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Law, Transnational

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Abstract: Transnational law is an institutional framework for cross-border interaction beyond the nation state. In distinction of territorially organized national and international law, it is structured as a plurality of functionally specialized transnational law regimes, which in a pragmatic approach combine different governance mechanisms of private (norms, alternative dispute resolution, social sanctions) and public (laws, courts, enforcement) origin, where the latter are dis-embedded from their domestic context. This article briefly explores the concept of transnational law.

Keywords: Transnational Law, Private International Law, Legal Theory, Globalization

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Law, Transnational

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Transnational law is an institutional framework for cross-border interaction beyond the nation state. In distinction of territorially organized national and international law, it is structured as a plurality of functionally specialized transnational law regimes, which in a pragmatic approach combine different governance mechanisms of private (norms, alternative dispute resolution, social sanctions) and public (laws, courts, enforcement) origin, where the latter are disembedded from their domestic context.

The concept of transnational law has long been disputed and is still subject to international scholarly debates. In 1956 Philip C. Jessup delivered his seminal Storrs Lecture on “Transnational Law” at Yale Law School. Although the attribute ‘transnational’ had been used before – as Jessup himself points out – he was the first to assign this attribute to the law. The background against which Jessup’s innovation must be seen is twofold. Until the late 1950s, the concept of law had been closely linked to the nation-state; sovereign state authority was seen as the only possible source of legal norms. The main conceptual distinction made by lawyers was and still is that between national and international law. National law is understood to be the law of the nation-states encompassing criminal codes, civil codes, administrative regulations, or other laws produced by a domestic law-making authority and directly valid within a particular nation-state’s territory. International law, on the other hand, is concerned with the relation between states. Public international law or the law of the nations encompasses international treaties concluded by sovereign nations, international custom and general principles of law. Private international law or the law of conflicts is national law regulating which domestic legal order is applicable to individual relations with cross-border elements.

None of these categories, however, comprises norms made by non-state actors. Jessup’s notion transnational law has become most relevant in the light of economic globalization and the rise of private self-regulation that reacts to both domestic and international law’s incapability to comprehensively facilitate and regulate cross-border interaction. Jessup had already identified the world community as a community not only of states but also of individuals and private groups such as internationally acting enterprises or organizations. Since especially international law was ill-equipped to reflect rules and regulations of private actors, Jessup posited that “… 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.”

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Jessup’s approach must also be understood in the light of the 1950s world-order. The beginning era of Cold War was shaped by the battle of the global superpowers and their allies. In this situation, Jessup, being an international lawyer, recognized that the progress of public international law (the law of nations) had come to a dead end. The bipolar world order seemed to be set in stone and major advances in public international law were not expected. The inclusion of private powers in the concept of transnational law promised to bring some movement on the stage of international affairs.

Generally speaking, Jessup’s approach to transnational law can be categorized as a functional one. It applies to all cases and events that ‘transcend national frontiers’. The benefit of Jessup’s definition of the term transnational law is that it was the first that was able to conceptualize the involvement of private actors in cross-border regulation. Its problem, however, is the fact that it applies to almost any cross-border situation. In its time, Jessup’s notion of transnational law was groundbreaking - and in some respects it is until today. But Jessup’s definition has become increasingly unreliable since cross-border trade and social interaction have moved on from being an exception to being a common phenomenon. In the ambit of globalization the once strict confines of the nation state have become ever more permeable, and nowadays almost no event is conceivable in which transnational law under Jessup’s definition is not involved. The term therefore has lost much of its persuasive power. This is why scholars of public as well as in private international law have been reluctant to adapt the term transnational law for their purposes. The problem of Jessup’s definition is that it does not reflect the sources of law but only pertains to a rather unspecific field of regulation.

