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Abstract

When Jessup first wrote about transnational law about 60 years ago, scholarship on globalisation had not started yet. It seems though that transnational law, as we understand it, is as closely related to and has been developing alongside globalisation. However, transnational law and its place in scholarship remains contested. In the context of this contribution, globalisation serves as the catalyst that has transformed the manner in which law is viewed nationally and internationally and as such presents the lens through which transnationality could be understood and conceptualised. The article shows that the transnationalisation of law is inevitable in a fluid and ever-changing society which demands answers and solutions to the increasing problems brought about by and through globalisation.

Keywords

International law; transnational law; transnational environmental law; globalisation.

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1 Introduction

In earlier works I have touched on aspects of the transnationalisation of environmental rights¹ and transnational environmental law² as emerging analytical frameworks. What I did not do in those works was to pay homage to the actual underlying theoretical framework upon which they could be understood. In this piece, with a view to outlining the contours and relevance of the transnationality of law, I seek to revisit the often-contested scholarly enterprise of transnational law. By no means will I delve into intricate aspects of what makes or drives transnational processes. The article also does not attempt to formulate a universal theory of, or exhaustively describe transnational law. Rather, the hope is that it fleshes out the context in which transnational law should be considered.

The first part of what follows provides the context in which this whole issue of the transnationalisation of law should be understood. It argues that through globalisation, a multiplicity of actors on the international stage has risen and new forms of regulation beyond the state are emerging. The second part briefly traces the concept of transnational law and surveys how the concept has evolved over time. In the third part, a brief exploration of law in the Westphalian state is undertaken. The line of reasoning followed here is that the state's exclusive control of law-making within its borders and on the international level is no longer intact. This is because forms of transnational law are emerging to address aspects of governance and regulation that are often hindered by the politics of government: i.e. the state. Lastly, I offer the example of transnational environmental law and the emerging concept of transnational climate law and governance to demonstrate that transnationalism in law has become a reality that could compliment the slower forms of law-making which states normally undertake.

2 The context: a note on globalisation

It would be challenging for one to approach the discussion of globalisation as a concept without preconceived ideas of what it is, given the attention it has been given in almost every facet of scholarship and the media. For that

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¹ Soyapi "Emerging Transnationality of Environmental Rights".

² Kotzé and Soyapi "Transnational Environmental Law".

reason, there can be no universal description of globalisation, as it is understood differently in many circles (be they sociological, philosophical, legal or economic).³ This notwithstanding, it is possible to come up with some generic features of globalisation from the literature. Globalisation is described as:

... political and legal processes where complex multi-level governance structures emerge. National legal systems, losing their central position, interact with a large number of public and private actors on both supra- and sub-national levels in regulating individual and business conduct.⁴

Indeed, globalisation has been associated with the supposed "demise of borders" and it would seem from this description that globalisation is an evolving concept which has been involved in the transposition of norms across borders, the harmonisation of laws, including their divergence as well, and the creation of an environment that has seen the proliferation of non-state actors. Yet this is only one of looking at it, as elsewhere:

... globalisation is being used to describe a process of social change, a world being transformed so that there are greater contacts across national boundaries and growth or intensification of new networks and interdependencies. In other contexts it means the condition where geographical boundaries are rendered less relevant by the existence of these cross-border connections and arrangements.⁵

To be sure, then, acknowledging that globalisation seems to blur borders and shapes and views the world as a single market or society, in the legal sphere one could argue that an unavoidable result of globalisation is the fragmentation of laws. The implication of this is that old ideas of unity and system in law could become contested.⁶ The inevitable result is that law, as a social construct, has to adapt and realign itself along those fragmented and pluralistic lines.⁷ To this end, for law, globalisation could serve as an analytical perspective, a lens through which we can reappraise the law in a symbiotic world.

³ Shams 2001 *Int'l Law* 1591; Kotzé *Global Environmental Governance* 29; Venter *Global Features of Constitutional Law* 29. Also see Sutherland "Globalization and Corporate Law" 255, where it is noted that the concept is actually controversial, and the result is that it is impossible to give an uncontested definition of it. For general criticism and arguments for and against globalisation, see Venter *Global Features of Constitutional Law* 29-34.

⁴ Larouche and Cserne "Conclusions" 371.

⁵ Cranston 2007 *Tex Int'l L J* 600.

⁶ Cotterrell 2012 *Law Soc Inq* 503. Also see Michaels 2009 http://lsr.nellco.org/duke_fs/185 11.

⁷ See Boyd 2010 *U Pa J Int'l L* 503. For a full discussion of the fragmentation of laws in the light of globalisation, see Kotzé 2014 *SALJ* 548.

2.1 *Globalisation as an analytical perspective*

A number of scholars observe that globalisation affects the manner in which we now understand law. They see globalisation as a lens through which one can view "the way legal norms are disseminated in an era when the prerogatives of territorially delimited nation-states ... have at the very least become less salient than they once were."⁸ Conceived in this light, globalisation is a lens through which to view the world because it helps us understand the social realities around us and the changes that come with them.⁹ Globalisation thus functions as an analytical perspective, rather than a process, since through the former we can appreciate contemporary societal phenomena.¹⁰ In other words, the world is now interdependent with the result that it is sometimes necessary to view the law in the context of the world as a single society.¹¹ To be clear, when law is no longer conceived as state-centric but understood in a societal context, the process of globalisation (as an analytical perspective) could help us understand how and why law transcends national borders (this could be related to social phenomena) and manifests as transnational law.¹²

Globalisation as an analytical perspective allows one to view the state in terms of its receding power in favour of other emergent actors.¹³ It presents itself as a way of thinking of law in a global realm. This does not in any way signify the demise of the state¹⁴ or the denial of the "significance of the state as author, interpreter and enforcer of law", but it "opens up possibilities for conceptualising law in new ways."¹⁵ As a consequence, law - a social construct - invariably changes or adapts to globalisation.¹⁶ One could say that globalisation facilitates the processes of socio-legal change.¹⁷ If globalisation is indeed a part of social change, and if we accept that law is

⁸ See Berman "Introduction" xiv.

⁹ Kotzé *Global Environmental Governance* 33.

