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Le sfide del diritto transnazionale

EDITORIALE

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OSSERVATORIO

PASSATO E PRESENTE

SILVIA SASSI

TRANSNATIONAL DEMOCRACY

1. *Why use the category of "transnational law"?*

Legal systems are strictly interdependent. This emerges from a series of juridical dynamics ranging from the proliferation of international agreements[1] to a dense network of regulators or institutions, from an ever more substantial customary international law to supranational systems of commercial and human rights. However, the pressures that transnational corporations, human rights activists and social movement exert on the creation and use of the local, national and international level are also strong and pervasive. All these, and other, legal novelties cannot be interpreted without considering the intensity and the speed with which currently economic, social and environmental phenomena are enmeshed among themselves mainly due to the advent of the new information technologies[2]. In such a dimension, where the interdependence of state communities and people is growing due to the increasingly close intertwining of economic transactions and the significant role played by human rights[3], the regulation of activities that cut state boundaries is necessary.

[1] Anglo-Saxon jurists have coined the term "treatification" to describe this phenomenon: A. Reinisch, P. Bachmayer, *The identification of Customary International Law by Austrian Courts*, in 2 *Austrian Rev. Int'l and Eur. L.* (2012), 17.

[2] About it T.E. Frosini, *Libertè Egalitè Internet*, Napoli, 2ª ed., 2019.

[3] On the ever more continuosus and global claim of rights, which has, paradoxically, promoted more diversity than uniformity, in an increasingly unequal and small world, beacause every part of it is in an interdependent relationship with every other part, you can see: G. Zagrebelsky, *Diritti per forza*, Torino, 2017.

That's why the emergence of new tools, actors and principles that together lead to new forms of decision-making processes are inevitable. In this perspective, we move to explain the emersion of a new type of law, transnational law: a law which, as we shall see, starts from the crisis of sovereignty, which has an essential function and which is formed through a particular regulatory process. Which gives rise to a new form of democracy, namely transnational democracy.

Nevertheless, the Italian doctrine, on the category of transnational law, has not discussed contrary to what happens in other countries. In Italy, since the end of the last century, the term and the concept of *global law*[4] has been used, which has been declined in several specific fields[5]. However, this has created room for uncertainty and some conceptual confusion, which have certainly not helped to interpret the contemporary legal phenomenon[6].

The first theoretical elaboration of transnational law dates back to the middle of the 20th century. More specifically, it is Philip C. Jessup who, moving from the need to overcome the inability of traditional international law to cope with the complex and interdependent nature of modern international relations, had proposed a transnational law regulating actions and events across national borders[7]. This proposal, which is then really innovative, now remains not only valid but as relevant as it is. In fact it is to be used, not so much and not only as a substitute for global law, but, rather, as a methodological option for legal comparison, with a significant fall-out in terms of configuration of legal space, beyond the States[8], in which partly new subjects move, with relationships that are regu-

[4] One of the first books published in Italy is the one written by M.R. Ferrarese, *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale*, Bologna, 2000.

[5] *Ex plurimis* see the volume: C. d'Alessandro, C. Marchese (eds.), Ius dicere *in a globalized world*, Roma, 2018.

[6] N. Walker, *Intimations in Global Law*, Cambridge, 2015, 5 ss. and D. Di Micco, *La globalizzazione abusata. Quando un concetto impreciso si impone nel discorso giuridico e nello strumentario del comparatista*, in *Annuario di diritto comparato e di studi legislativi*, vol. VIII, 2017, 241 ss.

[7] P.C. Jessup, *Transnational Law*, New Haven, Yale University Press, 1956.

[8] Although in a limited context, that is of the integration between the digital defense systems, R.M. Fischer (*Recht ohne Staat. Die Emergenz transnationaler Regelungsstrukturen am Beispiel privater bewaffneter Sicherheitsdienste auf Handelsschiffen*, Berlin, 2018) states that the law can assert itself not "beyond" but "disregarding" the State.

lated with mechanisms that go beyond the traditional ones of international and national law. Relationships that decline, also and above all, through ways and forms of democratic legitimacy.

