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What is Transnational Law?

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I. Introduction

In this paper, we will deal with the topic of what is transnational law. The world population has needs and as it rises there are more needs so there is an exigency for rules, norms which are becoming numerous and complicated. People worldwide have to live with a big number of laws and contingencies by which we attribute the label of 'law' to rules, norms or customs that govern various situations. There are a lot of corporate disputes on the inter-state level such as doctrinally challenging, legal conflicts and there is also the problem of the extraterritorial reach of antitrust statutes.

When we try to clarify the nature of transnational law there are questions about the law, and on the other hand about society. Transnational law forces the fundamental reconsideration about connection between the public and the private, between law and state and between different sources of law and legal authority.[1] There is also a question on which approaches might be the most productive and which issues need to be addressed to make sense of some broad trends in law's extension beyond the boundaries of nation states.

Transnational law from it's very beginning has been a subject of dispute. There are a few different disputes that have been open through the time of research that scholarship did. At first, they were focused on the origins of the term for a long time and through the time they figured out that the real challenge of transnational law lies in its scope and conceptual aspiration. For the longest time international law has been dealing with domestic-international dichotomy and transnational law offers itself as a supplementary and challenging category within interdisciplinary research on globalization and law.

Jessup made a lot of effort for transnational law and his work is really important for this subject. He's made a series of lectures that have broken

[1] Roger Coterell, „WHAT IS TRANSNATIONAL LAW?", Paper No. 103/2012, Queen Mary University of London

traditional thinking about inter-state relationships. He has pointed at forms of border-crossing relations among state and non-state actors that are frequently represented. [2] Jessup`s framework was made to reflect on the dichotomies underlying and informing international law while decisively moving onward to embrace a wider and more adequate view of global human activities. Jessup`s term of transnational law is present in every article where transnational law is mentioned and definition is that transnational law *"includes 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]

II. Historical review

During the Cold War in public there was no hope in international law and public international institutions had withered so Jessup tried to find a solution for the problem, so he wrote the concept of transnational law. That concept should be through the body of law that will be there for addressing transnational problems to make legal ordering and legal orders. Legal ordering refers to the transnational construction, flow, settlement, and unsettlement of legal norms in particular domains.

Transnational legal orders is 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. International law became a central component of transnational law and legal ordering and it permeates state boundaries. There is a formal and informal effect of international law. We will explain both. Formally is when international law has direct effect in national legal systems, when it is enacted by state legislatures or adopted by state regulators and when it shapes national courts in the interpretation of national law. Informally it has significant effects through the process of engaging international organizations, soft law norms, indicators, information-sharing, expert consultation, peer review, and other techniques. Private actors are central in driving the development and application of international law, as when they participate in norm-making that

[2] Yale Law School, (Jessup, 1956)
[3] Jessup, 1956, p. 2

is eventually incorporated into international law, when they bring claims before national courts derived from international law, and through their practices that apply and interpret these norms.[4]

Lex Mercatoria:

After World War II commercial lawyers rediscovered medieval merchant law and began a great revival of the borderless, universal trade law of nations. As Jessup said, transnational law in that situation should encompass and simultaneously challenge public and private international law were the latter to maintain their explanatory and guiding potentials in an ever more integrating world. Commercial lawyers were collecting, consolidating, codifying the legal nature of lex mercatoria as an autonomous legal order for decades. Characteristic for lex mercatoria was the battle between:

-'transnationalism' : embracing emergence of a self-producing legal order among commercial actors

-'traditionalists' : the state should have an important role in enforcing arbitral awards.

This dispute over lex mercatoria shows the inability of state-made norms and statutes embedded in an institutionally sound enforcement to solve problems that show up in the practice and need for harmonizing laws that are governing international trade. The concept of Transnational law underlies and shapes the appearance and applicatory scope of lex mercatoria. TL also points to the overarching political, perhaps utopian struggles that are shared among comparable developments and social movements in different 'regions'. Recognition of a transnational, denationalized lex mercatoria is otherwise left behind. The task of transnational law is to stop the separation of domestic and international legal problems and try to find the inner connections and resemblances in their alleged differences. These labels of 'domestic' or 'international' are merely the exertions of definitional and conceptual sovereignty over an otherwise untameable power.