¹⁰ Kotzé *Global Environmental Governance* 33.

¹¹ Kotzé *Global Environmental Governance* 33.

¹² Also see Berman, who asserts that studying law and globalisation helps one to broaden the concept of what counts as law, and this inevitably allows us to recognise various non-governmental fora through which legal norms are disseminated. Berman "Introduction" xiv.

¹³ Shams 2001 *Int'l Law* 1597.

¹⁴ See Venter, who argues convincingly that the era of the state is not at an end, since international law is dependent on the existence of the state, while supranational institutions like the EU also rely on the defined borders of states and their abilities to organise laws. Venter *Global Features of Constitutional Law* 19.

¹⁵ Cotterrell 1997 *Can J L & Soc'y* 76.

¹⁶ See Hund 2004 *SAPL* 32, who offers the contention that the globalisation of private law, "sometimes means the degree to which the whole world lives under a single set of rules."

¹⁷ Kotzé *Global Environmental Governance* 32. See further Shams 2001 *Int'l Law* 1599.

a societal construct that is self-evolving and adapts to its environment, then it could be possible to argue that globalisation presents itself as an opportunity to view law in the transnational realm.

Suffice it to say that in the context of this short paper, globalisation is taken to have served as the catalyst that has transformed the manner in which law is viewed nationally and internationally, and as serving as the context for and driver of transnational law. Transnational law is thus a clear example in law of how globalisation is a force for change, because through transnational law it has become evident that state-centric views on law are no longer as intact as they were before. But what is transnational law and where does it fit in with the national and international regulatory space?

3 The concept: transnational law

Authors generally agree that conceptually, transnational law has its origins in the works of Jessup,¹⁸ as his Storrs lectures and his subsequent book, *Transnational Law*, have been the starting point for many who endeavour to grapple with the concept.¹⁹ He used the term transnational law "as an expansive umbrella category"²⁰ for describing all law that is involved in international governance. Because of his conviction that the term "international law" was misleading since it suggested that one was concerned only with the relations between one state and other states, he framed his idea of transnational law as follows:

[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.²¹

On the basis of this description it seems that transnational law could mean anything from actions to policies, treaties to model laws and usages that go

¹⁸ An American lawyer, Jessup wrote major works in international law even before he ventured into transnational law. He is considered to have argued fiercely against absolute sovereignty in that the interests of the international community as a whole were supposed to supersede those of individual states. See Brouder "Philip Jessup" 10. Thereafter Jessup became largely active as a United States diplomat and it is probably through his experiences abroad and his own involvement in international disputes that he developed his theory of transnational law. See Tietje and Nowrot "Laying Conceptual Ghosts of the Past to Rest" 18.

¹⁹ A number of scholars have openly acknowledged the contribution made by Jessup to the concept. These include Burley 1993 *AJIL* 230; Koh 1996 *Neb L Rev* 186; Goode 1997 *Int Comp L Q* 2; Maniruzzaman 1999 *Am U Int'l L Rev* 660; Hathaway 2005 *U Chi L Rev* 473; Koh 2006 *Penn St Int'l L Rev* 745; Backer 2007 <http://lcbackerblog.blogspot.com/2007/03/principles-of-transnational-law.html>; Dibadj 2008 *Stan J Int'l L* 259; and Cotterrell 2012 *Law Soc Inq* 501.

²⁰ Scott 2009 *Ger Law J* 863.

²¹ Jessup *Transnational Law* 2.

beyond national borders.²² Transnational law, as perceived by Jessup, is thus flexible enough to be an umbrella term signifying rules and norms that cannot be categorised under national and international law. As a consequence, the term "transnational law" in Jessup's understanding has the advantage that there is a "larger storehouse of rules on which to draw" from; whether public or private,²³ for the purpose of settling disputes, effecting regulation or even seeking change. In fact, Jessup aimed to establish a jurisprudence that encompassed the law of cross-border social and economic phenomena more than international law did, since the latter could not.²⁴ Jessup's work accordingly had an aura of clairvoyance as he attempted to start a dialogue about the processes and implications of globalisation many years before the debates even began.²⁵

In recent times, however, the understanding of transnational law has broadened. For instance, Menkel-Meadow²⁶ states that transnational law is "the study of legal phenomena, including lawmaking processes, rules, and legal institutions, that affect or have the power to affect behaviors beyond a single state border." The scholar offers a broad definition with the open-ended phrase "legal phenomena", which could also include non-state-actor rules and norms that are developed for use in multiple states/jurisdictions. Elsewhere, transnational law is understood to mean:

... *across* nations, as opposed to 'international,' which means *between* nations. The term 'transnational' therefore encompasses a larger universe of activity and interactions than does the term 'international.' When applied to law, for example, transnational law includes any law that has cross-border effect, whereas international law refers only to treaties or other law that governs interactions between states.²⁷

²² While speaking on transnational commercial law, Kronke describes transnational commercial law as being a product of various means including "international treaties/conventions (i.e., binding instruments), model laws, contractually incorporated or 'codified' usages and rules, international restatements and pre-statements, and conscious or unconscious legislative or judicial parallelism-which lead to harmonisation of commercial law at the international level." Kronke 2005 *Loy L Rev* 288. Transnational commercial law is a derivative of the more general term transnational law and its sources could very well also be sources of transnational law.

²³ Jessup *Transnational Law* 15.

²⁴ Jessup *Transnational Law* 15. Perhaps this is because classically, international law concerns only the relations between states, their rights and obligations on the international stage. See Karton 2012 *Tilburg L Rev* 276.

²⁵ Brouder "Philip Jessup" 7.

²⁶ Menkel-Meadow 2011 *UC Irvine L Rev* 104.

²⁷ Hathaway 2005 *U Chi L Rev* 473.

The differences in definition extend further, as is evinced by Mendenhall's²⁸ description:

What, then, is transnational law? In short, it is the pluralistic order of various principles and rules from divergent customs, cultures, and communities that draws its lexicon from competing philosophical discourses and not from top-down, coercive commands of states or sovereigns. It is a rejection of the power and modes of statism and a reversal of state-formation. It is an unsettling of borders and boundaries and a turn toward compromise and competition as means by which to settle disputes. The beauty of transnational law is that it serves the putatively 'liberal' interest of pluralism while serving the putatively 'conservative' interest of minimizing and circumventing government bureaucracy.

