diritto internazionale
giurisprudenza catania

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What is Transnational Law?

2020-2.9

Fogli di lavoro
per il Diritto Internazionale

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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ABSTRACT

The aim of this essay is to underline the main concept of Transnational Law nowadays.

In order to do that, in the first part of the paper I will expose the actual international law framework and its connections with Transnational Law. Then, a short list of ideas about Transnational Law by a series of scholars will be presented. Finally, I will give my idea of the discipline.

WHAT IS TRANSNATIONAL LAW?

The last few decades witnessed the emergence of a cutting – edge discipline: Transnational Law.

This very term was used by Judge Jessup during his Storrs Lectures at Yale University in 1955, referring to "all law which regulates actions or events that transcend national frontiers". Jessup, with his notion, introduced a tool that could solve a series of modern issues, a lens from which scholars and lawyers could see international matters differently. However, Jessup's definition was more encompassing than that. In his opinion Transnational Law embraced not only public international law but also private international law. Jessup also included in the notion of Transnational Law the so-called "other rules", the ones that cannot be comprehended in the classical subjects. As a matter of fact, Jessup referred to Transnational Law as an enveloping discipline, capable of overcoming both domestic and international matters.

However, as time goes by, so does the original concept of transnational law; whereas Jessup 's quote is still considered a cornerstone in the Transnational scheme, scholars and practitioners never ceased to argue since then, in what really consists of Transnational Law in the legal field.

The widely accepted idea is that today's global society is really different than it was at Jessup's time, so it is important to understand how Transnational Law fits in the modern world.

In order to do understand this, it is also necessary to define and illustrate what Transnational Law really is, whether it can be considered as a new legal order or, simpler as a new approach towards present-day issues.

TRANSNATIONAL LAW: THE CONTEXT

1.1.

The dual fragmentation of the State

Nowadays, it is a locus communis that we are attending a peculiar era of law. The global order has significantly changed since Jessup gave that definition of Transnational Law. As Reimann writes in his piece "From the law of the Nations: Why we need a new basic course for the international curriculum", last century public international law underwent to a significant change.

At the beginning, Public International Law only involved the States, considered as equivalent entities. It regulated their relations and events with a limited range of sources, mainly derived by the United Nations or simple customs. This was basically due to the fact that the only actors in the international scenario were the States themselves; consequently, international law could have been purely defined stricto sensu as the law of the nations. It could happen as the States followed a classical, Westphalian international order, in which the equilibrium between the States was mainly based on their sovereignty. There was a limited amount of rules which had to be followed in order to respect the "iurisdictio" of the State; they were mainly based upon the non-intervention principle. In a few words, previously, the State could be considered as a Black Box: what happened in the State, was not for the other ones to concern nor discuss, it had to be considered an "internal affair".

Furthermore, relations between States were relatively limited. They were made possible thanks to specific figures amongst the State, such as diplomats or nuncios. This made possible to confer the foreign affairs power to a restricted group of people who regulated the States' best interest.

However, a similar approach nowadays is impossible to conceive. The globalization has produced a continuous connection between the various countries,

an unimaginable amount of interactions between the states and, finally it has created, international courts. The world is a now a "mobile law" arena (Russo). This means we are now observing a fragmentation of the State, mainly due to two factors connected between them.

The first one, is the gradual loss of its sovereignty. We have now achieved international courts, entities that make impossible to think of the State as a Black box. As a matter of fact, what happens in the State can be not only discussed but also, if it is the case, punished. The State lost an important part of his power. If in the classical scenario, the iurisdictio was typically national, today it can be exercised by another entity, the international Court, that can sanction and punish the State.

Furthermore, the loss of sovereignty is also related to the passage from the monarchy to a democracy. Previously the power was detained by a restricted group of people, in particular by the monarch who could be considered, sometimes, as the state him/herself. He/She was the one who decided whether or not take part in a war, whether or not punish a man. Today the situation is completely different, democracy has speeded up the power separation process. This means that more people are involved, for example, in foreign affair issues, such as Ministries. States are split up in separate entities that have relationship one to another, autonomously. There is no more a monarchy which interacts with another through diplomacy, ministries, judges cooperate between them (the so-called cross-border cooperation, Russo). State sovereignty is now fragmentated and lays upon a larger number of people than before.

1.2.
The appearance of International Organizations

Last century also witnessed another phenomenon, the birth of a wide range of international Organizations. As said before, in the Classical international scenario, the main actors were the States themselves. However, in the last seventy years, the appearance of International Organizations altered this scheme. Non – state actors began to be involved in the international stage, challenging the traditional rules. This defy mainly consisted in the fact that Public International law rules were only applied to States, whereas International Organizations shifted the focus on human rights producing a series of rules directed to men. International Law was considered a second level legal order, whose subjects were States not men; international organizations changed this equilibrium, introducing a series of norms aimed to men.

