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What is Transnational Law?

2020-2.7

Fogli di lavoro
per il Diritto Internazionale



La Redazione di FLADI-FOGLI DI LAVORO per il Diritto Internazionale

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Testo chiuso nel mese di giugno 2020

FOGLI DI LAVORO per il Diritto Internazionale è on line
<http://www.lex.unict.it/it/crio/fogli-di-lavoro>

ISSN 1973-3585

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Introduction

Living in a globalized Society, the idea that law crosses borders of nation states is common knowledge. Therefore, scholars started using the new concept 'Transnational Law' covering legal issues that extend the national borders yet can't be fully grasped by International nor Supranational law. Although the concept of Transnational sounds innovative, precision of the concept has left behind (Cotterrell, 2012, p.501). Transnational law is not yet generally recognised, since it has only emerged for some years, still some point of analysis needs to be discussed. Therefore, this paper aims to discuss some remaining questions concerning Transnational law. Moreover, this paper attempts to answer the following question: 'What is Transnational law?' and 'What is the role of the state in the concept of Transnational law?'

Argumentation

“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” (Jessup’s Storrs Lectures on Jurisprudence of 1965).

Before trying to answer the question ‘what is Transnational law and the role of the state in it’, one should delve into the literature concerning Transnational law to establish what is already known about the subject. Looking at the international scene now, one can say a lot of changes has appeared in comparison with the last few decades. Reimann (2004, p.402) states that in the second half of the twentieth century, several international subjects have developed from where some subjects don’t belong in public or private international law but lie completely outside of the traditional legal branches. It’s impossible for these areas to be assigned to either public or private international law, nor public or private, since they transcend both. Moreover, the rise of these new areas not only made the international scene more complex but also broadened the range of international legal issues and changed the character of the legal order (Reimann, 2004, p.403). Therefore, the boundary between public and private international law as well as other fields of law are blurring (Reimann, 2004, p.398).

Although the distinction between the different branches of international law is not negligible, in practice it isn’t meaningful because many subjects matter in our globalized world today aren’t limited too traditional legal classification but rather combine different legal issues. Reiman referred to (Reiman, 2004, p. 406-407) the fact that legal matters today are hybrid issues that touch several legal branches at the same time. Therefore, Reiman (2004, p.408) states when legal matters appear, they must be resolved with the blurring of the legal fields in mind, because they cannot be handled separately. To resolve this issues, Reiman’s paper concludes switching to a new approach called ‘Transnational law’ which aims to give and present balanced but most importantly, realistic picture of the international hybrid legal issues that are present in practice under the current complex global legal order (Reiman, 2004, p. 412).

Next to Reiman, also Zumbansen (2006, p. 738-744) refers to Philip Jessup’s Storrs successful work in which he challenged the boundaries of public and private international law by introducing Transnational law as a needed concept

that captures all law which regulates actions and events crossing national borders. Karsten (2018, p.11) highlighted that Jessup introduced the world to the concept of 'Transnational law' yet didn't invent it. Jessup describes Transnational law as all law which regulates actions and events transcending national borders. Although this doesn't seem very challenging for the public and private international law, since both fields of law are included, Transnational law reaches further by also including those rules that do not fully fit in such standard categories (Zumbansen, 2006, p.738; Karsten, 2018, p.11). Further, Jessup tried to demonstrate that reality of the legal practice of international intercourse is intertwined in public, private international and national law as well as state and non-state actors.

While on the one hand, transnational law blurs national, international and supranational law, on the other hand, legal branches like national, or private and public international law are restricted to their field of law and thus might conflict their legal rules with each other when confronted with certain international legal issue. So, the problem of traditional legal approaches, based on previous subdivisions can't analyse all legal problems, whereas the transnational approach, who combines all of this together, will be able to give a solution. In other words, there where the transnational law approach widens the net of the traditional legal branches regarding inter-state relationships, it also reminds law theories how fragile and untaintedness traditional law can be (Zumbansen, 2006, 738 – 744). Nevertheless, it remains important to retain a public international law element in the Transnational legal order, because public and private international law are necessary to address transnational issues, otherwise the concept threatens to become detached from the public sphere (Shaffer & Coye, 2017, p.20).

However, Jessup thought of international law as a misleading concept which only concerns relations of one or more states. For him, the global community contains transnational situations in which divers' actors such as individuals, states, corporations, organisations and others are involved. For these reasons, Jessup didn't find it useful anymore to speak of international law and thus, the expression Transnational law was born (Reiman, 2004, p.414). In this way, Transnational law can be understood as a normative framework governing transnational situations (Karsten, 2018, p. 11).

Though today, living in a globalised world, the doctrine of Jessup cannot be understood the same way. Legal scholars acknowledged the absence of comprehensive conceptualization and theorization of Jessup's description of

Transnational law. At that time Jessup didn't make any distinguishing in transnational problems but rather referred to them as '*other rules which do not wholly fit into such standard categories*' (Karsten, 2018, p.12). Though, Zumbansen (2006, p. 739.) rightly confirmed that the meaning of Transnational law, even though the word 'globalisation' didn't exist at the time, could be applied on present – day problems concerning the role of law.