For Cotterrell,²⁹ transnational law refers to "legal relations, influences, controls, regimes, doctrines, and systems that are not those of nation-state (municipal) law" but also "not fully grasped by the extended definitions of the scope of international law." In other words, apart from the "other rules" as noted by Jessup, modern concepts of transnational law have evolved to include intangible aspects like legal relations and influences, a development that indicates a shift from "government" to "governance".³⁰ Taking stock from the varied descriptions noted, it would appear that in many instances transnational law is used in its literal sense with the "trans" meaning either beyond or across and the "national" referring to countries.³¹ But to better understand the concept and how it functions, it is necessary to review some characteristics of transnational law.

Transnational law is meant to resolve and/or address issues that cross national boundaries but which cannot be regulated solely by a single state.³² The result is that transnational law lies between domestic and international law, and overlaps them. As with transnational commercial law, which is "neither particular to nor the product of any one legal system" but a "union of rules taken from many legal systems",³³ transnational law is not a product of one state, nor does it belong to any one state. It has an "anational"³⁴

²⁸ Mendenhall 2011 https://www.researchgate.net/publication/228227762_Transnational_Law_An_Essay_in_Definition_with_a_Polemic_Addendum 7.

²⁹ Cotterrell 2012 *Law Soc Inq* 500.

³⁰ See the discussion in Kotze and Soyapi "Transnational Environmental Law" 86-87.

³¹ Mendenhall 2011 https://www.researchgate.net/publication/228227762_Transnational_Law_An_Essay_in_Definition_with_a_Polemic_Addendum 5.

³² Karton 2012 *Tilburg L Rev* 277.

³³ Gopalan 2003 *Am U Int'l L Rev* 809.

³⁴ Gopalan 2003 *Am U Int'l L Rev* 810, where it is stated that "[t]ransnational commercial law signifies a melding of rules that are completely 'anational' in character, and it derives its meaning through international usage and its execution by the business world". Therefore rules, in addition to actions and events, cross national boundaries. Also see Goode 1997 *Int Comp L Q* 2, who associates transnational commercial law

character that is reflective of and reflects the global context in which law is being transnationalised.

There is, accordingly, considerable evidence that in recent times, the notion of transnational law has expanded to become increasingly complex, diverse and more particular at the same time. It has become an amalgam of rule systems, including hard and soft laws, whose foundational premise is its independence from the control/authority of any one state or community of states, by also creating a system of non-national and supra-national principles and rules.³⁵ As we shall see below, this description accords the term its distinctive characteristic: a combination and a mixture of rules/norms from different levels that are all available not as replacements/alternatives for existing laws, but as augmentations that fill gaps, and sources for reform and the further development of law and policies in a globalised world.³⁶

4 Transnational law in the Westphalian system

At this point it is necessary to briefly touch on how transnational law relates to law as conceived in the Westphalian system. As a caveat, the brief discussion that follows is far from comprehensive in detailing with the theory of law and its characteristics. This section is meant to achieve only two goals: to give an overview of what law has been generally understood to be and why that is so, and to discuss how transnational law fits within such an understanding.

4.1 Law as a "state" construct

The debates on what counts as law date far back, confirming that the law is of itself a human construct, designed by and for humans in society. In other words, law is a regulation of social conduct.³⁷ According to Black's Law Dictionary, law is "that which is laid down, ordained, or established... .That which must be obeyed and followed by citizens, subject to sanctions or legal consequences".³⁸ In some ways, this is an affirmation of the positivist line of legal reasoning.³⁹ As Berman argues, positivists consider law to be a

with the term "anational" and also notes that apart from rules and actions, events also cross national boundaries.

³⁵ Kotze and Soyapi "Transnational Environmental Law" 82.

³⁶ See section 5.3 below.

³⁷ De Garay 1941 *Notre Dame Law* 263.

³⁸ Black *Black's Law Dictionary* 1028.

³⁹ Converse to the implications of the positivist take on law, the natural law philosophers would conceive law outside the paradigms of lawmakers and its enforcement, since these came at a later stage in the development of human societies: the "essence of

body of rules posited by lawmakers to effectuate their will and policy; which is enforced through coercive sanctions by official authorities.⁴⁰ In this context, what counts as law cannot be separated from the lawmakers, the official enforcers and the enforcement itself. One could almost state that law cannot be thought of outside these paradigms. By implication, then, law in the modern state is inseparable from the institutions responsible for creating it and enforcing it. But for these institutions to work, one scholar notes, there must also be a body of substantive law, whether judicial or administrative (for example, law of contract or law of delict) and a judicial process which upholds the legal order.⁴¹ This description presupposes the existence of a highly organised society that is arranged along political lines and territorial boundaries; better known as a nation/state. Could it be possible, though, to speak of law without a state? Can there be law without a parliament or a judiciary to enforce it?⁴²

The state has been at the centre of both politics and law, as traditionally the state has been associated with regulation.⁴³ According to Venter,⁴⁴ the world, even in the 21st century, has been operating on the premise that "sovereign nation states are preordained characteristics of humanity and essential for the establishment and maintenance of public order" on all levels: from the family level to the global level. Evidently, in many societies law is that which is made by a legislature, with the result that anything else struggles to gain legitimacy as law. The prevailing and settled belief is that law has to be democratically legitimised and made by governments.⁴⁵ Calliess⁴⁶ takes it further and concludes that the state subjects "all forms of

law is not its political dimension but its moral dimension." Berman 2005 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=666143 6.

⁴⁰ Berman 2005 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=666143 6.

⁴¹ Berman 2005 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=666143 3-4.

⁴² There are obviously jurisdictions that have a form of common law, which is usually the product of precedent and settled practice/common law. On the international level, both judicial decisions and settled practice are already established forms of law under Article 38 of the *Rome Statute of the International Criminal Court* (1998). Consequently, such common law is not included in this discussion.

