directly applicable in the Courts of the Member States. Similarly, the Costa v Enel judgement was fundamental in defining Community law as an independent system taking precedence over national legal provisions. The Court has always claimed ultimate authority in determining the relationship between European Union and domestic law. In the most celebrated cases Van Gend & Loos and Costa vs. Enel, the Court developed the fundamental doctrines of the primacy of Euopean Union law. According to these doctrines, EU law has absolute primacy over domestic law and this primacy has to be taken into account by domestic Courts in their decisions.

Therefore, we can identify further peculiar characteristics of the European Union legal order:

- the institutional set-up, which ensures that action by the European Union is also characterised or influenced by the general European Union interests, i.e. the interests of the Union set in the objectives.

- the transfer of powers to the Union institutions to a greater degree than in other international organisations, and extending to areas in which states normally retain their sovereign rights.
- the establishment of its own legal order, which is independent of the Member States' legal orders.

The European Union is therefore an autonomous entity with its own sovereign rights and a legal order independent of the Member States, to which both the Member States themselves and their nationals are subject within the areas of competence of the European Union.

The Treaty on European Union at art. 47 explicitly recognises the legal personality of the European Union, making it an independent entity in its own right. The conferral of legal personality on the European Union means that it has the ability to conclude and negotiate international agreements in accordance with its external commitments; become a member of international organisations; join international conventions, such as the European Convention on Human Rights, stipulated in Article 6, paragraph 2 of the Treaty on European Union.

Several scholars define the European legal order as *"sui generis"* and the Member States delegate part of their national sovereignty to the European institutions but this is not enough.

The only feature that the European Union has in common with the traditional international organisations is that it too came into being as a result of international treaties. However, the European Union has already moved a long way from the roots of international law.

We should share the prevailing opinion that the European Union is neither an international organisation in the usual sense nor an association of States, but it has to be regarded a supranational organisation, an autonomous entity somewhere in between the two.

The European Union thus seems to constitute a tertium genus in the field of International law, precisely due to the characteristics of participation and interaction with the subjects, which distinguish it with regard to other international organizations, but also intra-community, such as the Council of Europe.

Nevertheless, we must take a step forward, finding common features between the European Union and Transnational law, stating if is it possible to describe European Union Law as an example of transnational law. In abstracto the answer should be affirmative, because several features of the European legal order look very much alike to the features at large of Transnational law.

First, the European Court of Justice was confronted with the same new problems that Professor Jessup called transnational situation.

Second, the idea of an European legal order and the idea of transnational law are both based on the necessity to cope, from a legal point of view, with situations which go beyond the reach of a single State.

One of the main features of transnational law's approach is the attention for the role of the Courts. European Union law would not exist without a Court. One of the main features of European legal cases and of Transnational law issues is the fact that they are cases before a Court. The State is not the only actor on the scene. These are issues that a State cannot solve and we need other norms and in a common law framework, such as was the one in which Professor Jessup was presenting his

theories, the Court feels free to look for these norms. So, the idea of European legal order and the idea of transnational law are both based on the necessity to cope, from a legal point of view, with situations which go beyond the reach of a single State.

Another feature is the role of the Courts, started to be a fundamental role, comping transnational issues precisely in the same years in which Professor Jessup held his Storr Lectures.

Another important feature is that both the European legal order and Transnational law are intended for judicial enforcement. This is why for instance, teaching European Union law and teaching Transnational law are both issues, which can be solved using judgements. We always concern with judgements to solve transnational issues.

We can state the European legal order is a particular form of transnational legal order and we are facing a main issue: the current approach to the nature of European Union law has always been the one based on the idea that the European Union law is something difficult to explane and to compare, a kind of sui generis nature.

It is possible to emphasize the fact that the European Union legal order has at least two features which fit well in a transnational scheme.

1) European Union is a legal order which is thought of as something which goes beyond the reach of the State. The European Communities were established as a means to go beyond the reach of a single State, building what Robert Schuman called *"a de facto solidarity"* in his declaration in 1950.

