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What is Transnational Law?

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Introduction - about the concept of transnational law

The father of the concept of transnational law, Jessup, described it as following: "all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as other rules which do not fully fit into such standard categories[1]".

He wants to imagine a new conceptual framework, breaking the classical dichotomy between private international law and public international law, the one between hard law and soft law and the one between state-actors and none-state actors. He is looking for a wider and more adequate view of global human activities, not limited by the traditional framework presented in the teaching of international law. At that time, Jessup thought primarily of national law as 'other rules'. From now on, it will be seen that the expression refers mainly to soft law, which includes new forms of law-making that are becoming increasingly important.

This is a very interesting concept because, even if born in 1955, it offers a new different way to address contemporary issues. The world becomes more and more globalizing, interdependent and faces common challenges as the climate change, the endangerment of democracy and the threat to human rights. The law plays a fundamental role in these challenges and must therefore adapt to **globalization**.

For this paper, I selected some reflections that I find particularly interesting about transnational law. It is mostly focused towards questions of public law. First, I explain why legal pluralism is interesting and that the idea of transnational law is linked with the need of interaction between different sciences. Secondly, I focus on the concept and the role of non-states actors in transnational law before analyzing two of them. Indeed, the third part is about international organizations and human rights and the last part is about the civil society.

[1] P. ZUMBANSEN, "Transnational Law", 2006, p. i.

1. Legal pluralism

Legal pluralism holds a very important place in the concept of transnational law. "**Legal pluralism** refers to the idea that in any one geographical space defined by the conventional boundaries of a nation state, there is more than one law or legal system. Variety of factors produce the perception of legal pluralism, which is reflected in intensified interest in the concept in contemporary scholarship. Legal pluralism has been identified as a fruitful area for constructive engagement between legal philosophy and the sociology of law."[2]

It is indeed important to consider other disciplines such as history, cultural studies and anthropology to better apprehend the law. For example, *legal history* tries to take all these factors into account to "challenge our understanding of how to go about the future while minding the past[3]". It offers to include the history, the sociology and the economics in legal discourses.

Each of these disciplines should also study the evolution of law. For instance, Von Daniels complained about the lack of **interaction** and synchronization between forensic *philosophy* and the law. Transnational law doesn't get enough attention in the interest of most legal philosophers. Those are still thinking in terms of nation state law. Concerning the *socio-legal research*, transnational must aid empirical research and help to orient regulatory practice. It offers a framework for comparing empirical socio-legal studies in different cross-border contexts. From them, we can find commonalities and interesting parallels and divergences.

One main field interesting for transnational law is the sociology because it studies the human society without boundaries. According to Cotterrell, a **reconceptualization of the social** would allow a better understanding of the new forms of regulation in transnational law. It would indeed allow an analysis of global needs and problems, without being limited by nation-state boundaries.

He proposes to imagine the social built on networks of interpersonal relations, "networks of community", based on the mutual interpersonal trust. These different networks bring together people who share the same values/beliefs, the same affect or the same environment. Each person is part of

[2] https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199542475.001.0001/oxfordhb-9780199542475-e-34, consulted on 11/06/2020.
[3] P. ZUMBANSEN, "Transnational Law", 2006, p. 748.

several networks. All these networks have "regulatory needs for justices and order that may or may not give rise to law in the form of institutionalized doctrine of some kind[4]". There is a certain form of self-regulation and the social sanction of expulsion from such a network is a very powerful constraint.

Cotterrell therefore imagines a paradigm shift that would focus on the 'law-creating potential' of these networks rather than that of states.

2. Non-state actors

Transnational law wants to include all forms of law, even those who don't fit the classical standards categories. This includes principally soft law. But new sources of law appeared with **new actors** on the mondial scene.

Classically, international law is based on the concept of state sovereignty: each state has equally the full right and power of governing over itself, without any interference from outside sources or bodies. This idea dates from the Westphalian legal order where international law is nation state centered. I think this conception is now really outdated. Since the evolution of globalization, nation states don't have a full control supervision of all regulation inside their territory. Sources of law now exist outside the ambit of state authority and are not all under the control of the states. We face an emergence of a large, decentralized and non-harmonized body of norms (corporation and other commercial factors, policy negotiations within regulatory networks, emerging global humanitarian law).

Today, it is impossible to not consider the **non-states actors** in the development of law, and more generally, of the global society. In the public area, we think about non-governmental organizations, unrepresented nations and peoples and even world citizens. They are the first to take initiatives leading to the evolving of our society. In the area of public international law, transnational wants to emphasize the importance of non-sate actors in cross-border relationships. Private actors play an important role in the international community and can also have relations with state-actors, which don't lead to Treaties but are still of fundamental impact[5].

[4] R. COTTERRELL, "What is transnational law?", 2012, p. 20.
[5] P. ZUMBANSEN, "Transnational Law", 2006, pp 743-745.

"The 'private' in transnational law suggests that the dynamo of norm-production, development, interpretation and enforcement is primarily located with civil society actors rather than public authorities of the state or public international law[6]".

The classical law-creating and law-interpreting agencies are the courts, the legislatures, the administrative agencies and the international organizations. But now, a lot of new agencies participate to the transnational regulatory doctrine. Cotterrell calls the reason and principle of law "the ratio". This new "ratio" is created "outside the normative reach of municipal authorities and international agencies created by treaties or conventions[7]". We can think for example about the Principles of International Commercial Contracts created by UNIDROIT.

The role of the **judge** has also to not be limited to the state boundaries, they are not under the control of the states. They read and study judgements from other countries all over the world and get inspired for their own decisions. The power of the judge to say the must not be forgotten.