2. *What is meant by transnational law?*

For the just mentioned reasons, transnational law[9] is a law that breaks the dichotomy between national and international law because it concerns activities put in place in new spaces that go beyond the State-Nation borders and, at the same time, do not fall within the traditional scope of international law. The phenomena that fall under its discipline can insist on disparate areas of the globe and affect more legal systems[10]. Transnational law does not have a common territory as its building block; in its place there is a transnational activity which is given political prominence. Because of these peculiarities, the sources that govern it are also of a non-state nature. The subjects of the transnational community, unlike the national (citizens) and international (States), are not only citizens and States, but also associations, organizations and social movements.

If the matrix of transnational law is varied, its training process can only be dynamic. Its sources may originate both at a national, sub-state, and international level, but also customary. From this varied interaction of public and private actors in the various national and international courts it emerges the transnational law, which is a new type of law, that in turn, is interpreted, internalized and applied, thus starting a new process.

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[9] Regarding other opinions of transnational law see also: P.C. Jessup, *op. cit.*; A.S. Miller, *Transitional Transnational Law*, in 65 *Columbia L.R.* (1965); H.H. Koh, *Transnational Legal Process*, in 75 *Neb. L. Rev.* (1996); Id., *Why Transnational Law Matters*, in 24 *Penn St. Int'l Rev.* (2005-2006); R. Cottarrell, *What is it Transnational Law?*, in 37(2) *Law and Social Inquiry* (2012); K. Tuori, *Transnational Law. On a Legal Hybrids and Perspectivism*, in M. Maduro, K. Tuori, S. Sankari (ed.), *Transnational Law. Rethinking European Law and Legal Thinking*, Cambridge, 2014, 11 ss.; T.C. Halliday, G. Shaffer (eds.), *Transnational Legal Orders*, Cambridge, 2015; M. Avbelj, *The European Union under Transnational Law: a Pluralistic Appraisal*, London, 2018; P.C. Zumbansen, K. Bhatt, *Transnational Constitutional Law*, King's College London, Legal Studies Reasearch Paper Series: No 2018-05; N. Figueiredo, *O Direito Constitucional Transnacional e Algumas de suas dimensões*, D'Plácido, 2019.

[10] Think of environment, climate change, migration phenomenon, Internet, finance, commerce and the economy.

The transnational order that is emerging, and is being built, can be obtained, if the concept is to be maximized from a logical and legal point of view, from two traits: constitutional pluralism and transnational spaces[11].

In such a dimension, in the absence, like it or not, of a legitimate and effective global political authority able to handle such a framework, those involved act following an interactive logic according to each other's influences that develop horizontally, vertically and diagonally. Applying transnational logic, therefore, which crosses the States, passes from the States, transcends them. A logic that innervates in the crisis of the sovereignty of its derivatives, that doesn't show itself in not recognizing other powers as superiors, but in the fact that it is a power that has in the people its ultimate and definitive justification. And that is determining a constitutionalism with new forms «that our eyes are not accustomed to see them»[12] .

3. *The emersion of transnational democracy*

If the perspective from which we must move to study transnational law is different from the one used to deal with national/constitutional law and international law, in order to deal with this new type of law, it is necessary to change the way of understanding the law, the way to enforce it and how to produce it.

And it is precisely from this last profile – the way in which transnational law is produced – that we can see the dimension of transnational democracy.

One of the peculiarities of this new law is the new way in which it is created, and which provides for the participation of new actors in its formation. Actors who are not necessarily States or citizens but also simply "interested" parties.

About it, we recall a famous report (Cardoso's Report, 2004) prepared by a panel of experts on a United Nations' commis-

[11] See Caballero C. Lois, L.M. Pinto Bastos Júnior, *Pluralismo constitucional y espacios transnacionales: ¿el fin de la constitución nacional o su nuevo comienzo?*, in *Rev. Der. Estado*, n. 40, 2018, 127 ss.

[12] S. Cassese, *Oltre lo Stato*, Roma-Bari, 2006; Id., *Il diritto globale. Giustizia e democrazia oltre lo Stato*, Torino, 2009.

sion[13]. This report noted, among other things, that another form of a democratic participation – i.e. participatory democracy – is developing alongside traditional democracy: «this constitutes a broadening from representative to participatory democracy».