2) The European legal order is essentially a judge made legal order: we generally make reference to two or three famous judgements by the Court (Plaumann, Van Gend & Loos, Costa v Enel). The features which were elaborated by the European Court of Justice are still hold good.

So, what are these features which still hold good and what are the features which the European legal order and the idea of a Transnational legal order share in common?

- One of the main features, which we can find when speaking of the European Union legal order and before the European Communities legal order, is the fact that in this legal order the quality of subject is not only reserved to States such as International law used to be, at least when the judgement in the Van Gend & Loos case was issued by the European Court of Justice. But also it extends to individuals. The Court states clearly the fact that individuals can be regarded as subjects in this legal order. This was a revolutionary feature put forward by the Court: private individuals are also actors. Individuals and States can be regarded as being both actors on the scene of the European legal order and actors on the scene of transnational legal issues that should be emphasize and investigated. The European legal order is about not simply States, but most of its cases concern directly individuals and this is something which sets European legal order apart traditional public international law ideas.
- There are other several actors: non State actors, local governments, associations, etc. that can have an important role to play.
- As well as Transnational law, the European legal order is a judge made law. Professor Jessup was addressing judges and lawyers who are asked the way reasonely when discussing issues of transnational law.

- Another important feature is the issue of European citizenship, because European citizenship is a great example of denationalized citizenship. Before the Rottmann judgement, in 2008 Professor Besson and Utzinger argued the possibility that the European citizenship could become something new and free people from the dictatorship of State citizenship. As a matter of fact the *"Toward European Citizenship"* is one of the first paper in Europe which points to the question of the European citizenship being a denationalized citizenship.

<< A source of concern alluded to previously is that EU citizenship still appears to discriminate unduly between different categories of lawfully resident people. This becomes particularly obvious in view of the limited political rights of TCNs. The source of inequality can be located in the two concurrent principles that, today, serve as additional conditions for the granting of rights of European citizens: on the one hand, the nationality of a Member State, and, on the other hand, lawful residence within EU territory. As a result, there are basically three categories of lawful residents in each Member State: European nationals, European nonnationals, and non-European nonnationals.
The proposal that national and hence EU citizenship should be based on long-term residence and integration to the host society is the natural consequence of the now largely completed externalization of national citizenship rights to European nonnationals. The next step would come naturally indeed and would be to extend them to non-European nonnationals in each Member State >>.
So, the only way to properly denationalize the contents of European citizenship should be the possibility of extending European citizenship autonomously to people who are not national of a Member State, but they are lawful long term residence in European Member State.
<< First of all, European citizenship could be granted at EU level only, on grounds of residence in any Member State, and no longer at national level on grounds of nationality. In this scenario, the Union would, in a "top down" manner, extend European citizenship to all lawful long-term residents in the European territory >>.
When this paper was written in 2008 the main decisions, the main judgements by the European Court of Justice were still to come (as for instance the Rottmann judgement in 2010), so it was impossible for Besson and Utzinger to understand that the European citizenship was going to become much less than they were expected it could become.
Nevertheless, they stressed rightly the point that the European citizenship must be granted at European level, starting from those who are not nationals of a Member State, but when you speak people who are not European nationals, this is the point, this is the way thruough which you can solve the problem of European citizenship.
<< Second, some Union citizenship rights, and especially political ones, but not the whole status of citizenship as such, could be extended to TCNs residing in the EU. The recent tendency in case-law and legislation actually seems to take this direction. The difficulty with this approach, however, is that it risks diluting the idea of political membership and the inherent exclusivity of citizenship, on the one hand, and to create second-class citizens, on the other.
A third and preferable alternative might be to encourage Member States to promote naturalization at national level on grounds of residence and thus to extend the European political franchise through nationalization. This presents the advantage of bringing exclusive European citizenship closer to universal human rights guarantees without superimposing a homogeneous socio-legal structure onto the national one >>.
Now, is it possible to expect similar to happen when you have a Court of Justice sticking to the issue of the fact that European Union citizenship must be delivered only to nationals of a Member State?