For example, the Human declaration of men created legal obligations for the States.

In general words, the main idea is that nowadays countries can be accounted with human rights protection rules made by international organization. Some of them even have the power to reach human beings through special norms, enforced by peculiar institutions whose sovereign was given by state themselves (EU regulations). This implies that men can now bring up a claim before an international Court against a State if it has violated an obligation. The European Court of Justice, the International Court of Justice, the Inter-America courts of Human Rights are just a few examples of a series of international tribunals around the globe (Reimann). As these Supercourts grow, so do the sentences. In many cases, these decisions have been life-changing for a series of people. An example is offered by the Dudgeon v. United Kingdom

case (1981), brought before the European Court of Human Rights. The claim, filed by Mr.Dudgeon concerned the criminalization of homosexual acts between consenting adults in Northern Ireland , to whom he was a victim. However, the judgement by the European Court of Human Rights declared a violation by the Northern Ireland Republic, specifically this criminalization was a violation of Article 8 of the European Convention of Human Rights […"Everyone has the right to respect for his private and family life, his home and his correspondence.."]. As a result of the judgement, male homosexuality was finally decriminalized in 1982 in Northern Ireland, setting an outstanding precedent. As a matter of fact, an International Court directly influenced a State.

1.3.
The prominent role of Judges

One might wonder how national judges react to the growing importance in the scenario of international claims and tribunals. The matter is quite controversial as there are no "empty spaces". This means that, the more international judges expand, the less international (and sometimes also national) jurisdiction is left to national judges. In order to avoid this from happening, national judges try to increase their case-law in international matters.
One enlightening example is offered in Zumbansen's research paper "Transnational Law" where he focused on the Filartiga decision taken by the Alien Tort Claim. The Alien Tort Claim was created in 1789 with the Alien Tort Statute [..."The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States ..."]. Nevertheless, since the Filartiga decision, United States courts interpreted the act in a wider sense, in order to protect

foreign citizens who were looking for justice in U.S. courts for human rights violations. This instructional precedent Filartiga v. Peña -Irala concerned a matter happened in Paraguay, where the seventeen-year-old Joelito Filartiga was kidnapped, tortured and murdered by the inspector Américo Norberto Peña – Irala. The Filartiga family tried to shed a light on the case, accusing the police for the murder, but the case remained unsolved. A few years later, Joelito's sister Dolly, moved to the U.S. where she applied for political asylum and discovered that Peña was also there illegally. She reported it to the authorities and then filed a complaint in U.S. courts against him, for her brother's death. Even though the case was dismissed at first by several courts, it happened to be ruled at the end in favor of the Filartiga. In a few words, Courts extended their jurisdiction in the case regardless it concerned an issue happened in Paraguay. In order to justify the decision, the U.S. court invoked the Alien Tort Statute that claims U.S. courts jurisdiction for torts "committed in violation of a treaty of the United States". Fairly, Joelito Filartiga's death by the hand of Peña- Irala, violated a series of international treaties to which United States had adhered.

The case is nowadays considered cornerstone in Transnational Law, as regardless the locus commissi delicti, U.S. jurisdiction transcended national frontiers in order to protect those human rights.

2.
THE TRANSNATIONAL ISSUE

Having had regard to our modern and global context, it is now time to understand our approach towards Transnational Law. As remarked in the previous paragraphs a series of issues such as the fragmentation of the State, the growing number of international organizations and the role of judges lead scholars and practitioners to reconceive a way to analyze international matters.
Many of them are convinced that Transnational Law is the finale answer. However, it is also important to understand how we should conceive it, whether as a new legal order or as a mere lens through which issues could be better solved, or as an evolution of International Law.

The described context leaves us in a mixed framework. All the issues previously analyzed caused a significant problem: a line more and more blurred between private and public international law.
The mere fact that a claim can be brought up against a State, or that norms by non-state actors can be legally binding, leaves us a series of questions. Domestic and international problems are often related, in a wider sense than before. This causes a bigger issue towards Transnational Law.
Precisely, a cleavage has been produced amongst transnational analysts. Some intellectuals are strongly convinced that a transnational approach could be solely applied as a private discipline; in a few words it should be conceived as "Transnational Private Law".
On the other hand, other scholars claim and firmly support that a new legal order should be created. For a series of reasons, they believe that a series of Transnational Legal Orders can be created in the international panorama.