3. International organizations and human rights

Public international law has influence in many areas of social life. A norm is never to be analyzed in isolation with regard to the problem it aims to solve, it has **impacts on the whole society**. Shaffer and Coye therefore propose a shift in focus to understand how norms "penetrate and shape law, legal practice and social identity within states[8]".

In my view, a very interesting issue in this theory concerns human rights. When a **human rights treaty** is ratified by a state, it must first adapt its constitution to comply. The evolution of constitutional human rights has a considerable impact on a state, especially when it is in democratic transition. Simmons also shows that these treaties, beyond their formal effects, "shape executive agendas, support activist groups litigating before domestic courts and mobilize domestic support[9]". They can even create new professions, such as human rights lawyers" in the UK, which is beginning to spread across

[6] R. COTTERRELL, "What is transnational law?", 2012, p. 12.
[7] R. COTTERRELL, "What is transnational law?", 2012, p. 22.
[8] C. COYE, G. SHAFFER, "From international law to Jessup's transnational law, from transnational law to transnational legal orders", Legal studies research paper, 2017, p.11.
[9] *Ibid*, p. 15.

Europe. The aim of the ratification of a Treaty is not only to solve one specific problem, it is to reach deep within state law, institutions, and practices.

In this process, the role of **international organizations** can be noted. They are the main creators of human rights law. Indeed, intergovernmental organizations now play a fundamental role in establishing norms, procedures, peer review mechanisms, dispute settlement, coordinating resources and expertise, while international non-governmental organizations act as observers and consultants and disseminate information through their own networks. Several organizations have also the power of bypassing the sovereignty of the state to create norms and enforced them on individual human beings, as the European Union.

Even when it has no binding force, there is a formidable weapon that the soft law provides to non-governmental organizations: **the power of shame**[10]. When they uncover an injustice, they have the power to inform civil society about it. When civil society takes hold and becomes outraged, it can be expected to exert pressure in democracies, which in turn can shape the law and even reach the institutional architecture of a state.

In addition, transnational law proposes that domestic courts should be able to handle human abuses themselves and deal with cases involving problems that go beyond the limits imposed by their territory. Indeed, in the last two decades of the 20th century, civil litigations seeking for human rights abuses brought against states, state official and private corporations occupied Courts all over the world. The problem is that many domestic courts have had to dismiss these claims because of *forum non conveniens* or state-immunities. However, **human rights claims** are mainly of a border-transgressing nature. This law cannot more be confined to territorial borders. The case *Filartigia* (1980) is a reference in this field because it sets the precedent for United States federal courts to punish non-American citizens for tortious acts committed outside the United States that were in violation of public international law. It is considered as inspirational for the future[11].

[10] J. ZIEGLER, Les murs les plus puissants tombent par leurs fissures, Paris, Éditions de l'aube, 2018, pp. 35-36.
[11] P. ZUMBANSEN, "Transnational Law", 2006, pp. 745-746.

4. Civil society

What about the role of **individuals and associations**? The doctrine of transnational law can be elaborated by experts but also by non-experts. A norm can be created through a **collective** deliberation by non-legal expert individuals in which everyone can participate, without having to be a member of a specific group.

For example, the concept of '**rough consensus and running code**'(RCRC) of Callies and Zumbansen is interesting. It is a "process of global and technical standart-setting and rule-making for the internet[12]". It is a way to create technical standards for the Internet after collective deliberation and experimentation. This process consists of a debate in which everyone can participate: technical experts, network designers, system operators, researchers and Internet enthusiasts with varying degrees of technical experience. It is guided by an ad hoc chairperson. Once a consensus has been reached, a proposed standard is published, and the deliberative community decides whether or not to put it into practice. If this is the case, the standard becomes a "running code".

In that case, the process concerns a technical matter. But it could be applied to other areas which also have the common good as their goal, as in public law. This process could be interesting for adopting certain rules of law. I think that it can be linked with the techniques of **participatory democracy**, which represents a conceivable and interesting alternative to representative democracy for the future.

Another example of the role of citizens in the creation of the norm is the open mass organisation of **mass opinion** through the internet by transnational organisations such as Avaaz (*nonprofit organization promoting global activism on issues such as climate change, human rights, animal rights, corruption, poverty, and conflict*). Everyone can give their opinion without having to be an expert or meet membership requirements. These mass opinions will strongly influence legislators and governments. Thanks to the new means of communication represented by the Internet, "opportunities for democratic will formation can be extended transnationally, theatrically without limit[13]".

[12] R. COTTERRELL, "What is transnational law?", 2012, p.17.
[13] R. COTTERRELL, "What is transnational law?", 2012, p. 26.

Conclusion - about a change of cursus

In conclusion, we can consider transnational law as a new way to think the law and more generally, the society under globalization. Classical international law misses some links with other disciplines and other disciplines need to apply this way of seeing the international law. Beyond that, we must focus on the new actors and sources on the international scene. Non-sate actors such as human rights organizations and the civil society have a non-negligible role on the shaping of law and represent the future of our society.

In my opinion, it is always easier to apprehend, understand and learn law by organizing its elements as much as possible. The "cases" 'public law', 'private law', 'state actors', 'non-states actors', 'hard law' and 'soft law' make it possible to put some order into these rules, which have significant differences. So I think it is first necessary to study each of them before having the global view that transnational law offers. Courses in public and private international law could, for example, devote a few hours to this subject by way of conclusion.

On the other hand, to understand how the world works and evolves, a course in transnational law is indispensable. I think that it really allows us to link law, politics and society. It provides an opportunity to question the system and to ask questions about how the system works and what is at stake in society at a global level. A transnational law course could, for example, be offered in the school year following the one in which the two basic courses were discovered. I think that we are in a period of great change and that it is **necessary to shift our way of looking at things**, which is why I really enjoyed this course.

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