Going through the case law of the European Court of Justice, it is possible to find some cases which the European Court of Justice had to conclude that there was not possibility for the Court to adjudge the case, because it was a matter strictly within the domestic jurisdiction of the State. For instance the ways, through which a State can confer its own nationality citizenship to people under its jurisdiction, is a matter solely within the jurisdiction of the State. It was not for the European Union, nor was for the European Communities to go into this matter, but in several judgements the Court has assumed that, if the issues are suitable to involve two or more Member States, then the problem should come under the European power of review and under the European Court of Justice power of conform.
When the issues involve the cornerstone of Union citizenship, i.e. the principle Freedom of movement and residence for persons in the European Union, then the issue comes under the power of the control of the Court.
When cases assume a cross border dimension, then the powers of the European Court of Justice and the European Union itself are involved. Cross border means more or less the same thing as transnational. So, there are many issues which can be qualified as cross border and this means transnational and the European Court of Justice assumes suitable to comes under the power of review and control.
According to Article 9 of the TEU and Article 20 of the TFEU, every person holding the nationality of a Member State is a citizen of the European Union. Nationality is defined according to the national laws of that State.
As a matter of fact the new articles 9 TEU and 20 TFEU establish that European citizenship is added to national citizenship and no longer, as provided by art. 17 EC, that European citizenship is complementary to national citizenship.
European citizenship is additional, it does not replace the National citizenship and it confers on all citizens of the Member States various additional rights compared to those deriving from the status of citizen of a Member State.
This means that European citizenship could exist even in the absence of a national citizenship.
The Rottmann case is useful to explain the point in question, but it must be pointed out right away that the Rottmann case is a missed opportunity to establish greater autonomy of European citizenship compared to National citizenship, partially in contrast with the most recent reforms introduced by the Lisbon Treaty.
In the *Janko Rottmann v Freistaat Bayern judgement***,** Mr. Rottmann, born in Graz and originally an Austrian citizen, as an European citizen he enjoyed the freedom of movement and in 1995 he went to live in Germany. In 1998 Mr. Rottmann applied for German nationality. During the German naturalisation process, he lost his Austrian nationality, because Austrian law prohibited the possession of dual citizenship. Mr Rottmann had omitted the fact that he had been prosecuted in Austria. When the German administration learned of it, the Freistaat Bayern withdrew the naturalization with retroactive effect, thereby rendering him stateless.
Mr. Rottmann then took a legal action complaining about the revocation of his German citizenship by the Land of Bavaria and above all the loss of the status of European citizen.
Instead, << *the German and Austrian Governments also argue that when the decision withdrawing the naturalisation of the applicant in the main proceedings was adopted, the lat- ter was a German national, living in Germany, to whom an administrative act by a German authority was addressed. According to those governments, supported by the Commission, this is, therefore, a purely internal situation not in any way concerning European Union law, the latter not being applicable simply because a Member State has adopted a measure in respect of one of its nationals. The fact that, in a situation such as that in the main proceedings, the person concerned exercised his right to freedom*