⁴³ Jessup *Transnational Law* 1; Bernal 2011 *New Polit Sci* 155; Quack 2007 *Organization* 645. Zumbansen states an assumption associated with law - that it has a territorial connection to a politically institutionalised system of rule creation, implementation and adjudication (he mentions that in Europe this is distinctly called the state-law nexus). Zumbansen 2011 <https://www.wzb.eu/system/files/docs/tsr/cgc/zumbansen2012definingthespaceoftransnationallawwzbhu.pdf> 44.

⁴⁴ Venter *Global Features of Constitutional Law* 12.

⁴⁵ Calliess 2007 *Ind J Global Legal Stud* 473. A concession is made here that there are instances where binding law results from undemocratic or autocratic regimes. For this discussion, these are not considered within the meaning of "democratic legitimacy".

⁴⁶ Calliess 2007 *Ind J Global Legal Stud* 473. See also Teubner 2002 *Eur J Soc Theory* 206 where it is stated that "[r]ulemaking by 'private governments' is thus subjugated under the hierarchical frame of the national constitution which represents the historical

non-state law to different methods of degradation, namely incorporation, delegation, and deference." Put differently, if law is not incorporated or delegated and thereafter backed by sanction and not made by government, then such law is questionable and ultimately perceived as being illegitimate.

In their study of non-state ordering in South Africa, Nina and Scharf⁴⁷ found that there is some kind of selective acceptance of other laws within states:

The state has historically defined the limits of that other sphere, and also defined its future trajectory. But the state's reaction to the other law varies greatly, depending on time and circumstance: sometimes it sees the other law as complementary to its ordering agenda and tolerates it without incorporating it. At other times and circumstance the state takes a dismissive and repressive stance towards the other law and attempts to discredit and destroy it.

Indeed as some scholars have found: "[t]he final word always rests with state law; whatever it fails to authorise has no prospect of recognition - especially within a democratic state".⁴⁸ In yet another argument it is posited that if law is not prepared in a practical manner, and if it does not have coercive means to secure its performance, then it is like "justice without her sword".⁴⁹ To the extent that any rule or law is not dependent on the state for its enforcement, then according to the above arguments such rules lack the essential character of law.

To underscore the power and the privilege states have in making law, one scholar notes the following:

The distinction law/non-law is based on a hierarchy of legal rules where the higher rules legitimate the lower ones. Normative phenomena outside of this hierarchy are not law, just facts. The highest rule in our times is, after the decline of natural law, the constitution of the nation state which refers to democratic political legislation as the ultimate legitimation of legal validity.⁵⁰

Taking this line of argument further, it is clear that even international law itself is centred on states, since international law concerns the rights and

unity of law and state." See further Michaels 2007 *Ind J Global Legal Stud* 461, where it is observed that state law treats non-state law in a special way: "it 're-states' these norms by translating or even transposing them into the semantics of its own system."

⁴⁷ Nina and Scharf "Introduction" 2

⁴⁸ Calliess 2007 *Ind J Global Legal Stud* 476. Also see Cremades and Plehn 1984 *BU Int'l L J* 324, who argue in relation to transnational commercial law that "given the world's present political structure, in particular the overwhelming power of the nation state, any so-called non-national legal system can only exist with the sponsorship, or at least tolerance, of nations."

⁴⁹ De Garay 1941 *Notre Dame Law* 266.

⁵⁰ Teubner 2002 *Eur J Soc Theory* 206. Also see Kronke 2005 *Loy L Rev* 287, where it is stated that international organisations like the International Institute for the Unification of Private Law are bureaucracy driven.

obligations of states.⁵¹ International law is law because states agree on it and authorise it.⁵² It is for this reason that international law, much like national legal systems, cannot be conceived of without states being involved.⁵³ What this means is that any system of law that is not state or international law suffers from what Michaels⁵⁴ calls a "competitive disadvantage," given the more functional and institutional support state law has.

4.2 The consequences of/for law in a transnational context

Given the embedded and long-established dominance of the state in law making, could there be a way to rethink/reimagine law-making? Consider the following question posed by one scholar: "Can the concept of law, endlessly refined and disputed in legal philosophy, be made to embrace legal transnationalism; that is, law no longer understood in its 'central case' as being state law?"⁵⁵ Arguably, when we start thinking transnationally, we become liberated and can then "venture beyond long-established, perhaps stifling, conventions about what constitutes law and how to study it, into a less structured environment."⁵⁶ In other words, through transnationalism in law we are invited to see law in terms of its role in society, which could be productive for reconceptualising law, given that law is a reflection of society and its changing structure.⁵⁷ In this globalised world, then, the state is simply a part of a society, which could now be conceived as a "world society".⁵⁸

⁵¹ See Twining "Implications of 'Globalisation' for Law as a Discipline" 46, who sees state laws and international law as the Westphalian duo.

⁵² Meaning it cannot operate without the consent and recognition of nation states. Also see Berman, who states that traditionally international law is narrowly associated with the official acts of governmental bureaucratic entities which has resulted in the idea of international law itself increasingly becoming insufficient to capture the scholarly approaches that have been emerging. Berman "Introduction" xiv.

⁵³ It has been suggested by some authors that transnational law itself ostensibly emerged "from the limits of international law". See Dibadj 2008 *Stan J Int'l L* 256.

⁵⁴ Michaels 2007 *Ind J Global Legal Stud* 462.

⁵⁵ Cotterrell 2012 *Law Soc Inq* 504.

⁵⁶ Heyvaert and Ety 2012 *TEL* 4.

⁵⁷ See Zumbansen 2011 <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1065&context=clpe> 3.

⁵⁸ Zumbansen 2011 <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1065&context=clpe> 3. This is in direct contrast to a society or community in the narrow sense, as these are usually demarcated along borders. (Here, a society represents a grouping according to state borders.) In such cases, each society has its own views on law in the same way that each state has its own laws. Cotterrell 1997 *Can J L & Soc'y* 79. It follows then that a community in the sense that Zumbansen is referring to must be understood in the wider sense as a "world society".