It is against this background that some scholars have tried to narrow down the notion of transnational law in order to restore some of its focus and give it a clearer shape. Specifically scholars in the field of commercial law, in which trade customs and standard form contracts have always been of paramount importance, have readily taken up Jessup’s inclusion of private actors into the concept of transnational law. The idea was very welcome to those who had always pleaded for a recognition of the law-making power of private actors. The American legal scholar Louis Jaffe had analyzed the “Law Making of Private Groups” as early as in 1937, whereas German legal scholar Hans Grossmann-Doerth had identified standard contract forms as the ‘economy’s self-made law’ (“Das selbstgeschaffene Recht der Wirtschaft”) in 1933. The roots of the idea that merchants and traders create their own law alongside or even in substitution of national law are often traced back to the medieval Law Merchant, denoting a body of law that was developed in early European commerce by merchant courts dispensing justice at city markets, trade fairs, and sea harbors based on the usages of the ‘community of merchants’. In more recent years economic historian scholars such as Avner Greif have taken this ancient ‘lex mercatoria’ as the starting point for an institutional economics analysis of private ordering by private legal regimes.
In the 1960ies the English legal scholar Clive Schmitthoff has analyzed the practice of international commercial law and pointed out that its sources are not only domestic laws or international law but especially contractual practice and customary law. Thus, with reference to the ancient ‘lex mercatoria’, he claimed that a ‘New Law Merchant’ was emerging beyond the nation-state - as was proposed in similar terms by his French colleague Berthold Goldman. This ‘New Law Merchant’ has been subject to legal and political debates in the US as well as in Europe. The core of the concept is that commercial law is created largely outside the law-making institutions of the nation-state. This transnational commercial law is supposed to be reflected in trade usages and standard form contracts such as the International Commercial Terms (INCOTERMS), developed by the International Chamber of Commerce in Paris (ICC), and in the practice of international commercial arbitration, but also in international model laws and private codifications such as the UNIDROIT Principles of International Commercial Contracts or the Lando Principles of European Contract Law, which based on a functional comparison of domestic legal systems aspire to reflect the common core of the laws of civilized nations.

The ‘New Law Merchant’ has often been used as a synonym for transnational (commercial) law. This, however, implies a definition of transnational law that is much narrower and much more specific than the one Jessup has suggested. The transnational law of cross-border commerce is thus conceptualized as a third category of law besides national law and international law. In this spirit, the German legal Scholar Klaus-Peter Berger compiles an open ended list of the rules of modern lex mercatoria in his ‘Transnational Law Database’ on the Internet which contains not only rules taken from the above-mentioned private codifications of general principles, but also rules that have gradually emerged in the practice of international commercial arbitration. This project of a ‘creeping codification’ of the ‘Lex Mercatoria’ combines the comparative law approach of the UNIDROIT Principles with the common law approach to rule-making by judges.

The practice of international arbitral tribunals thus assumes a central role in the contemporary theory of transnational law. Arbitral tribunals can be organized in various ways, from so-called ad-hoc arbitration, where the contract parties appoint the arbitrators as a dispute arises, to institutionalized courts of arbitration, which administer arbitration proceedings according to standing rules such as the International Court of Arbitration at the ICC in Paris. Ad-hoc arbitration and institutional arbitration have in common that no state officials are directly involved in the private dispute resolution process. As opposed to State courts, an arbitral tribunal under the 1985 UNCITRAL Model Law on International Commercial Arbitration, on which the procedural law concerning arbitration is based in most states, may not only apply state contract law, but also rules of law such as the UNIDROIT Principles or the Lex Mercatoria. Indeed, many arbitral awards apply such a-national rules.

Under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which enjoys almost universal membership, State courts enforce arbitral awards without de novo review as to their substance. Recognition and enforcement may be refused only in a strictly limited number of situations, especially if such enforcement were contrary to the public policy of the country where enforcement is sought. The proponents of the new Lex Mercatoria contend, however, that arbitral awards are implemented by the parties to a dispute
almost always without reference to State enforcement in order to preserve their reputation as a decent merchant in the international business community.

If this would hold true, all constitutive elements of the New Law Merchant as a transnational legal regime, from norms over dispute resolution to enforcement, were created and administered exclusively by private actors. Another example for such a privately created transnational legal regime would be the Uniform Dispute Resolution Policy (UDRP) of the Internet Corporation for Assigned Names and Numbers (ICANN), which offers online resolution services for disputes between owners of internet domains and trademark holders. Against the background of such purely private legal regimes, the following definition of transnational law is suggested:

Transnational law denotes a third category of autonomous legal systems beyond the traditional dichotomy of domestic law and (public) international law. Transnational law is created and developed by the law making forces of a global civil society: (1) It is based on (a) general principles of law, derived from a functional comparative analysis of the “common core” of domestic legal systems, and (b) on the usages and customs of the international business community as expressed in standard contract forms and general business conditions, (2) it is administered and developed by private providers of alternative dispute resolution, and (3) it is enforced predominantly by virtue of social sanctions such as reputation and exclusion. Finally (4) its rules are codified – if at all – in the form of lists of principles, standard contract forms, or codes of conduct proposed by private norm entrepreneurs.