of movement before his naturalisation cannot of itself constitute a cross-border element capable of playing a part with regard to the withdrawal of that naturalisation >>.
The Court of Justice stated that:
a) European citizenship necessarily depends on national citizenship, therefore without national citizenship consequently European citizenship ceases.
b) In matters of nationality, the State competence is exclusive: the Member States are competent to determine the ways of acquiring and losing citizenship;
c) nevertheless (and this is the novelty) when the decisions of the National authorities affect the status of European citizen (as in the case of Mr. Rottmann), those decisions must be taken in compliance with European Union law and its general principles, which includes the principle of proportionality.
This means that it will be up to the national Courts to verify whether the State decisions to deny or withdraw nationality are proportional, that is, adequate and necessary compared to the aim pursued.
Furthermore, the national Court must verify whether, in the light of all the relevant circumstances, compliance with the principle of proportionality requires that, before such a decision to withdraw naturalization becomes effective, whether the person concerned is allowed a reasonable time for him to try to recover the citizenship of his home Member State.
In conclusion, a Member State of the European Union can withdraw citizenship of a citizen of the European Union, conferred by naturalization, when obtained in a fraudulent manner, even rendering him stateless, only if the principle of proportionality is respected.
In 2019 the Court of Justice of the European Union came back to rule on the possible withdraw of National and therefore European citizenship.
In the *Tjebbes judgment*, the judges recall the key points of the previous Rottmann judgement, i.e. the nature of the provision in the public interest and respect for the principle of proportionality also regarding to the individual position of the interested parties, who may also be citizens from birth and not only naturalized.
The Tjebbes judgment originates from a request for a preliminary ruling presented by the Dutch Council of State: Tjebbes (born in Canada), Koopman (born in Netherlands), Saleh Abady (born in Iran) and Duboux (born in Switzerland) appealed against the decision of the Ministry of Foreign Affairs which denied them the right to a passport. All the ladies except Ms Duboux (as a minor, she was entered in her mother's passport) had a Dutch passport and filed with consular authorities or embassies to renew the expired Dutch passport.
According to art. 15 and 16 of the Netherlands law, the foreign minister, with four different decisions in 2014 and 2015, decided not to have to examine their applications, believing that they had lost their Dutch citizenship because in fact they had resided for more than ten years outside the European Union.
As a matter of fact << *From the outset it must be noted that, in so far as it is not apparent from the order for reference that the applicants in the main proceedings have exercised their right to free movement within the European Union, there is no need to answer the question with regard to Article 21 TFEU.*
That clarification having been made, it should be noted that the Law on Nationality provides, in Article 15 (1) (c) thereof, that an adult loses his Netherlands nationality if he also holds a foreign nationality and if, after attaining his majority and while holding both nationalities, he has his principal residence for an uninterrupted period of 10 years outside the Netherlands and outside the territories to which the EU Treaty applies. Article 16 (1) (d) of that law provides that a minor loses, in

principle, Netherlands nationality if his father or mother has lost his or her di lei Netherlands nationality pursuant, inter alia, to Article 15 (1) (c) of that law.
In that respect, it is important to bear in mind that the Court has already held that, while it is for each Member State, having due regard to international law, to lay down the conditions for acquisition and loss of nationality, the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by EU law, the national rules concerned must have due regard to the latter (judgment of 2 March 2010, Rottmann, C-135/08, EU : C: 2010: 104, paragraphs 39 and 41and the case-law cited) >>.
The Court of Justice of the European Union has denied the abstract nature of the relation between the European Union and its citizens, enhancing a concrete one: the fact of residence in the European Union is assumed to be a symptom of the presence of the effective link that legitimizes the maintenance of the status of citizen European.
The Tjebbes case therefore differs from the cases in which the trust between the State and the citizen is discussed, especially if the citizen is naturalized, as in the case of the acquisition of citizenship for fraudulent behavior in the Rottmann case.

The different features and the several cases mentioned above allow us to find a *"fil rouge"* between European Union Law and Transnational Law in dealing with what Professor Jessup defined as transnational situations.

After all we can state that European Union as such can be compared to Transnational law because:

1) European Union is itself a transnational field, a transnational space that goes beyond territorial borders;

2) European Union can be described as a transnational entity, because European Union exists to facilitate cooperations across the borders, between different States in the same continent;

3) the institutions of the European Union were created to build a transnational institution, an intistution capable, as the Court said in the Van Gend & Loos judgement, of building a legal order beyond the States;

4) European citizenship can be compared to transnational citizenship or postnational citizenship.

So again we are led to the fact that Transnational law features are useful to detect whenever you have cases which go beyond the border of a State. Before the EEC these situations were solved applying the Private International Law. So, EEC and European Union improved the area, we define it the Europeanisation of Private International Law.

