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IS THE EUROPEAN LEGAL ORDER, IN THE END, SORT OF A TRANSNATIONAL LEGAL ORDER?

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INDEX OF ABBREVIATIONS

ECHR	European Convention on Human Rights
ECJ	European Court of Justice
NGO	Non-Governmental Organization
UN	United Nations

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Börzel, Tanja, "What's so special about policy networks? An exploration of the concept and its usefulness in studying European Governance", European Integration online papers No 16 (1997).
Börzel, Tanja, "Organizing Babylon – On the different conceptions of policy networks", Public administration 76 (1998).
Bressand, Albert /*Nicolaidis*, Kalipso, « Regional integration in a network world economy" and W. Wallace, "Introduction: the dynamics of European integration", in W. Wallace (ed.), The dynamics of European integration (1990).
Claes, M /*de Visser*, M., Are You Networked Yet? On Dialogues in European Judicial Networks. Utrecht Law Reviews, 8 (2), (2012).
Jessup, Philip, Transnational Law, New Haven: Yale University Press (1956).
Pappalardo, Maria M., What is Transnational Law? A Trip through a Still Unknown Land, CRIO Papers 50 (2020).
Sapienza, Rosario, La Rivincita dei territori tra Geodiritto e diritto internazionale. A Geo-Legal Approach to Public International Law Theory and Practice, CRIO Papers 56 (2020).
Sapienza, Rosario, The Return of European Public International Law. A Manifesto, CRIO Papers 52 (2020).
Zumbansen, Peer, Transnational Law (2006).

1. Introduction

The European Union legal order includes an unconceivable and complex mass of rules and regulations and for sure, relates to something more than one national state. But can we assume that the European Legal Order is, in the end, sort of a Transnational Legal Order? Is that even possible? Or could it be something else? For that, we shall ask if the European Legal Order should be analyzed as being something like Transnational Law or as being in itself just only an experiment in Transnational Law? To answer that question, we should elaborate the origin of the European Legal Order and the Transnational Law approach and the characteristics of Transnational Law. In the fourth paragraph, we will address the features of the European Legal Order and last, we will discuss the nature of the EU and answer the final question if the European Legal Order can possibly be qualified as a transnational legal order.

2. History of the European Legal Order and the Transnational Law Approach

Indeed, the European Legal Order was advocated by the European Court of Justice (ECJ) in its famous *Van Gend en Loos* judgement in 1963. Therein, the ECJ noted that "the European Economic Community constitutes a new legal order of international law". Even though we can draw from it that the European Legal Order is kind of sui generis, its features can only be analyzed and understood against the framework of the crisis in international law which can be traced to the period between the two World Wars. In fact, the period since the second half of 19th century until the first World War, was called the "first golden age of international law". International law was deemed to be something new, very interesting and very useful. It appeared as a utopia. To build an international legal order, international lawyers and judges just simply took the norms from the internal legal order of the states and tried to see if they worked when applying them to international relations. They may have all shared the conviction that this was international law. However, only some among them, for example the famous jurist Hans Kelsen, were interested in the possibility of giving a more comprehensive foundation to international law. Anyway, everything was done with the aim to try and see what happened. Indeed, this apparently naive method was very useful because it produced several interesting approaches to matters of international law.

Then, when the First World War broke down, everything was crumbled into pieces. After that, international law had to be rebuilt, and along with that, the League of Nations was established. During the period between the two World Wars, the League of Nations tried to enforce the international law which has been created in the second half of 19th

century. However, states had difficulties to cope with these norms. As a result, the Second World War took place. After the Second World War, the international legal order again was shattered into pieces. Since the previous legal order seemed incapable of preventing world wars, a general need arose for a recasting of the legal order. Thus, the end of the Second World War marks the beginning of a global stage of international law[1] where a lot of phenomena arose: With the creation of the United Nations (UN) in 1945, a first attempt to satisfy the need for rebuilding the international legal order has been established. International law worked in a way which was deeply influenced by the existence of the operation of the UN. The UN has inspired the single tail of Public International Law and as well started to constitute its center. However, Public International Law exists not only in the UN, but also outside. In the same years in which the UN were starting their fascinating history, some critical approaches arose: the Transnational Law, the European Convention on Human Rights (ECHR) and the European Communities. The first critical approach was presented by Professor Jessup in 1956. For the first time the term "Transnational Law" came up. Professor Jessup proposed this phrase in its famous Storrs lectures and set the scene for a new and different approach to the things happening beyond the borders. He criticized that all that has been told regarding Private International Law and Public International Law does not represent a comprehensive picture. He developed the idea, that Public International Law is not limited to the relations between states and further, that international relations between individuals cannot be managed by states. In his opinion, they are issues which can neither be qualified "international" nor "internal" in a traditional sense. Thus, he proposed to call those "transnational" issues, which need to be ruled. By contrasting the operations at the UN, he highlighted a further aspect that should be considered to create these rules. On the one hand, the happening in the United Nations and on the other hand, the happening beyond the borders of a single state and their legal orders. Concerning the first component, the actors are the states. Regarding the second one, the actors are the entities different from the states which are capable managing relations among them, with or without the states.