This concept of transnational law has far-reaching implications. It suggests that law cannot only be created by private actors outside national legal systems, but is also administered by private courts and, thus, to a great extent independent from state control. For adherents of a concept of law that is under permanent democratic control, transnational law as privately made law is of course a serious provocation. They fear that social values, environmental standards, employment security and the like would suffer from a lack of public policy in private lawmaking. Recent research conducted by Moritz Renner and Andreas Maurer, however, suggests that international arbitration courts begin to develop standards for a genuinely transnational public policy, and that standard form contracts in the transnational arena are not necessarily forced upon the party with less bargaining power but are often negotiated with all stakeholders involved.

Although politically challenged, the concept of transnational law as law created and administered by private actors offers a valuable and workable definition of the term. If transnational law can be distinguished from other law by the fact that it is created by private parties and that private arbitration courts exercise jurisdiction in that particular field, it can be regarded as a body of law in its own right. The weakness of an understanding of transnational
law as wholly made and administered by private actors, however, is that it might narrow the term down too far.

Recent empirical surveys have shown that international commercial transactions are rarely ever governed by the ‘New Law Merchant’ understood as an exclusively private regime, but are structured by a context-specific mixture of private and public governance mechanisms. Thus, transnational law regimes are not designed for the academic purpose of doctrinal rigor, but in case of the ‘New Law Merchant’ simply in an pragmatic effort to serve the needs of cross-border commerce by composing workable institutional arrangements. It is against this background that a comprehensive concept of transnational law should not be limited to the rare case of purely private regimes, but also encompass hybrid structures that consist of private and public elements, where, however, the public elements in a situation often described as regulatory competition lose much of the authority which they traditionally enjoyed in the domestic context. This means that even where an arbitral tribunal, for example, does not apply the substantive rules of ‘lex mercatoria’, but rather the domestic contract law of a certain nation-state, this law is not applicable by virtue of that States’ monopoly in the legitimate making and enforcement of law, but rather by virtue of the contract parties’ choice of law on a global law market where law is a product competing with other regulatory arrangements.

The definition of transnational law proposed here thus covers all forms of private law-making but also allows for the inclusion of state created law where necessary. It accounts for the long-noticed dissolution of the distinction between the public and the private sphere that had been established in the dawn of the modern nation-state. The nation state is no longer a monopolist in regulation. International organizations and private actors have entered the global stage and have taken responsibility for regulatory issues such as protection of the environment, of cross-border investments, labor, consumers and the like. The guidelines of international bodies such as the OECD directly affect nation-states and their policies. Non-governmental organizations such as Greenpeace, Transparency International, consumer organizations, or the International Chamber of Commerce use their attributed powers to influence the behavior of nation-states as well as that of multinational enterprises and, therefore, have a degree of influence on international regulation that cannot be overestimated. Such forms of soft law as well as universally binding contract terms, trade usages and commercial practices contribute to the formation of a transnational body of law.

To the extent that transnational law contains privately created norms, the emergence of such a transnational body of law raises major policy issues. Both the legitimacy of legal norms and the accountability of lawmakers are problematic in the transnational arena. Private law-making actors usually lack democratic legitimacy. But their legitimacy might be enhanced by various means. One important aspect is the creation of procedural justice. If as many stakeholders as possible are involved in private law-making processes and if their involvement also entails the opportunity to be heard and to have their own interests fairly considered, this inclusiveness greatly contributes to the legitimacy of transnational law-making processes. In this context, a valuable concept of legitimizing transnational law is entrenched in the idea of “rough consensus and running code” which was developed in the context of the making of technical standards for
the Internet. It describes a process in which proposals for rules and standards are publicly discussed. As soon as a major part of discussants has come to an agreement (rough consensus) the agreed-upon rule is tested in practice. If the rule turns out to be useful, it enters into the body of transnational law by virtue of universal acceptance (running code). If rules turn out not to be practical, they simply fall into oblivion. Thus, the concept of legitimacy will have to be reconsidered in a globalized world. It will not suffer to stick with democratic standards as long as a world constitutional state is not at sight. New forms of legitimizing law will have to be developed, one of which has been presented here.

The brief overview over the potential meanings of the term transnational law and its practical relevance has shown that, in order to give the term a distinct meaning, the notion must not be overstretched. If the term transnational law shall present a manageable concept it should be used for new forms of co-regulation between private actors and public actors on the global stage, as suggested by the definition presented here. Thus, its value lies in conceptualizing new forms of cross-border governance in the ambit of globalization. It is well suited to describe a body of law that will increasingly regulate cross-border relations, be they commercial, political or societal.
FURTHER READINGS:


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