When the European Court of Justice delivered several judgements, he spoke of something which was very close to the Transnational law. As a matter of fact scholars have stated that: Transnational law has developed as a law suitable to rule tipical problems of the global markets, which are problems that are not related to a single State, but on the contrary, going beyond the State.

Furthermore, the issue of citizenship is also a valid topic of reflection. Citizenship can be projected beyond the borders of the nation-State. In an article *"I confini della cittadinanza"* (2014) Professor Edoardo Greblo underlined this point, while in the article *"Transnational European Citizenship. Tracing Concepts of Citizenship in the European Integration Process"* (2008) and in the book

"Transnational Citizenship in 'European Union: Past, Present and Future" (2012) Professor Espen DH Olsen made a historical reconstruction and with a critical approach came to the conclusion that European Union citizenship is transnational, a status that has emerged incrementally during the process of European integration.

I want to point out a very interesting project on this point, which further helps us to support the idea that citizenship of the European Union is transnational. Through cross-border cooperation the IMPEU project promotes the values and requires a joint effort of all actors concerned at all levels: the Member States, including their local and regional authorities, European institutions and civil society.

4. What is European Union? Is it really a Transnational legal order? Is European Union a network or a network of networks?

It's difficult to give an exhaustive answer on what European Union is. We can scholastically assert that the European Union is an economic and political union, one of a kind, in 2021 as many as 27 Member States are part of it, but this is not enough.

The European legal order doesn't exist per se, made out regulations, directives, decisions, treaties, etc. but it exists as a way of coordinating (at the European level) the different national legal orders.

It is possible to consider the European Union as a network, capable of creating links between the States.

- Some scholars have characterized the European Union itself as a 'network form of organization', a system of 'governance without government' whereby ongoing negotiations take place in policy networks made up of public and private actors at different levels.
- Others have used 'networks' to explain the workings of European institutions such as the Commission.They focus on the relationship between the Commission and national and transnational interest groups in various policy areas and the influence of these sectoral networks on policy outcomes and changes in European policy-making.

An interesting example is offered by the judicial dialogue. Professors Monica Claes and Maartje de Visser focus on more or less institutionalized horizontal European networks, that is to say transnational networks which bring together judges who are more or less at the same level and have similar functions in their respective legal systems.

There are several various networks between judges: most of them have been created by the European Parliament itself; others have been created at initiative of the judges themselves. As examples of network which were created by the European Parliament, the authors speak of three main networks:

1) The European Judicial Network (EJN), which is designed to facilitate judicial cooperation across borders in criminal matters, fighting against serious crimes such as corruption, drug-trafficking or terrorism.
2) The European Union Agency for Criminal Justice Cooperation (Eurojust), which exists to enhance cooperation between the competent authorities responsible for investigation and prosecution of cross-border and organized crime.

3) The European Judicial Network in Civil and Commercial Matters (EJNCCM), which is intended to facilitate judicial cooperation between the Member States in civil and commercial matters.

Regarding the networks created by the judges themselves, the authors speak of other networks were simply created to improve the knowledge of the various legal systems in Europe, which are very different one from the others:

1) The Network of the Presidents of the Supreme Judicial Courts of the EU (NPSJC), which has been created to facilitate the knowledge of the different legal systems and the different role of Supreme Court in those legal systems, but also to enhance debate among its members.
2) The European Judges and Prosecutors Association (EJPA), which was created to enhance cooperation and reciprocal knowledge among judges of different legal systems.
3) The Association of European Administrative Judges (AEAJ), which is an organization dealing with the cooperation by administrative Courts.

However, there is also another different type of network, infact several European networks have been created to share and exchange best practices, for instance the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, the Conference of European Constitutional Courts (CECC), the Association of European Competition Law Judges (AECLJ), etc.

Some of those networks exist to protect the judiciary as a professional category, for instance the AEAJ not only exists to improve knowledge of other legal systems, but also to *"promote the professional interests of administrative judges at national and European level vis-à-vis the institutions of the European Union and the Council of Europe".*

So, judicial networks offer alternative avenue for dialogue, which may support the formal legal channels such as the preliminary reference procedure and the traditional dialogue through case law. Networks thus have the potential to increase the dialogic qualities of the relationship between the European and the national courts.