A second important critical approach was moved in Europe through the conclusion of two fundamental treaties. One made in 1950, the ECHR, and the second, in 1951, the treaty establishing the "European Coal and Steel Community". Those two treaties shared one element in common which was to be highlighted some years after their establishment: The ECJ, when in the meantime two other communities were created, the "European Atomic Energy Community" (Euratom) and the European Economic Community, stated in the famous *Van Gend en Loos* judgement in 1963, stated that European treaties which had created the three communities should not be deemed as ordinary traditional treaties.

[1] Sapienza, *The Return of European Public International Law. A Manifesto*, CRIO Papers 52 (2020), p. 3.

These treaties, although being treaties, were not simply capable of generating reciprocal mutual obligations among the member states, but could set up a new legal order, generating objective obligations which were enforceable per se. These kinds of obligations are directly enforceable and give rights to individuals. Two years before in 1961, the European Commission of Human Rights delivered an advice in the *Fundres* case between Italy and Austria, having quite the same message to what the ECJ later said. They stated that, given the fact that they are a ministry in treaty whose content is the protection of human rights at international level, it should be concluded that the ECHR is capable of generating not only reciprocal mutual obligations, but sort of objective obligations. To sum up, after the Second World War, the major efforts were made by states who generated sort of a legal order based on an international organization (the UN). But in that very moment and those years after, other efforts have been made towards the achievement of the same result: a legal order existing among states, capable of generating objective obligations which were not to be limited towards their contractual nature of Public International Law, supported through the approaches of the Transnational Law, the ECHR, and the European Communities.

3. What is Transnational Law?

Before we can compare the Transnational Law approach to the European Legal Order, we first must assess what "Transnational Law" is in fact. It seems to be an easy question but indeed, is difficult to answer. Transnational Law is a very loose fabric. Practically, we could put everything under it. There are countless views of scholars what they see as "Transnational Law" and several ways of speaking of it. In the following, I will try to figure out, what we can understand under the wide term "Transnational Law". What we can say for sure is that the concept of Transnational Law arises from the complex interaction of the various protagonists on the international stage creating a new legal, non-territorial dimension for the global society.[2]

It consists of a very large, vague series of theories trying to grasp what is difficult to understand under traditional national law, giving the state a less or more important role. Professor Jessup defined "Transnational Law" in its famous quote as something "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."[3] At the time of delivering his lectures, Professor Jessup did

[2] Sapienza, *La Rivincita dei territori tra Geodiritto e diritto internazionale. A Geo-Legal Approach to Public International Law Theory and Practice*, CRIO Papers 56 (2020), p. 9.

[3] Jessup, *Transnational Law* (1956), p. 2

not consider the issue of the interrelationship between Transnational Law and the global society. Herein, Transnational Law can be seen as a way of regulating the operation of our global society. In light of this connection, it can also be seen as a novel way of attaining the aim of legal coordination of different legal orders, whether international, supranational, or national.[4] The main difference among the several schools of thoughts is those who believe that transnational law is something that has nothing to do with the states. The most renowned scholar of this school of thoughts is Peer Zumbansen.[5] In his opinion, Transnational Law is made out of the interactions by private subjects with traders or corporations, … It shall be about people who network among themselves and create rules to manage these networks, without the interference of states. On the contrary, most of the transnational lawyers think that, when it comes to rules, you cannot do it without the states. Even if private networks have generated rules, when it comes to the enforcement of them, you need states cooperation. Most of the transnational scholars think that Transnational Law is a sort of international law in which states are joined by other subjects as corporations, individuals, … Besides, there is another theory elaborated by two American scholars in which transnational law is not simply a method. Rather, when we analyze the field of the international legal relations, we can detect the existence of different legal orders – one autonomous from the other – which can be defined as transnational. A good example for what a transnational legal order could be, is the "international sports law": there are private subjects, NGO's, states and international organizations that are all involved in legal processes intended to the management of international sport events. Since Transnational Law is such a wide category, it is practically impossible to include almost everything. However, it is possible to conclude that a legal order can be deemed transnational when it relates to cases which can, on their part, be defined as transnational, involving subjects coming from two or more states and giving rights to a legal intercourse among them, with or without the cooperation of one or more states.