Law is self-evolving and is moulded by its environment simply because it must and does change in response to such an environment.⁵⁹ If our current environment/society is now globalised, and if law is a societal construct, then as a self-sustaining and self-evolving system that changes according to its environment, law is no longer only a product of political compromise but also one that is largely driven by society.⁶⁰ In a transnational context then, law is not about states, but about the global society and its needs. This however, raises important issues relating to the legitimacy of any law (especially in this case, transnational law) that is not state law (and dependent on a parliament). The most probable cause for this is because there are no checks and balances, forms of accountability (there is a lack of sanctions and enforcement thereof) and no demos to elect the legislator that must "make" and enforce such law.⁶¹ However, in defence of rules, norms and principles (law) not created by democratically elected parliaments, Perez⁶² argues that the question of legitimacy could be approached from a:

[F]unctional or substantive perspective: to the extent that a transnational norm promotes the common good, it should be seen as legitimate. From this perspective, the process leading to the adoption of a certain norm is not relevant to the question of its legitimacy. Under this account, democracy has no role in the creation of legitimacy: the question is rather which set of criteria constitutes the best expression of the common good.

This apt analysis by Perez looks good for non-state actor rules and norms. In a way it also challenges the politics that is often associated with law, in

⁵⁹ See Berman "Introduction" xv, who indirectly alludes to the societal touch the law has in the following statement: "Accordingly, legal scholarship emphasises both how people think about law in their daily lives and (more subtly) the ways in which largely inchoate ideas about the law can affect decisions they make."

⁶⁰ De Garay notes that there must be a norm that informs the law; either juridical or societal (De Garay 1941 *Notre Dame Law* 267). Consider for example the case of environmental rights. Some states do not recognise or provide for them while international law does not provide for them in any treaty or convention. However, their legitimacy could be derived from the norm that informs their existence; their purpose, viewed normatively gives them credence with the result that it could be possible to argue in courts for the right to a healthy environment even though it is not specifically constitutionally protected. The norm behind them is the right of, or the entitlements of "society" in the broad sense to a healthy environment. If one considers that legitimacy is less the result of some logical deduction and more the product of practice and narrative, then it is possible to refocus the understanding of law in a transnational context along the lines of society's experiences.

⁶¹ See Ong 2010 *Nord J Int'l L* 71, for the view that rule-making and standard-setting by transnational and non-State actor networks are marred by the "perceived lack of transparency and hence accountability."

⁶² Perez 2003 *Ind J Global Legal Stud* 28. Also see Ong 2010 *Nord J Int'l L* 72, where it is argued that some non-state actor rules like the Equator Principles are approved through the active participation of the entities that will eventually implement the standards. This suggests that where the responsible parties or the concerned entities are represented, then concerns about transparency might not be legitimate.

that the common good can be societal in nature rather than political. As noted above, law is a reflection of society and if, for the common good, non-state actor rules are created, their legitimacy could be weighed not in formal ways but in the light of their ability to express a common good. To further provide ways to better understand transnational law, one could also look at the existing differences between public law and private law. When it comes to the exercise of private power, there is an absence of the kind of constitutional and legal scrutiny and inquiry found in public law.⁶³ To put it in the most general terms, public law is rightly subject to a constitutional order because those who are involved in its administration are in their positions by virtue of democratic ideals. The same goes for public international law; states act within treaty or norm standards, which dictate the limits of their powers. On the other hand, in private law the relationship is not umpired under the same rubric of accountability and transparency. De Búrca⁶⁴ thus contends that decision-making beyond the state should not be assessed by the standards of democratic legitimacy. To the extent that transnational law involves many other actors outside of the state, it must not be subjected to the same standards as those of public law.⁶⁵

If we accept the above as true, then one could argue that transnational law is coming of age:

[F]irst I want to examine the 'space' of transnational law. When we take a look at what is 'out there', we see a rich and complex set of relationships, overlapping competencies, and dialogues among states, state entities, international organisations, and non-governmental organisations. Some of these spaces are occupied by institutions creating hard law (such as the World Trade Organization) that purport to bind member nations. Other spaces are sites where a number of national (and sometimes supranational norms) compete.⁶⁶

Based on Aleinikoff's postulation, transnational law has its own distinct space outside of state laws and international law. In fact, a number of scholars agree with this. For example, Calliess⁶⁷ presents the argument that transnational commercial law "constitutes a third category of law beyond the

⁶³ De Búrca 2008 *Colum J Transnat'l L* 110. Also see Aleinikoff 2008 *Yale J Int'l L* 488, where the author argues that legal development in transnational spaces is different from how we think of law (and how it is made) and that one of the reasons is that we have not as yet developed a legitimacy story to apply to transnational norms.

⁶⁴ De Búrca 2008 *Colum J Transnat'l L* 110.

⁶⁵ An extension of this argument is that in most cases, there would be a constitution from which the public law ideals are derived, whereas in the transnational space no transnational constitution is available. As such, if democratic legitimacy, as is expected under public law, is imputed to the assessment of transnational law, on which constitution are those ideals based?

⁶⁶ Aleinikoff 2008 *Yale J Int'l L* 484.

⁶⁷ Calliess 2007 *Ind J Global Legal Stud* 476.

traditional dichotomy of national and international law." Along similar lines, Capuzzo⁶⁸ argues that:

The global legal order is essentially an order of international networks and organizations, a set of transnational regimes connected and intertwined with each other. In this sense, the global legal order and the transnational regimes that sustain it are something different from both public and international law. It is possible to conceive this complex of transnational regimes as a legal system, or as a set of different and strictly connected legal systems.

This clearly supports the view that any transnational legal system is possibly autonomous from the state and international law, as it does not fit wholly into them. Transnational law could thus be perceived to occupy its own normative space (although this space arises as a result of a gradual accumulation of decisions by both the state and the international order), creating scholarly enterprises like "transnational labour law", "transnational commercial law" and "transnational environmental law", to name a few.⁶⁹ Looking at these enterprises, it seems that the existence of forms of transnational law suggests that there is a "felt need" for regulation, which implies that the problems that are addressed through transnational governance are "not adequately addressed by state-based and local decision-making"⁷⁰ or regional and international decision-making. Admittedly, issues of legitimacy will always attach to these forms of transnational law, and issues related to how they can be enforced will persist.⁷¹ In view of these potential concerns, transnational law could be better understood as a model complementary to traditional state and international law, as is the case with transnational environmental law.⁷²

5 The example: transnational environmental law

5.1 Environmental law in a transnational context

Why should we think about environmental issues in a transnational context? Why is transnationality important? There are a number of reasons. To start

⁶⁸ Capuzzo 2013 *CLR* 3.