According to this report, the difference between one form of democracy and the other one is that while «traditional democracy aggregates citizens by communities of neighborhood (their electoral districts)»[14], the «participatory democracy aggregates citizens in communities of interest»[15].

This phenomenon is not only possible but also useful.

It is possible due to new information and communication technologies. Because of their intrinsic characteristics, it is undoubtedly possible to connect representative democracy with the participatory one. And it allows the "community of interested parties" to be "global" and "local"[16].

And it is useful, at least, for a couple of reasons. First, it helps develop a range of policies and/or rules and regulations that reflect the real needs of a such highly composite society, such as the modern one, enriching them with experiences and expertise. Secondly, it facilitates the dialogue between the different actors involved, thus reaching a wider consensus on the question raised in the light of the different solutions proposed[17].

Enrichment, if it can be called so, which involves the participatory phenomenon, consists of attributing, in particular, a new position and a new function to citizens who are part of a community that identifies itself by sharing common interests. From this perspective, the citizen of this new "world" must therefore be given an active position in order to participate in the drafting of the act intended to affect his interests.

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[13] Report of the Panel of Eminent Persons on United Nations-Civil Society Relations, «We the peoples: civil society, the United Nations and global governance, United Nations, General Assembly, 11-6-2004», A/58/817, 8.

[14] *Ibidem*.

[15] *Ibidem*.

[16] On the role played by technologies in the relationship between representatives and stakeholders see: B. Holznagel, A. Grünwald, A. Hanßmann (ed.), *Elektronishe Demokratie. Bürgerbeteinligung per Internet zwischen Wissenschaft un Praxis*, Munchen, 2001.

[17] OSCE, *Transparency and Public Participation in Law Making Processes*, Skopie, October 2010, 12 ss.

This participation, however, to be effective, must be channeled into more or less formal instruments that allow forms of connection with the institutions of traditional democracy. This means, therefore, the participation in the decision-making process of both the *demos*, that summarizing is here named 'citizen participation' – and of all those who are significantly involved in the decisions that are to be taken – that we'll call here 'participation of the involved ones'.

It is essential for these forms of participation (of citizens and those concerned) to be functional to the citizen's exercise of participation, that also other liberties effectively occur, that are: expression of thought, print, association and meeting.

And cohabitation and collaboration of the different types of government, national and global are required[18].

As the link between multiple levels of government is essential, it is equally essential that new ways of "participation" of the citizens in the decision-making process in general are emerging. So naturally an evolution of the concept of democracy is looming at this historical moment, as the course of the history of democratic forms shows[19]: from a "passive" form, imposed from above, placed vertically, circumscribed within the territory by the State, and therefore to its electoral body, to an "active", created from below, horizontally and/or diagonally placed, outlined by the interests that emerge from time to time.

This conceptual evolution of the democratic model, however, is placed, compared to the previous one, in an "inclusive" and not "exclusive" dimension of connection, and not in opposition. In this perspective, citizens are also involved in their aggregation of inter-

[18] S. Cassese, *La democrazia e i suoi limiti*, Milano, 2017 e B. Caravita, *I circuiti plurali della decisione nelle democrazie moderne*, in P. Bilancia (a cura di), *Crisi della rappresentanza politica nella democrazia contemporanea*, Torino, 2018, 21 ss.

[19] Reganding recent reflections on new forms of democracy, such as participatory and/or deliberative see: G. de Vergottini, *Un nuova ingovernabilità*, in *Percorsi cost*., n. 3/2017 and T.E. Frosini, *Declinazioni del governare*, Torino, 2018. See also some articles published in P. Bilancia (a cura di), *Crisi della rappresentanza politica nella democrazia contemporanea*, cit.: R. Bifulco, *Democrazia deliberativa e principio di realtà*, in 31 ss.; T.F. Giupponi, *La "democrazia elettorale", tra rappresentatività e governabilità*, 67 ss.; E. De Marco, *Democrazia in trasformazione: i nuovi orizzonti della democrazia diretta*, 147 ss.; A. Torre, *Chi dirige la democrazia diretta? Leviathan e Behemot, il* monstrum *bifronte della sovranità*, 201 ss.; J. Luther, *Dove è diretta la democrazia? Risposte tedesche*, 363 ss.

ests, an aggregation that forms a community to which political prominence is given.