2.1.
NEW LEGAL ORDERS

In their paper "From International Law to Jessup's Transnational Law, From Transnational Law to Transnational Legal Orders" Shaffer and Coye become great sponsor of the creation of Transnational Legal Orders. Starting from the known Jessup's quote, they trace the development of Transnational law through the years. Then, they apply Jessup's concept to nowadays international matters. Specifically, they bring to light the fact that a series of International matters can be seen as emerging Transnational Legal Orders. By this very term, they refer to "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions" (Halliday and Shaffer). In order to demonstrate the existence of these legal orders, they present a series of solutions that have been done in the recent years by using this kind of approach. This happened for the intellectual property topic and for the indigenous rights concerns.

As a matter of fact, International Law norms by being enacted by state legislatures, or adopted by state regulators, can have direct effect in national legal systems. Moreover, the appearance of both inter-governmental and non-governmental organizations has largely accelerated the creation of this scheme in two ways. First, they often take part in the international law-making processes. This causes an augmentation of the so-called "softification" of international law.

In his paper "A Darker Legacy of Jessup's Transnational Law?", Nowrot highlights how the international law-making procedures has been changed through a series of instruments and tools that are not as compulsory as the

precedent ones. This kind of international rules produced are not, as Nowrot writes, "legally binding", yet they can be considered pretty rigid for the involved parts in the scenario.
Secondly, they also bring up claims that involve privates against States (The Dudgeon Case could be an example). This, as underlined before, can cause the blurring between private and public international law.

So, the two intellectuals sustain that the way the problems analyzed in the paper have been solved, suggest the emersion of new Transnational legal orders. The critical fact was that in both cases international treaties and convention obligated the countries where the issues were born to find a solution. In a few words, the main concept is that with the help of a State and with the existent International Law sources, Transnational Legal Orders can be created. This means that Transnational Law and International Law are closely related, one is necessary to the other.
Furthermore, the issues analyzed in the paper had both elements combined of domestic and international dispute at the same time. The problem about intellectual property rights concerned the TRIPS, Trade- Related Aspects of Intellectual Property Rights of the World Trade Organization.
It showed how the TRIPS agreement could be considered as Transnational; in fact, the TRIPS dealt with a series of public international commercial rules in order to prevent violation of intellectual property. TRIPS was ratified by numerous countries and it determined the creation of new domestic institutions, new professional figure that could be specialized in intellectual property problems. Some of the States, China for example, use the TRIPS agreement as a directly applying source in their domestic issues concerning intellectual property amongst privates.

In this sense, the role of the State has been crucial for the debut of the new Transnational Legal Order. The State still has its importance, in Shaffer and Coye's opinion, in Transnational Law, actually, it is maybe one of the most important elements.

2.2.
TRANSNATIONAL PRIVATE LAW

Notwithstanding, a conception of transnational legal orders is not that convincing. How could we talk about a law "that transcends national frontiers" if the State is still involved?

In order to answer that question, Calliess and Zumbansen suggest a different approach towards Transnational Law, considering it as a private autonomous regime.

In their book "Rough Consensus and Running Code" the authors point out a different transnational scheme. They mainly state the impossible separation between private and public, even though they still find useful the classification.

The book takes into consideration a series of matters that involve generally private actors whose relevance give them access anyway to the public sphere. What is more, is that this kind of scheme is "bottom- up". The transnational rules amongst private primarily derived, in this scheme, conveniently, by privates themselves. To explain it, Zumbansen and Calliess use as an example the Lex Mercatoria, an autonomous legal regime that survived for centuries without the state intervention and that has governed international trade between privates.

Nowadays the situation is pretty different, lex mercatoria could be today compared to the modern lex digitalis. However, it is difficult to achieve an

international trade on the internet, as it has been legislated singularly by the states in some cases. In others it has been "standard legislated", de facto, by private agencies in the US and then copied in other places in the world.
Lex digitalis is now partly produced by states and partly by private agencies. In a few words, it may need State authority in order to be effective. Or, maybe, this authority could be gained by using a system of "Rough consensus and Running Codes" (RCRC).
This would be, as Cotterell writes "a process of technical standard-setting and rule-making for the Internet, embodied in the long-established 'request for comments procedure' ". It should be a system thought out to deliberate and experiment with consensus that comes out by the member of network communities, as Cotterell affirms. Internet experts or amateurs can set up the governance structure of the tool, discussions can be made by the members in the forum and then, a rough consensus can be attained.
Of course, this method can be applied to transnational issue, in order to gain a general consensus. Plus, is quite simple as it really transcends national frontiers. If internet has changed something, it is that: the virtual world really transcends barriers.