4. Features of the European Legal Order that Can Be Described as Transnational

Several features of the European Legal Order look very much alike to the features of transnational law. In the *Van Gend en Loos* judgement of the ECJ, the European Legal Order is described as having some features which prima facie allows to conceptualize that we are facing kind of a transnational construct. But in which way can the European Legal Order be compared to the Transnational Law approach and thus, be qualified as sort of a

[4] Pappalardo, *What is Transnational Law? A Trip through a Still Unknown Land*, CRIO Papers 50 (2020), p. 4.

[5] Zumbansen, *Transnational Law* 2006

transnational legal order? For that, I will present the several features of the European Legal Order that can also be described as transnational:

1. The first feature concerns the fact that Transnational Law, as well as the European Legal Order, is not simply about states but most of its cases directly concern problems with **individuals** and relates to issues which are of interest of individuals. When it comes to states, it concerns the way how those are enforcing the European law. That is a point that sets the European Legal Order apart from the traditional ideas concerning Public International Law.

2. The second feature concerns the fact, that the European Legal Order and the Transnational Law approach refer to cases which have elements of Transnationality or of Europeanness because both apply to things that are related. There is always the need of **two or more legal orders** involved in one issue. According to Professor Giuseppe, Transnational law is about transnational cases. Even if we might say that the EU exists at the regional level, whereas the Transnational Law approach generally relates to issues at the international level, as for transnational law, we can also describe the European Legal Order as dealing with things that **go beyond the reach of a single state**. We can find proof for that in the famous *Rottman Case*. In this judgement, the ECJ had to deal with a person, Janko Rottman who was an Austrian citizen but asked for the German nationality.

There is a rule in Austria according to which you lose your Austrian citizenship when you ask for another one. When getting the German citizenship, he lost the Austrian one. However, it was discovered that Rottman had been pursued in Austria for a criminal offence, which he concealed when being asked for the German nationality. Therefore, the German authorities tried to withdraw the accordance of the nationality. The reason why this judgement is interesting is because at first sight, one can think that it is a national matter: the German authorities applying German law to a German citizen. However, Rottman already has lost his Austrian nationality and that if he loses the German nationality, he will be stateless. In consequence, he would lose his European nationality for which you need to have the nationality of one of the member state. For this reason this case has an aspect of European law. Thus, the European legal order, like a transnational legal order, is always dealing with issues involving more than one state.

3. Moreover, the third feature concerns the fact, that the European Legal Order as well as the Transnational Law approach are essentially **"judge-made law"**, as they always have to do with issues which are discussed in judgements. Professor Jessup also supported this kind of view in regard to Transnational Law. The European Legal Order is about cases that we can qualify as transnational. We can recognize the importance of the ECJ and of the decisions taken by it.

5. But what is the EU?

As we can see, there are many features of the European Legal Order in common to the Transnational Law approach. But in which direction can these elements be used? In order to say if the common features speak for or against the European Legal Order to be a Transnational one, it is now to question, how the European Union itself is to be qualified. It is important to understand, what the EU really is: Is it a federal state? Or is the EU something different? A network of states? Or a network of networks? First, I would like to address the aspects that speak against a qualification as a transnational order. It is true, that the European Union tries in every possible way to look like a federal state. But this does not mean, that it really is a federal state. If the EU is a federal state, the Transnational Law approach becomes less interesting. The EU may have the necessary minimal attributes of a federal system in a formal way. But as the institutions and the High Representatives do not have any exclusive power and the EU lacks fiscal federalism, we cannot speak of a federal state. Furthermore, the EU can also not to be seen as a prospective federal state, as of December 2020, the EU has no formal plans to become a federation. The Transnational Law approach further loses its meaning if we say that the EU is an international organization. However, when we go into the treaties, we won't find a single place where the EU is defined as a federal state or international organization. These opinions are merely grounded on scholarly approaches.