There is cooperation between the EU institutions and networks created by the judges. The networking by judges helps the creation of something which is not agreed by States for instance with a formal agreement, but which emerges from the cooperation among the judges, so this is a transnational way of lawyering. The result of a European way of thinking is not established with an international treaty by the States, but emerges from the cooperation between the judges.

A more useful alternative way to express that the European Union is a network of networks is represented by the Open Method of Coordination, which is something near to transnational and it can be considered as a network between the States.

Soft law is one of the main features in Transnational law. Most of the rules in Transnational law are elaborated through methods which can be ascribed to the category of soft law.

Since the 1990s, the use of non-binding legal instruments is increasingly frequent in the regulatory system of the European Union. These acts are indicated by community doctrine as soft law instruments and consist not only of typical acts, such as recommendations and opinions, but also acts not provided for by art. 288 TFEU, being resolutions, guidelines, broad guidelines, programs and reports. The relationship between the sources of EU law and national ones has been revolutionized, because

soft law has become the main mechanism through which member states are invited to implement the political objectives indicated by the European Union.

In the European context community soft law concerns the rules of conduct which find themselves on the legally non-binding level (in the sense of enforceable and sanctionable) but which according to their drafters have to be awarded a legal scope, that has to be specified at every turn and therefore do not show a uniform value of intensity with regard to their legal scope, but do have in common that they are directed at (intention of drafters) and have as effect (through the medium of the Community legal order) that they influence the conduct of Member States, institutions, undertakings and individuals, however without containing Community rights and obligations.

Community soft law generally refers to recommendations, opinions, white papers and green papers, action programs, codes of conduct, resolutions, communications, conclusions, interinstitutional agreements and the Open Method of Coordination.

In the White Paper on Governance, drawn up by the European Commission, we read: << *the regulatory act is only part of a broader solution, in which formal rules are combined with other non-binding instruments such as recommendations, guidelines or even self-regulation according to a agreed in common* >>, in agreement with scholars such as Professor David Trubek who speaks of << *"hybrid" constellations in which both hard and soft processes operate in the same domain and affect the same actors* >>.

Scholars are divided between two different currents of thought:

1) On the one hand, community soft law is a method to increase cooperation with States, with the indirect effect of balancing the democratic deficit.

2) On the other hand, soft law ensures ample discretion and the possibility of circumventing formal procedures with an extension of the powers of the executive bodies or with the intervention of bodies and subjects that act without democratic legitimacy (such as the ECB).

Supporting this latter interpretation, the European Commission declares the objectives to which soft law tends: << *the European Union must be able to react more readily to changes in market conditions and to new problems that arise, shortening the time long necessary to adopt and apply the Community rules* >>.

Hence there is a link between soft law (with its *"unstructured and multiform juridicality"*) and the order (governance) of the *"highly competitive social market economy"*, to which art. 3, par. 3, TEU refers to, with the need for adaptable rules.

The system of sources is progressively deconstructed by soft law and becomes more and more flexible. Professor Anne Peters in fact observed that: << *the most important European constitutional principles prima facie discourage an excessive use of soft law. Among these there are rule of law (including the protection of legitimate expectations, legal certainty), transparency, democracy, the institutional balance* >>.

The European Parliament, with the Resolution of 4 September 2007 on institutional and legal implications of the use of soft law instruments, underlines that << *where the Community has legislative*

competence but there seems to be a lack of political will to introduce legislation, the use of soft law is liable to circumvent the properly competent legislative bodies, may flout the principles of democracy and the rule of law under Article 6 of the EU Treaty, and also those of subsidiarity and proportionality under Article 5 of the EC Treaty, and may result in the Commission's acting ultra vires >>.

The economic crisis in 2008, which has exposed the weaknesses of the EU economic governance of the time, has resulted in a debate on how to find a balance between intergovernmentalism and supranational actions within the EU framework, bringing into question further use of soft intergovernmental methods, such as the Open Method of Coordination (OMC).