⁶⁹ Also see Cremades and Plehn 1984 *BU Int'l L J* 321, 324. The authors note that any transnational legal order existing outside the nation state is autonomous from rather than independent of national control.

⁷⁰ De Búrca 2008 *Colum J Transnat'l L* 104.

⁷¹ It is probably necessary at this point to state that transnational forms of law could be understood as soft law is. While not binding, soft law creates principles that are often adopted by states and at times considered binding by states. In a forthcoming study, we show that courts in Kenya and South Africa are increasingly considering soft law principles derived from the *Rio Declaration: United Nations Conference on the Environment and Development* (1992) and the *Stockholm Declaration: United Nations Conference on the Human Environment* (1972) in their decisions. See Soyapi and Kotze "African Courts" (forthcoming 2021).

⁷² See the further discussion below on transnational climate law and governance.

with, it is increasingly becoming limiting to think of the geography of law as national, regional or international in nature as there are now various non-state actors that exercise different regulatory roles (which they do because they are not constrained by issues of sovereignty and state interest).⁷³ For instance, organisations like the World Bank and the International Monetary Fund (IMF) have been prioritising environmental concerns, and we see that environmental norms and principles are now being tied to their aid and their conditions for receiving funding. The Equator Principles, for example, arose through the need for the inclusion and recognition of the environmental, social, health and safety standards where private banks provide funding for socio-economic development.⁷⁴ Adopted by banks as private and non-state actors, the principles are voluntary but prescriptive in that they provide the basis for policies and actions aimed at reducing the negative environmental and social impacts of development projects.⁷⁵

The growing communication networks that are largely a product of globalisation have also been exercising non-state actor influence and transnationality. There has been an increase in technological advancements over the last decade with various social media now to the fore, and with the term "social network" gaining popularity.⁷⁶ Instead of people learning about environmental disasters like oil spillages from news channels or even printed newspapers that are issued at designated times, people become aware of environmental concerns instantaneously because of the "quick nature" of Facebook and Twitter posts.⁷⁷ Accordingly, the internet has become popular and crucial for environmental law, with some scholars noting that "the contemporaneous rise of environmentalism and the internet in the mid-late 1990s was not coincidental."⁷⁸ These communication networks facilitated by the internet have also enhanced the spread of environmental activism, which more often takes the form of online campaigns with much more contentious information being disseminated than that which people can get from official state sources.⁷⁹ With this

⁷³ Scholtz 2007 *SAYIL* 247. Also see Pattberg "Partnerships for Sustainability" 175, where it is indicated that the view that international relations are based on a state-centred ontology can no longer be sustained, since non-state actors of all kinds have been increasing influential.

⁷⁴ Ong 2010 *Nord J Int'l L* 37.

⁷⁵ Ong 2010 *Nord J Int'l L* 39.

⁷⁶ Twitter, Facebook and online websites.

⁷⁷ Lambert *Environmental Law NGOs* 8.

⁷⁸ Sullivan and Xie 2009 *China Q* 423.

⁷⁹ Sullivan and Xie 2009 *China Q* 425; Lambert *Environmental Law NGOs* 8. One scholar notes that the use of the social media also enhances the meeting and linking of people and groups with shared interests and relevant causes. See Matthews 2011 <http://www.thegreenmarketoracle.com/2011/02/social-media-marketing-and.html>.

internet-based phenomenon of communication, it is not states *inter se* at play here, but people, groups of people⁸⁰ and non-state actors that are linked in a web of communication that is not national but transnational in nature.

The environmental problems the world faces today are of such a nature that the national and international spaces might not be enough for regulatory purposes.⁸¹ As far back as 1989, Sands⁸² stated that "[t]he recognition by governments that environmental issues transcend national boundaries" was accompanied by the realisation that *ad hoc* and disparate responses by individual states will not solve these pressing problems. Climate change, for instance, is an issue that affects the globe as a whole.⁸³ Thus, the extent to which issues arise in one jurisdiction resulting in regulatory responses which might emanate from the regional or the supranational only shows how borders could become increasingly ignored in the future in environmental matters: "[a]gainst the long history of law, global environmental change is a new and complex problem for which we are fashioning a new legal regime. It is the new frontier of environmental law."⁸⁴

Related to this last point, the problematic nature of environmental regulation through international environmental law is worrisome. To think of international environmental law entirely outside the state is questionable. This is because states are the primary instigators of international environmental law and they drive its development and effectiveness.⁸⁵ To be sure, international environmental law's objectives cannot be achieved without domestic implementation that is dependent on states.⁸⁶ Not only is the process of negotiating treaties and customs slow, but the treaties and customs themselves usually do not offer much, as they often produce weak standards.⁸⁷ This is particularly true when one considers that international agreements are usually a matter of compromise, and some states do not

⁸⁰ The growth of these networks is enhanced by the existence of think tanks, especially epistemic communities that have wide networks of communication.

⁸¹ See Kotzé, who comments that environmental problems are not only global and reciprocally interconnected, but are also becoming unpredictable. Kotzé 2014 *SALJ* 562.

⁸² Sand 1989 *Harv Int'l L J* 393.

⁸³ Faure "Globalisation and the Multi-level Governance" 388. Also see Sand 1989 *Harv Int'l L J* 393.

⁸⁴ Wiener 2001 *Ecology L Q* 1296.

⁸⁵ Shaffer and Bodansky 2012 *TEL* 33. Also see Boyd 2010 *U Pa J Int'l L* 505, where it is observed that there is a state-centric approach to international environmental law.

⁸⁶ In some instances, transnational environmental law is also dependent on state efforts.