Through denationalization of commercial law we can see that TL is nothing but a resurgence and restatement of the very problem of regulatory power and autonomy, of private and public autonomy. In this way, TL reconnects

[4] https://studium.unict.it/dokeos/2020/courses/19472/document/TL4Schaf-ferCoye2017.pdf?cidReq=19472

inseparably both private law discussions and the public law themes of deregulation and privatization.

TRIPS Agreement:

The TRIPS Agreement is a practical case in which we can see characteristics of resolving transnational law problems. It is about conflict between U.S. industrial and commercial interests and developing countries. The problem is recognition of intellectual property and the payment of royalties.
Transnational law concepts help to answer the questions:

1) How the problem was framed - as a private property right implicating trade,
2) by whom -by U.S. and European private parties and their governments,

   and where the legal response derived - from norms developed in U.S. and European law.

This Agreement made big implications of the change in international law which are needed. Most important changes are: creation of new institutions to monitor enforcement at the multilateral level, new transnational mechanisms under a particular normative frame and creation of new institutions within states which will ensure compliance with TRIPS obligations (such as patent examining agencies in this case).

Developments like this involve interactions with domestic institutions, professions, commercial interests, and social movements over time which are really important for solving some problems that are in the domain of transnational law.

III. About transnational law

As we can see from our example of living in the European Union, merchant communities that operate across national borders are a normal part of our time. Communities like the EU make regulations that effectively bind all people inside them despite the national borders. They bind them as law and

people now are used to the concept that law is not anymore just from their own state.

1.Jurisdiction

The last two decades of the 20th century courts were occupied with civil litigation. Law subjects were seeking compensation for human rights abuses. Filartiga's decision inspired a lot of former victims of human rights violations to bring their cases in front of court. Those are cases brought against states, state officials and private corporations. Those cases mostly failed to be overcome because of state immunity or courts were declared ill-suited to hear cases that are not from their territory. Subjects such as states are immune from lawsuits before courts in foreign states.[5]

Justice Story's invocation of a law governing for making commercial transactions (law of nations). There is a tendency for a genuinely denationalized body of law and the practice of law arises against the resistance of jurisdictional and conceptual boundaries firmly erected by private international law.

However, the conflict of laws that confronts the respective courts refusing to hear these cases can no longer be confined to territorial borders. Human rights are becoming more important and the norms that are governing them should have border-transgressing nature that they both undercut and surpass the territorial boundaries.

Norms of international law should be universally binding regardless of whether or not states have incorporated these obligations into their domestic legal regime. There should be general openness and receptiveness of domestic courts towards international law. Transnational law suggests a process whereby domestic courts appraise themselves and appraise human rights abuses and the need to grant legal standing to the victims. With a large number of these violations of human rights and series of judgments that show courts addressing issues that go beyond the boundaries of their own respective legal situation we can see the result of transnational concepts.

[5] Forum non conveniens doctrine

2. New legal relations and different views on transnational law

What in the beginning was just an economic community is not anymore. We are connected in many ways with laws of our country and laws of the Union that we live in. There are transnational judicial communities. We also have conventions made by international law which create rights and duties for people in cross-border relationships. Human rights instruments and agencies are creating new expectations of rights and protections that are not limited by national borders.

These new legal relations, influences, controls, regimes, doctrines and systems which are not those of nation state law, but are not fully grasped by extended definitions of the scope of international law are defined as transnational law. This term is widely invoked but rarely defined with much precision.

People, corporations, public or private agencies and organisations are addressed or directly affected by regulations that are made outside the nation state jurisdiction. It can be referred to as a regulation that is guaranteed neither by nation state agencies, nor by international legal institutions or instruments such as treaties or conventions.[6]

We have two views on this situation. The first view is that national and international law should be part of it insofar as they have these effects, and it could address both public (state and governmental) and private (non-governmental, civil society) actors (Tietje and Nowrot 2006).