The first and most developed example of a OMC has been the European Employment strategy (EES), which was introduced in 1997 at the Luxembourg European Council. The OMC is an EU policy-making process, or regulatory instrument, formally initiated by the Lisbon European Council in 2000. It takes place in areas which fall within the competence of the Member States, such as employment, social protection, social inclusion, education, youth or training. It deals with measures which are binding on Member States in varying degrees, but which never take the form of directives, regulations or decisions.

In many policy areas, European Union Member States set their own national policies rather than having an EU-wide policy laid down in law. However, under the Open Method of Coordination, governments learn from each other by sharing information and comparing initiatives. This enables them to adopt best practice and coordinate their national policies.

This is interesting because the Open Method of Coordination is a soft policy that is expressed through the adoption of soft acts: where it is a question of bringing together legislation, national policies in the social field, the practice that is affirmed at European level, especially after the ratification of the Maastricht Treaty and at least until the Lisbon Treaty, consists in the adoption of a recommendation by the Commission. Therefore a soft act, a non-binding act, which however suggests on the one hand to achieve certain objectives in the field of social policy and on the other hand at the same time to identify within the same act some indicators on the basis of which to then evaluate the performances achieved by the individual countries. There is not only in the initial recommendation the convincing suggestion to achieve a certain objective in the field of social policy, but there is also the identification of a set of indicators and methodologies, on the basis of which to go for an ex post evaluation of the degree of compliance shown by the state. This is very important because the evaluation feeds back on individual behaviors in an even more significant way than the simple ex ante recommendation.

The Open Method of Coordination consists of 3 steps:

1) A Member State, a group of Member States or the European Commission submits a proposal to the Council of Ministers. A recommendation suggests the objectives and suggests the indicators on the basis of which to evaluate the achievement of the objectives.

2) At the level State, the Member States, supported by the European Commission, freely decide if and when to implement the recommendation on social policy. The European Parliament acts as an advisory body. The Council of Ministers confirms the agreements made between the member states.

3) With the OMC the implementation is part of the procedure. Member States develop national action plans that are based upon the agreements. We come back to the European level in which the States communicate the objectives they have achieved (and this is already a first element of pressure) but above all the Member States exchange information about the best ways to achieve the set objectives. Therefore, the States that have the best indicators will be considered models that the other Member States, compatibly with the various local characteristics, will try to imitate.

So the initial soft act suggests aims and then this soft act joins with the best practices at national level, which are suggested in a soft way to the other Member States, trusting that efficiency in a competitive context such as European Union is in any case a strong factor of uniformity of policies and also of harmonization of national legal systems.

This is a twofold soft mechanism but in practice it has shown a certain level of managerial capacity of the individual Member States.

So, in conclusion there is not a solution generally agreed by all the scholars studying European Union as a social phenomenon.

I share the opinion of those who believe that European Union is a complex structure capable of creating networks among the Member States, which has the possibility of using very different approaches to solve the problems. It is possible to use the traditional Community approach or use the Open Method of Coordination or other possibilities, but i think that the Open Method of Coordination is the best way to describe European Union as a network of networks.

However, I prefer to describe this phenomenon imagining it in a different way: I imagine three concentric circles in which:

- the common center is formed by transnational problems;
- the smallest circle is formed by the single State acting alone;
- the central circle is formed by the Member States that communicate one to the others;
- the largest circle is formed by the European Union as an autonomous entity which plays the role of an orchestra conductor, directing the group of musicians (the States), planning the objectives and encouraging the States to communicate effectively with each other, acting all together for the Common Good to safeguard present and future generations.

In 2021 today more than ever a problem for one Member State is a problem for all the Member States.

Just think of the *Next Generation EU*: it is not just a recovery plan, it is a unique opportunity to emerge stronger from the pandemic (COVID-19), create opportunities and jobs for the Europe where we want to live. We have everything to make this happen.

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