⁸⁷ Shaffer and Bodansky 2012 *TEL* 32.

even subscribe to the agreements.⁸⁸ This has resulted in one author arguing that multilateral agreements are not the appropriate solution, given that consent is usually attracted by the provision of incentives for participation, which often results in rules and standards that reflect the lowest common denominator.⁸⁹ In contrast, transnational environmental law can exist outside state agreement as it consists of diverse norms that apply in a broader geographical sense than international environmental law.⁹⁰ A good example is that of the *International Organization for Standardization (ISO) 14001* which, although not hard law, has sought to and continues to influence behaviour.⁹¹ Thus, even though states could play a role in facilitating the growth and spread of transnational environmental law, the reach of transnational environmental law is beyond states and can apply extensively to organisations and companies (non-state actors).⁹²

5.2 Understanding transnational environmental law

If international environmental law is considered to be relatively new and constantly changing,⁹³ as it is, then transnational environmental law is even more recent and can be described as a young and continuously "emergent system".⁹⁴ To illustrate this, after seven editions of their book *Environmental Law*, Bell, Macgillivray and Pedersen⁹⁵ only recently, in their latest edition, acknowledged transnational environmental law as a distinct body of law and as a source of environmental law. In addition, a new journal titled *Transnational Environmental Law* was launched a few years ago.⁹⁶ This demonstrates that transnational environmental law is no longer a theoretical

⁸⁸ The end result in international environmental law is rarely the initially envisioned goal, as by the time treaties are ratified, compromises would have been made.

⁸⁹ Lin 2013 <http://hdl.handle.net/10722/185528>.

⁹⁰ Shaffer and Bodansky 2012 *TEL* 33. In addition, Bell, Macgillivray and Pedersen note that transnational environmental law has the advantage that it does not have the vagueness and problems relating to enforceability that international environmental law has, since the rules of transnational environmental law are adopted as national laws. See Bell, Macgillivray and Pedersen *Environmental Law* 87. Also see section 3.5 below for the discussion of the meaning of "law" in transnational environmental law.

⁹¹ Also see the brief discussion of ISO standards in section 3.5.2.2 below.

⁹² Kotzé notes in this regard that global environmental law discards the idea that it is derived exclusively from states. Kotzé 2014 *SALJ* 571.

⁹³ Turner *Substantive Environmental Right* 6; Kotzé 2014 *SALJ* 549. Also see Driesen 2006 *ANNALS AAPSS* 253, where it is noted that modern environmental law came into being in the 1970s.

⁹⁴ Yang and Percival 2009 *Ecology L Q* 617; Kotzé 2014 *SALJ* 566. Also see Heyvaert and Eddy 2012 *TEL* 7, who state that although transnational environmental law may have grown out of its earliest stages of infancy, it is still in the process of finding itself.

⁹⁵ Bell, Macgillivray and Pedersen *Environmental Law* 87.

⁹⁶ The website of the journal is 2020 <https://www.cambridge.org/core/journals/transnational-environmental-law>. It is published by Cambridge University Press and its first edition was in 2012.

concept only but a fast developing body of law that increasingly demands the attention of scholars.

Sands⁹⁷ suggests that transnational environmental law operates below "the level of visibility of classical public international law" and its rules relate to both the international and national legal order; to public inter-state relations and even to issues of private international law and procedure. Similarly, Kotzé⁹⁸ notes that transnational environmental law is "simultaneously national, inter-national (between and across domestic jurisdictions), regional, and international (supranational), and ... it emanates from multiple state and non-state actors variously situated at all of these levels." This formulation suggests that transnational environmental law is wide in scope and like its parent concept, transnational law, exists and operates within, in between and beyond borders. It invites us to look at transnational environmental law as a flexible and reactive body of law that is easily susceptible to change. Consequently, in the same way that transnational law is non-static and dynamic, transnational environmental law is reactive⁹⁹ and concerns the manner and extent to which environmental law responds to the global nature of present-day environmental problems.¹⁰⁰

5.3 *Transnational climate law and governance*

As noted in the introduction to this paper, I have attempted in earlier works¹⁰¹ to demonstrate that the right to a healthy environment is perhaps one clear example of how transnationalism in law is happening. In the absence of the right to a healthy environment at the global level, non-state actors have long been advocating its constitutionalisation in national constitutions. Such constitutionalisation is happening fast through transnational juridical processes of transplantation, convergence of laws, integration and harmonisation; networking and judicial comparative borrowing.¹⁰² Yet one of the clearest examples of transnational processes at play is the rapid development of transnational climate law and governance initiatives.

Climate change is perhaps the biggest global environmental threat of our time. Global legal developments, however, do not seem to move fast

⁹⁷ Sand *Transnational Environmental Law* 35.

⁹⁸ Kotzé 2014 *SALJ* 568.

⁹⁹ Although international environmental law is also reactive to environmental issues, it is quite slow, as noted below under section 3.3.

¹⁰⁰ Heyvaert and Ety 2012 *TEL* 3.

¹⁰¹ See Soyapi "Emerging Transnationality of Environmental Rights" and Kotzé and Soyapi "Transnational Environmental Law".

¹⁰² See the general discussion of these processes in Soyapi "Emerging Transnationality of Environmental Rights" and Kotzé and Soyapi "Transnational Environmental Law".

enough to deal with the threat of climate change. The multilateral environmental agreement space which is dominated by states has produced the *United Nations Framework Convention on Climate Change*,¹⁰³ the *Kyoto Protocol*¹⁰⁴ and more recently, the *Paris Agreement*.¹⁰⁵ While instructive and representative of global concerns, there is an acceptance that these frameworks are not adequate to address climate change issues.¹⁰⁶ Against this backdrop of state-led initiatives, transnational climate law and governance initiatives have risen to become not only:

... a means of supporting and diffusing the implementation of climate-related policies and practices at various governance levels and by non-state actors, but they are also a response to the apparent incapacity of the multilateral climate change regime to address the growing urgency of climate change and to adapt to the changing circumstances of the world. Thus, there is a clear trend away from purely intergovernmental policy making and towards a governance system that incorporates public and private actors at all levels into norm setting, policy making and norm implementation.¹⁰⁷

This clearly accords with the descriptions of transnational law noted earlier in this paper. There is a movement of initiatives beyond the state,¹⁰⁸ without necessarily an erosion of the state. Such initiatives can be found in climate adaptation measures, climate funding, cities networks etc.¹⁰⁹ Thus, transnational climate law and governance initiatives are the product of something like a bottom-up approach, in that non-state actors and the private sector are driving the creation of regulatory norms which could then filter into individual states.