Another view is that writers treat transnational law as conceptually distinct from national and international law because its primary sources and addressees are neither nation state agencies nor international institutions founded on treaties or conventions, but private (individual, corporate or collective) actors involved in transnational relations (for discussion see Zumbansen 2002; Calliess 2007, 476). [7]

There is controversy as to if transnational law is primarily made up of rules which apply directly across national borders, or is it mainly co-ordinating

[6] https://studium.unict.it/dokeos/2020/courses/19472/document/TL2Cotterell2012.pdf?cidReq=19472

[7] Ibid.

regulation harmonising or linking substantive rules that may differ between states?[8]

We have the pluralistic approach, which is recognising and preserving legal differences but smoothing interactions between legal regimes and a substantive approach that could envisage convergence in regulation, and „universalist harmonisation"[9] in which transnational law aims at a gradual spread of legal uniformity across national boundaries, and moves towards a „world law"

3. Associated areas and regulations:

Areas that are often associated with transnational law are municipal law, international law and nonlegal regulation. The list could also include international human rights law, international criminal law, international trade law, international financial law, international environmental law, Internet regulation, international commercial arbitration practice and the transnational regulation of merchant communities (lex mercatoria), European Union law etc.

We also have a lot of regulation that are connected with transnational law, such as guidelines, standards, norms, principles and codes, together with procedures for norm-creation, adjudication and enforcement, established by associations, non-governmental organisations and administrative agencies, in addition to the „internal" collective regulation of transnational corporations.

4. Corporations

There are a lot of companies that have transterritorial impact. Their activities are globally spanning and bring together a multitude of autonomous organizational and economic actors. In those situations it is often the case that traditional regulatory aspirations of nation states are not enough for their business and there is a need for global ruling. Transnational law focuses on

[8] Roger Cotterrell, "WHAT IS TRANSNATIONAL LAW?" Paper No. 103/2012, Queen Mary University of London

[9] (Berman 2007, 1164, 1189-91)

the different regulatory frameworks for business corporations. Those frameworks are on the domestic, transnational and international level.

Transnational law differentiates relation to the regulation of business corporations. First way is hard law that governs the corporation through company law or securities regulation and even labour law. Second way is the soft law of voluntary codes of conduct, corporate governance codes and human rights codes on the other.

There is a need for a denationalized knowledge economy in corporations. They are placed in a multilevel regulatory field and transnational law provides a better understanding of the changing nature of applicable law. Transnational law of corporations must be seen as holding a central place within a legal theory inquiry into the nature of governance through law.

5.Transnational law and terrorism

Baker`s view on transnational law is shown with the example of terrorism and how to solve the problem with help of transnational concept. The US is facing continuous danger of terrorist attack utilizing weapons of mass destruction, such as atomic weapons. Imperative to addressing this threat are the intelligence function and national security law, which includes international law. Baker argues that international law is more important today in dealing with this threat than it was before September 11.

Tried and agreed mechanisms can maximize speed and secrecy while minimizing the qualitative risks of receiving intelligence from unknown sources with unknown agendas and unknown records.

Transnational law is a crucial component of intelligence work. International law can assist as a valuable national security tool, as it can contribute the structure and procedure for the efficient collection, sharing, and utilization of intelligence. Likewise, international law can encourage intermediary connections. Tested and approved systems can maximize speed and secrecy while reducing the qualitative dangers of accepting intelligence from obscure sources with unknown plans and records

Transnational law constricts and authorizes intelligence operations. International treaties may likewise raise the expenses and results of conduct as long as it is found or disclosed.

IV. Globalization process and views

In the 20th century, there is a significant challenge to the state-centred view of international relations and international, constitutional and regulatory law that is a consequence of transnational law. Transnational law undermines and complements the legal view on relationships between states and state actors in the international arena by emphasizing the importance of non-state actors in cross-border relationships.

This recognition of private actors' growing relevance in cross-border relationships allows for a much richer understanding of the International community than would otherwise have been possible under the pressure of the oppositional ideology of the Cold War. Transnational law encompasses those cross-border relationships between state and nonstate actors that fall short of leading to official international legal acts such as treaties or conventions.