3.

THE CRITICS

3.1. Transnational Legal Orders

How should we consider Transnational Law then?
If we take a look at Shaffer and Coye's opinion some arguments should be moved.
First of all, they debate about the emergence of a series of Transnational Legal Orders. This means that Transnational Law will not a create a unitary framework; per contra, every time an international matter will be solved, in their opinion, we will witness the appearance of a new Transnational Legal Order. As a consequence, the transnational approach will not create a unitary framework but a fragmentated one from the beginning.
This also has to be analyzed taking into consideration the fact that international law is already undergoing a period of dissolution, so one might wonder whether the creation of multiple transnational legal orders really is the ultimate answer.

Moreover, despite the fact that their examples still are valid, they are quite isolated. Effectively, a victory has been reached through the usage of the transnational approach, but States are still reluctant from this system. They hardly accept to let their guard down in order to follow orders by international organizations. If we take a look at the Lissabon Urteil sentence, which involved the Federal Republic of Germany and the European Court of Justice, the German court demonstrate how little it is willing to give away its sovereignty. Plus, Germany is not the only one who had this kind of reaction, other countries

too show resistance towards lack of their powers prospected by International Organizations.

Finally, if International Law has taught us something is that internal law and international law are deeply related. One depends on the other, this means that also the internal political of the State can change the international equilibrium. This has a dual significance.
Firstly, the fact that a State adhered to a certain agreement, or to a certain Institution does not implicate that the international setting will always be unchangeable.
Brexit can be an example, ideologies in the United Kingdom had changed so did, consequently, United Kingdom memberships in the European Union. Still their choice is coherent to the actual framework international law. Brexit demonstrates how, despite every effort, States still are the main actors in the international order. The main decisions still depend on the "voluntas" of the States.
As for the second aspect, the connection between internal and international law means that, again, "no empty spaces" are left. What can be said about this expression is that, summarily, if a powerful State leader is weaker than another, he loses power in the international scenario whilst the other gains it. In a few words, nothing is really lost, it just is transferred. Obviously, this has a consequence both on the international and internal framework. On the international side, the content in general will be different regarding the international repartition of power of the States.
On the internal one, the ratification agreements, conventions and sources in general will be different for every State parties, regarding their actual government.

Thinking of Transnational Legal Orders would mean to involve primarily States, consider them as main actors in the stage. A side effect of this approach would be creating an exact photocopy of the actual International Law but without having a real dynamical evolution. As Zumbansen writes: "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".

3.2.
Transnational Private Law

One might then wonder what the right approach towards Transnational Law should be.

Now, more than ever, law is undergoing a process of de-territorialization. It is no more just linked to a spatial territory, on the contrary it is a "droit déraciné" (Russo). It means that law does not belong to a certain State, or to a territory in general, it just is eradicated from the geographical context.

This of course leaves in a different scenario where a Transnational approach is needed.

The RCRC matter could be, in a next future, a solution, in many Transnational network communities this regime is applied, and it really is found useful for many purposes.

Yet, this system too can have side effects.

First of all, our communities are now "polycentric" as a side effect of the fragmentation process, this means that we are contemporarily part of many of them. In order to be part of them, the question should be about what community rules we should follow, whether the ones about hypothetical community one or two. Plus, even though consensus can be reached amongst members, it will always be weaker than State Authority coercion.

4.

Conclusion

In our global context, the right approach to follow is the one suggested by Anna Margherita Russo in her paper "Globalization and Cross-border Cooperation in EU Law: A Transnational Research Agenda".

Her paper suggests the existence of a transnational regime in Europe: the cross- border cooperation between regions. This kind of plot do not aim to do a separation between public and private, States or international organizations, it is just aimed to highlight a specific aspect of the European integration, the cooperation amongst subnational entities, regions.

Regions are neither that big nor that little, they seem to be the perfect test subject for the experiment. INTERREG, is a tool through which the differences can be reduced amongst regions using a series of Transnational instruments such as the Single Market or the freedom of movement.

This does implicate a State involvement of course, but it would not be as considerable as the one prospected in a legal order. What is good about this approach, is that regions can continue to cooperate regardless the internal political situation of the State, as if they were, from the moment the cooperation began, independent. Surely, State is necessary in order to start and validate the cooperation but notwithstanding, the interregional program from then continues autonomously.

In this way, Transnational Law could be seen as a tool that involves a series of actors, issues and different subjects, that embraces polycentrism and really goes beyond national bounds.

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