What must therefore be recognized in this new set-up is not only the role of the electoral body but also the aggregation of citizens around the interests that are subject of the decision, beyond the State of origin.

The result is the participation not only of the citizens, as element of a territorially identified State, but also of those concerned, the interested ones, which constitute, on the other hand, the personal element of the transnational space.

In other words, the national dimension of citizens' participation has now become a transnational dimension of the participation of the "people interested".

In this dimension, it is essential to identify mechanisms for coordination between the plural circuits of decision-making and the participation of the multiple levels of government, since the implementation of the first ones is prodromal to the realization of the other ones.

And such an objective, if it is to preserve a minimum level of democracy, requires the establishment of compensatory and transnational structures.

Among the international subjects who have taken action to configure models to strengthen and to support the participation of citizens (*lato sensu*) in the different decision-making processes, there's undoubtedly to be mentioned the Council of Europe that over time, because of its nature and its purposes, has developed a regulation framework that has progressively taken on connotations of transnational constitutional law[20].

There are several acts, different in nature and strength, adopted by the Council of Europe in this regard. Among them are to be mentioned, in particular: (*a*) the «Code of Good Practice for civil Participation in the decision making process» adopted by the

[20] On doctrinal arguments in favor of such a framework see the following: G. Buquicchio, P. Garrone, *L'harmonisation du droit constitutionnel européen: la contribution de la Commission européenne pour la démocratie par le droit*, in *RDU*, 1998-2/3, 323 ss.; S. Bartole, *Comparative Constitutional Law - An Indispensable Tool for the Creation of Transnational Law*, in *Eur. Const. L. Rev.*, 13, n. 4, 2017 1 ss.; P. Craig, *Constitutionalismo transnacional: la contribución de la Comisión de Venecia*, in *Teoria y Realidad Constitutional*, n. 40, 2017, 79 ss.

Conference of International non-governmental organitations (INGO) in October 2009 on impulse of a recommendation of 2007 by the Committee of Ministers of Council of Europe; (*b*) the «Guidelines for civil participation in political decision making», adopted by the Committee of Ministers of Council of Europe in September 2017.

These two acts are important essentially for two reasons.

First, because, although not binding, the Member States of the Council of Europe are acting as a paradigm for national authorities – Parliaments, Governments and public authorities – who want to develop initiatives to promote the participation of individuals, of non-governmental organizations and of the civil society in state-level decision-making processes[21].

Secondly, because both acts, unlike many other acts adopted by international, supernational and national organizations, make clear a set of concepts that are as crucial as they are elusive in this specific field.

As example is provided the definition of participatory democracy: participatory democracy «is based on the right to seek to determine or to influence the exercise of public authority's powers and responsibilities, and it contributes to represent and direct democracy»[22].

Individuals entitled to exercise the right to participate are identified: «the right to civil participation in political decision-making should be secured to individuals, non-governmental organisations (NGOs) and civil society at large»[23].

We identify the principles that govern it, which are: «participation; trust; accountability and transparency; and independence»[24].

Both acts fix the conditions that make civil participation effective, that is «the respect for human rights and fundamental free-

[21] Point II, Code of Good Practice of 2009.

[22] Fourth recital of the Guidelines of 2017. As regards a doctrinal perspective on participatory democracy see: U. Allegretti, *Globalizzazione e sovranità popolare*, in *Dem. dir.*, nn. 3-4, 1995; Id. (a cura di), *La democrazia partecipativa. Esperienze e prospettive in Italia e in Europa*, Firenze, 2010 and P. Ridola, *La parlamentarizzazione degli assetti istituzionale dell'Unione europea e democrazia partecipativa*, in Id., *Diritto comparato e diritto costituzionale europeo*, Torino, 2010.

[23] Pursuant to the fourth consideration and point 2.a. of the Guidelines of 2017.

[24] About it see p.to III.ii of the Code of Good Practice of 2009 and point 4 of the Guidelines of 2017.

doms, the rule of law, adherence to fundamental democratic principles, political commitment, clear procedures, shared spaces for dialogue». But also «the creation and maintenance of an enabling environment by Member States, comprising a political framework, a legal framework (where appropriate), and practical framework, guaranteeing individuals, NGOs and civil society at large effective rights of freedom of association, freedom of assembly, freedom of expression and freedom of information»[25].