But which is the description that is more suitable to speak of it in a transnational way? In my opinion, it is one that speaks of the EU as a network, as a legal environment capable creating links between states. If we go further, we could also speak of a network of networks. First, we have to clarify what a network actually is. According to Tanja Börzel, a network is "a set of relatively stable relationships which are of non-hierarchical and interdependent nature linking a variety of actors, who share common interests with regard to a policy and who exchange resources to pursue these shared interests, acknowledging that cooperation is the best way to achieve common goals"[6].

There are some voices that declare the EU as a network form of organization where we can find a "governance without government" system in which ongoing negotiations occur in policy networks made up of public and private actors at different levels.[7]

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[6] Börzel, *What is so special about policy networks? An exploration of the concept and its usefulness in studying European Governance*, 1997 European Integration online papers No 16, p. 1; Börzel, *Organizing Babylon – On the different conceptions of policy networks,* 1998 *Public administration* 76, pp. 253, 254.

[7] Bressand/Nicolaidis, *Regional integration in a network world economy* and Wallace, *Introduction: the dynamics of European integration*, in W. Wallace (ed.), *The dynamics of European integration*, 1990.

The term is also used to explain the functioning of European institutions or to address the impact on the national structures of the Member states of European policy-making. A core feature of networks is the presence of several interconnecting and non-hierarchical relationships between the different actors.

The horizontal European networks are considered as transnational networks with the objective of bringing judges together who are the approximately at the same level and have similar functions in the national legal system. There are two different kinds of judicial networks: the ones that are made by the European legislature and the ones made by the instigation of the judge themselves.[8]

One way to argue the European Union to be a network is the *European Territorial Cooperation* (ETC), better known as Interreg. It is the instrument of cohesion policy and provides a framework for the implementation of joint actions and policy exchanges between national, regional, and local actors from different Member States. It aims to solve problems across borders, by which the corporation actions are supported by three components: cross-border corporation, transnational cooperation, and interregional cooperation. There are also more judicial networks created by the European legislature:

- The *European Judicial Network* (EJN), which helps to improve the judicial cooperation to fight against grave crimes
- *Eurojust*, which helps to improve cooperation between the authorities dealing with investigation and prosecution of cross-border and organized-crime
- The *European Judicial Network in Civil and Commercial Matters* (EJNCCM), which helps for the judicial cooperation between the Member States in civil and commercial matters

On the other side, judicial networks are also created by the will of the judiciary themselves:

- Networks seeking to improve knowledge of other legal systems, for instance the *Network of the Presidents of the Supreme Judicial Courts of the EU* (NPSJC)
- Networks seeking to share practical experiences and to promote the exchange of ideas, for example the *Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union* (ACA-Europe) and the *Conference of European Constitutional Courts* (CECC)
- Networks seeking to advance the interests of their members at the national and/or European level, for instance the *Association of European Administrative Judges* (AEAJ)

[8] Claes/de Visser, *Are You Networked Yet? On Dialogues in European Judicial Networks,* in *Utrecht Law Review*, 8(2) 2012, p. 106

If we think of the European Union as a Network of states, but also of other subjects like territorial entities, NGO's, people, individuals, all of them networking together and, as a general framework, the European Union networking on these networks, we could claim that this is a way of speaking and living Transnational Law. And that's why we could think that the European Union can be seen as an expert in Transnational Law, a Transnational Legal order, or something else. Anyway, something that belongs to the large family of Transnational Law approaches. The fact, that the EU exists with a legal order, can therefore be a good example of a transnational legal order. The European Momentum thereby describes the process, in which Transnational law becomes this legal order.

6. Conclusion

In my opinion, the European Legal Order is an excellent example of Transnational law. Because several features of the European legal order are common with the ones in Transnational Law, we can say, that - in abstracto - the European Legal Order is in the end sort of a Transnational Legal Order. There are prima facie three possible issues in favor of qualifying the European legal order as a transnational one. Both go beyond the reach of a single state, they both concern individuals and can be described as "judge-made-law". In my opinion, the EU may use the language of a federal state, that is in fact simply a network of states. We have loose institutional ties with a lot of different actors at the European, national or local level. As the EU is not even a state, we could speak in favor of transnational issues. It is possible to use the Transnational Law approach for a better understanding of the EU. In conclusion, it seems to be most persuasive to regard the EU as something which is a network of states, or even a construct of networking these networks. Therefore, it is possible to qualify the European Legal Order as a sort of a Transnational Legal Order.