Although it's difficult to define the term '**globalisation**', The judgement in the case of Costa vs. Enel in 1964 made it possible to enforce the idea that the legal order of the European Union should be seen as one in which individuals and states are both subjects and actors. Globalisation can be referred to as a system of law in which individuals can reach legal norms through formal and informal procedures. Zumbansen states globalisation doesn't represent the end of national politics but rather is a projection of national politics across nation borders whereby the transnational perspective deconstructs law-state associations in order to gain a more adequate perspective in the evolution of law in relation to the global society. Also, Baker (2007, p.650) states globalisation is the result of an interaction between countries and their legal regimes.

Moreover, globalisation stimulates research to the theories of society which offer perspective in the understandings of law (Russo, 2012, p.4). Some scholars speak of an interrelationship between transnational law and the global society whereby transnational law can regulate the operation of the global society (Russo, 2012, p.5-6). Besides globalisation are also polycentrism and the complexity of the international field today important in order to understand the transnational context (Russo, 2012, p.5). One of the things that makes Transnational law unique, which was already mentioned above, is that it differs itself by encompassing the international legal relationships between state and non – state actors, since it regulates cross-border actions and events involving persons, cooperation's, states and other groups. Shifting away from the idea that states alone are relevant actors in cross-frontier activities, transnational law highlights the importance of private and non - state actors (Zumbansen, 2006, 743-744; Reiman, 2004, p.415). In this way, Transnational can be seen as a system of norms in which states and other entities coexist.

Hence, it's not only important to know what the transnational law means in order to understand hybrid international legal matters from our complex global society, one should also question the role of the state in this matter, because transnational law increasingly influences law and national policies. Clearly, the

evolving international law field isn't the same legal community as when public international law was created. Instead, the international field widened his scope in which it didn't only made place for secondary law-making, i.e. 'soft law', but also created a network community whereby states and non – state actors have the possibility of setting up legal relations. Developments like these enhanced the dept and size of the international law field (Shaffer & Coye, 2017, p.15). The role of the State can be illustrated by the following two transnational issues our global society faces today.

For instance, Karsten (2018, p.9) mentions the following quotation from Radu Mares: *“At its core lies the realization that “[c]onceptual treatments of human rights in a less state-centered global order do not seek mistakenly to reinforce distinctions such as those between hard and soft law, between legal and nonlegal, private and public, territorial and extraterritorial, but to transcend such distinctions with a decisive focus on root causes and a search for new regulatory arrangements to tackle them.”* The term “Transnational law” refer to cross nation – state borders issues involving Non-State actors in addressing transnational cases. The rise of international non – governmental organisation (INGO's) and non – governmental organisations (NGO's) lobbying, influencing the international law-making process and putting pressure on governments to act on certain legal matters (Baker, 2007, p.652; Shaffer & Coye, 2017, p.11). Although, these organisations had only limited power in the past but play now a significant role in addressing norms, procedures, peer mechanisms and creating soft law. With their intermediary role, international organisations can shape national law and practice (Shaffer & Coye, 2017, p. 9-15).

Another last but relevant example in order to understand the dynamics of transnational law is the law of cross-border cooperation. Russo (2012, p.18) speaks of *“a multisource, multilevel, multi-actors, multidisciplinary and multinational legal system, yet a unitary phenomenon, where soft law and actual practices also play an essential role.”* During cross-border cooperation, where states interact with other states as well as other public or non-public actors, certain common obligations are applicable on all states (Russo, 2012, p.18) However, this limitation is being restricted by national law. According to Russo (2012, p.14-15) this creates a paradoxical effect, since EU provisions have the intention to create a common framework for cooperation, European law can't undermine the existing diverse national legislations of the member states.

The characteristics of transnational like polycentricism and fragmentation of sources are demonstrated trough the foreign cooperation (Russo, 2012, p.15) By looking at European law, member states are part of the European

integration, still their discretionary power as a state remains intact, since states may refuse their participation on the basis of non-compliance with their national law or for reasons of public interest and public order (Russo, 2012, p.13). According to Russo (2012, p.10), the evolved interaction between institutional levels should, not be understood as a loss of power and control over the sovereignty of states but seen as a complex interplay of national member states that are part of greater interests. Thereby, polycentrism in the transnational context does not detract the role of the state (Russo, 2012, p.13).

Conclusion

This paper aimed to answer the two following questions concerning transnational law: What is Transnational law and what is the role of state? One can clearly state that the debate concerning Transnational law is still going on, which makes it difficult to define it. Though evocating for the recognition of Transnational law as an existing legal technique is off the table, this paper tried to extensively describe the developments of transnational law framework in the legal international practices, to better understand the concept.

By accepting the relevance of the meaning of transnational law, one will be able to address the transnational legal matters one faces today in the international field of today. Therefore, Transnational law should be seen as a product of our evolving complex and globalised world. While realising that the international field of law-making isn't the same as it was before but rather evolved into a complex globalised world. Although this might seem as a challenge, just as defining a new subject such a transnational law, one should be open to develop this new approached in order to better understand as well as reducing the complexity of the world. Furthermore, Reiman rightly noted that a course in Transnational law could provide students an overall understanding of the international forest in stead of limiting it to a specific legal branch.

So, discussing the subject of transnational law will make it able to not only eliminate uncertainties concerning the transnational law, but will also help us to better understand our global complex society that will continue to develop further. (Reiman, 2004, p.415). In other words, as Russo (2017, p.19) has stated, one is recommended to follow Alice through the looking – glass, because stepping away of what is know and trusted through exploring the new, will help us to reduce the complexity of the world. To conclude, it matters to discuss the concept of transnational law, because without it, one won't be able to

understand nor handle the complex hybrid international legal matters one faces today in our global legal order.

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