A distinction is stressed between civil society participation to the decision-making process and the one performed by the lobbies, on the one hand, and also by political parties on the other hand: the 2nd point of the 2017 Guidelines specifically states that: «civil participation in political decision-making is distinct from political activities in terms of direct engagement with political parties and from lobbying in relation to business interests».

It becomes clear what is meant by civil society generally speaking (civil society at large), that is: «the ensemble of individuals and organized, less organized and informal groups through which they contribute to society or express their view and opinions. Such organized or less organized groups may include professional and grassroots organizations, universities and research centres, religious and non-denominational organizations and human rights defenders»[26].

Finally, both the Code for good Practice of 2009 and the Guidelines of 2017 indicate the methods and the instruments to implement civil society participation: civil participation in decision-making is manifested in four forms, which are listed here in an increasing order of relational intensity between stakeholders and public authorities, i.e. «from least to most participative. They are: (1) provision of information; (2) consultation; (3) dialogue; (4) active involvement. Each of them uses, in turn, different implementing tools depending on the phase of the decision-making process in which it fits. Please remember that these elements are combined to form a matrix of civil participation that provides to detect the interrelated nature of the process[27].

[25] See point III.iii of the Code of Good Practice of 2009 and point 3 of the 2017 Guidelines.

[26] Point 2.d, Guidelines of 2017.

[27] About it see par. IV of the Code for Good Practice of 2009 and par. V of the Guidelines of 2017.

4. *Some reflections*

There is no doubt that the path to identification and implementation of transnational democracy, and therefore of transnational law, is still fraught with obstacles to overcome. But if States want to maintain their centrality on information flows, technologies, migrants, weapons and financial transactions (think of the crypto currency launched this year by Zuckerberg), both legal and illegal, i.e. on all those matters that cross their borders, this is the way to go, that is, their institutional restructuring adapted to the epochal change taking place.

If so, the attitude that constitutional law should maintain towards transnational law should be not of opposition but of commitment[28]. In order to do this, a joint and systemic effort is needed between the regulatory lever and the judicial lever, first and foremost, and if necessary, also economic to be activated in the light of four principles: that of international legitimacy, that of subsidiarity, participation and liability.

Such a challenge will therefore involve, both vertically and horizontally, narrower and different forms of coordination and cooperation between the many players of which transnational society is composed.

However, transnationality has one limit: respect for the values of a given order. «Where its founding values are non-negotiable, transnationality results to be problematic, in fact. On the contrary, transnationality can overcome cultural ideological differences where the values of the order possibly involved touch on non-sensitive subjects»[29]. So that for the implementation of transnational democracy there must be common reference values arising from a common background of historical experiences. These limits are mandatory as they are non-negotiable.

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[28] V.C. Jackson, *Transnational Challenges to Constitutional Law: Convergence, Resistance, Engagement*, in 35 *Fed. L. Rev.* (2007); Id., *Constitutional Engagement in a Transnational Era*, Oxford, 2010. With regards to thies, Peters A. (*The Globalization of the State Constitutions*, in J. Nijman, A. Nollkaemper (ed.), *New Perspective on the Divide Between National and International Law*, Oxford, 2007, 293 ss.) has noted these challenges.

[29] G. de Vergottini, *Diritto transnazionale e omogeneità culturale…*, in questo numero di questa Rivista, 389 ss.

Abstract

L'articolo si snoda in tre brevi passaggi. Anzitutto, si intende chiarire perché in questo momento storico è necessario ricorrere alla categoria del diritto transnazionale. In secondo luogo, che cosa si intende per diritto transnazionale. Infine, come si configura la democrazia transnazionale. Da ultimo, si trarrà più che una conclusione un avvio di riflessioni.

Legal systems are strictly interdependent. It needs, therefore, to regulate activities that cut the boundaries of the State. For these reasons, this article is articulated in three short steps: first, why at this historic moment is it necessary to use the category of transnational law?; secondly, what is transnational law?; thirdly, how is transnational democracy set up, outlining the principles (transparency, openness and regularity), the subjects (non-state actors) and the mechanisms that implement this form of democracy in the decision-making process at transnational level? Finally, it will reflect on the topic rather than draw conclusions.