Furthermore, TL should be viewed as forming and illuminating a large field regarding legal concepts. TL today depends on its ability for enlightening the mind-boggling multifaceted nature of decentred and profoundly divided socio-legal and political talks around transnational movement. TL is utilized to remove and relativize the view that states alone are relevant in border-crossing activity (Zumbansen, 2002a; Berman, 2005). Increasing cooperation among different state representatives helps the view of a changing and cooperative international field TL short-circuits legal concepts with regard to the global against the domestic background. TL makes the projection of domestic analogies onto denationalized circles of social action obvious.

Moving from the realism and political agitation of post-war international relations (Bull, 1977; Morgenthau, 1978) to a time of global coexistence and further onwards to one of collaboration (Fox and Roth, 2000), the start of the 21st century is marked by hostile elements in international relations. We

witness the rise of large decentralized and disorganized norms. Whether the emphasis is on understandings between large corporations and other business actors (lex mercatoria, strategy arrangements inside administrative systems (Butcher, 2000, 2004; Schimmelfennig, 2004) or the still delicate and fleeting standards and measures of emerging humanitarian law (Scott, 2001; Wai, 2003; Scott and Wai, 2004), these norms comprise a developing transnational normative regime, which links current pursuit of law across regional and conceptual divides. 'Regulatory fatigue' (Stewart, 2003), which has been shown as the state's rising incompetence to structure widespread public law and policy interventions into society.

The guarantees of a transnational administrative law in the sense of a broadly accepted legislative science as regulatory science (Aman, 2004) are especially prevalent in the unfurling of a more receptive and experimental approach of dealing with public administration (Ladeur, 1997). This approach must be comprehended in two different ways. First, from a procedural perspective, in a highly scattered and divided public sphere, transnational administrative law tries to promote procedures of cooperation and consideration. Second in a normative sense, it focuses on the formation of an administrative system that can sustain public and private cases which develop from privatized and deregulated groundwork of what is formerly public administration.

Globalization process leads us to legal fragmentation and reconsidering the traditional concepts of "territory" and "frontier". Any place can become a mobile arena for law. Common law interests became more important than the frontier. Issues and needs of states which go beyond the mere territorial frontiers, as happens with cross-border cooperation among territorial entities within the European Union (EU) legal order.

Zumbansen explained that "rather than describing the advent of globalisation as an end-point of legal development, from a transnational perspective, it becomes necessary to de-construct the various law-state associations in order to gain a more adequate understanding of the evolution of law in relation and response to the development of what must be described as 'world society'" .[10]

[10] Zumbansen, 2011

Scott tried to systematize the literature and he identified at least three possible understandings of the term "transnational law":

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

• Transnational law as "transnationalized legal decisionism" according to which it is "understood as the resulting (institutionally generated) interpretations or applications of domestic and international law to transnational situations" (Scott, 2009, 870); and

• Transnational law as "transnational socio-legal pluralism" which "as being in some meaningful sense autonomous from either international or domestic law, including private international law as a cross-stitching legal discipline. Rather than focusing on Jessup's broad definition that sees transnational law as some kind of umbrella within which 'other [nonstandard] rules' fall alongside public and private international law, this approach sees these 'other' rules as the true – or at least the quintessential – transnational rules"[11]

V. Conclusion

Transnational law is a really complicated term. There is a reason as to why there is not just one right definition of it. When we take a look from the start of this subject there is really a lot to say, and there is always something new in this complex system. Transnational law is needed in our jurisdiction and it changed the world that we live in and solved a lot of problems throughout history. There were big international problems which have been discussed through the articles like terorrism, Filartiga, Apartheid, human rights etc; and transnational concept was used for solving them. Transnational legal orders are not inexorable, they rise and fail. Like we saw throughout this essay, they often encounter strong resistance. Resistance can come from any direction. It

[11] Scott, 2009, 870

can be locally, nationally, and transnationally, including through the engagement of international organizations.

Jessup included public international law within his broader concept but today we can see that public international law remains central to the concept of transnational law, both empirically and normatively. Public international law is a critical part of the concept today because of its deep implications for transnational legal ordering and the creation of transnational legal orders.

Public law element must remain in transnational legal ordering because otherwise, the concept of transnational law risks becoming disconnected from the public sphere. Public international law and institutions are needed to address transnational problems in complement with private international law and private norm making. Transnational scholars have two very important duties to reveal the place and roles of international law and institutions while critiquing their processes.

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