6 Conclusion

This article has attempted to stitch together ideas gleaned from an array of scholarship pertaining to transnational law in order to make out a coherent case for its relevance as a scholarly enterprise. The literature shows that it is now clear that because of global change, the idea of the state's complete dominance in law-making is fast diminishing and the notion of a nation, to borrow Venter's¹¹⁰ phrase, is "becoming frayed at the edges". The state has become open or cosmopolitan, as the 20th and 21st centuries have generated a wave of globalisation that has influenced virtually all forms of law and governance. While this does not signify the beginning of the end of

¹⁰³ *United Nations Framework Convention on Climate Change* (1992).

¹⁰⁴ *Kyoto Protocol* (1997).

¹⁰⁵ *Paris Agreement* (2015).

¹⁰⁶ Depledge "Continuing Kyoto" 41; Castro 2016 *TEL* 381; Dzebo 2019 *Int Environ Agreements* 452.

¹⁰⁷ Castro 2016 *TEL* 384.

¹⁰⁸ Dzebo 2019 *Int Environ Agreements* 448.

¹⁰⁹ Dzebo 2019 *Int Environ Agreements* 450.

¹¹⁰ Venter *Global Features of Constitutional Law* 13.

Westphalian sovereignty and the continued existence of the nation state, any modern map of the law that does not include such emerging orders is leaving out too much.¹¹¹

In an environment where international agreement on many concerns usually drags on interminably and is beset by various challenges (like the low standards produced in environmental treaties),¹¹² the transnationality of regulation could be a welcome innovation. This is particularly true when one considers that once an agreement is reached and codified, changing it might prove even more difficult than reaching the agreement in the first place.¹¹³ As they are not national, "transnational rules stand a better chance not to reflect the outdated rules which may still be found in certain legal systems".¹¹⁴ Accordingly, transnational law-making is inevitable. In fact, transnational law-making is a practical problem-solving and sense-making process which "illuminates how the by-products of professional problem solving gradually accumulate into non-binding legal rules."¹¹⁵ In other words, transnational law-making is inevitable in a fluid and ever-changing society, which demands answers and solutions to the increasing problems brought about by and through globalisation. Transnational law represents the totality of norms and rules operating on a global scale and represents the interaction between the national, regional and international systems. It represents a compromise between the conservative nation state law-making process and the rigid process of creating international law. To be sure, transnational law has been fast developing over the last 60 years or so. Evidence of its remarkable growth includes the existence of many journals that are now based on transnational law,¹¹⁶ as well as academic

¹¹¹ See Twining, who observes that a modern legal map cannot afford to leave out forms of indigenous, or customary laws, religious laws and also emerging orders like the new *lex mercatoria*, among others. Twining "Implications of 'Globalisation' for Law as a Discipline" 47.

¹¹² These could be many. For instance, some states might abstain from treaties while others may make reservations. Yet others will flatly refuse.

¹¹³ Two scholars have expressed the following opinion: "States face increasing difficulties negotiating and bringing into force multilateral treaties, especially treaties on subjects of universal ambit. For a host of reasons—from bureaucratic inertia to opposition from powerful interest groups—states are refusing to ratify international conventions, even when they accept the legal rights and obligations at issue Indeed, even the successful codification of international law brings its own problems; once codified, the law cannot readily evolve to respond to the changing world." Brower and Sharpe 2004 *Va J Int'l L* 201.

¹¹⁴ Gaillard 2001 *Arb Int'l* 61.

¹¹⁵ Quack 2007 *Organization* 644.

¹¹⁶ Some of the journals include *Columbia Journal of Transnational Law*, *Journal of Transnational Law*, *Journal of Transnational Law and Policy*, *Transnational Legal Theory*, *Transnational Law Review* and more recently the journal of *Transnational Environmental Law*.

qualifications dealing with transnational law.¹¹⁷ It already has a corpus of law to its name, and is no longer abstract but can be taxonomically identified.

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¹¹⁷ Among the many qualifications, there is a Master of Laws (LLM) in Transnational Legal Studies at the University of Amsterdam; LLM in Transnational Law at King's College London; LLM Transnational Law at the University of Bremen; a graduate degree in US and Transnational Law for Foreign Lawyers at the University of Miami; LLM Transnational Law at Temple University and an LLM in Transnational Law at the University of Oldenburg.

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List of Abbreviations

AJIL	American Journal of International Law
Am U Int'l L Rev	American University International Law Review
ANNALS AAPSS	ANNALS of the American Association of Political and Social Science
Arb Int'l	Arbitration International
BU Int'l L J	Boston University International Law Journal
Can J L & Soc'y	Canadian Journal of Law and Society
China Q	The China Quarterly
CLR	Comparative Law Review
Colum J Transnat'l L	Columbia Journal of Transnational Law
Ecology L Q	Ecology Law Quarterly
Eur J Soc Theory	European Journal of Social Theory
Ger Law J	German Law Journal
Harv Int'l L J	Harvard International Law Journal
Ind J Global Legal Stud	Indiana Journal of Global Legal Studies
Int Comp L Q	International and Comparative Law Quarterly
Int Environ Agreements	International Environmental Agreements: Politics, Law and Economics
Int'l Law	The International Lawyer
LA Legal Notes	Libertarian Alliance Legal Notes
Law Soc Inq	Law and Social Inquiry
Loy L Rev	Loyola Law Review
Neb L Rev	Nebraska Law Review
New Polit Sci	New Political Science
Nord J Int'l L	Nordic Journal of International Law
Notre Dame Law	Notre Dame Lawyer
Penn St Int'l L Rev	Penn State International Law Review
SALJ	South African Law Journal
SAPL	Southern African Public Law
SAYIL	South African Yearbook of International Law

Stan J Int'l L	Stanford Journal of International Law
TEL	Transnational Environmental Law
Tex Int'l L J	Texas International Law Journal
Tilburg L Rev	Tilburg Law Review
U Chi L Rev	University of Chicago Law Review
U Pa J Int'l L	University of Pennsylvania Journal of International Law
UC Irvine L Rev	UC Irvine Law Review
Va J Int'l L	Virginia Journal of International Law
Yale J Int'l L	Yale Journal of International Law