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TRANSNATIONAL LAW AND TRANSJUDICIALISM: BEYOND THE DIALOGUE BETWEEN COURTS*,**

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ABSTRACT: This article enters into the scholarly discourse surrounding transnationality and its legal manifestations, specifically aligning itself with the discussion of transjudicialism within the context of a global legal community. The paper argues that contemporary transjudicialism extends beyond the simplistic dialogue between courts, emerging as a pivotal instrument consolidating Transnational Law. The exposition of this argument is buttressed by an inductive methodological approach, employing techniques of reference, category, operational concepts, and bibliographic research. The paper concludes by illustrating the formation of an already consolidated global legal order, primarily driven by the evolution of transjudicialism, further emphasizing the need for the extension of current legal models.

KEYWORDS: transnationality; dialogue between courts; transnational law; transjudicialism.

DIREITO TRANSNACIONAL E TRANSJUDICIALISMO: ALÉM DO DIÁLOGO ENTRE TRIBUNAIS

RESUMO: Este artigo entra no discurso acadêmico em torno da transnacionalidade e suas manifestações jurídicas, alinhando-se especificamente com a discussão do transjudicialismo no contexto de uma comunidade jurídica global. O artigo argumenta que o transjudicialismo contemporâneo vai além do diálogo simplista entre tribunais, emergindo como um instrumento fundamental para a consolidação do Direito Transnacional. A exposição deste argumento é sustentada por uma abordagem metodológica indutiva, empregando técnicas de referência, categoria, conceitos operacionais e pesquisa bibliográfica. O artigo conclui ilustrando a formação de uma ordem jurídica global já consolidada, impulsionada principalmente pela evolução do transjudicialismo, enfatizando ainda a necessidade de extensão dos modelos jurídicos atuais.

PALAVRAS-CHAVE: transnacionalidade; diálogo entre tribunais; direito transnacional; transjudicialismo.

1. Introduction

This paper engages with the dynamic discourse surrounding transnationality and its evolving legal implications. The key argument advanced is that transjudicialism has evolved beyond a mere dialogue between courts, emerging as a significant instrument in the consolidation of Transnational Law. To provide a robust theoretical base to this argument, the paper explores the constructs of transnationality and Transnational Law, demonstrating their intrinsic connection to the praxis of transjudicialism.

Recognizing a dearth in the current literature, this paper explores the transformation of transjudicialism from a mere dialogue to a critical tool in the consolidation of Transnational Law. In doing so, it also raises pertinent questions about the implications of this transformation for our understanding of the global legal community.

The paper unfolds through three sections: Initially, we elaborate on the phenomenon of transnationality, explicating its close relationship with the jurisdictional action of national, international, and supranational courts. Following this, we examine transjudicialism as an outcome of dialogues among these courts, incorporating Slaughter's (1994) classification of the form and degrees of involvement among courts.

The final section presents an overview of an emergent global legal order, driven by the amplification of transjudicial dialogues. Here, the crucial role of Transnational Law in addressing present transnational dilemmas is underscored. This methodological approach is rooted in inductive reasoning, supported by techniques of reference, category, operational concepts, and bibliographic research. In advancing this discourse, we aim to provide a novel perspective on transjudicialism's role in Transnational Law's consolidation, thereby enriching the broader theoretical conversation on transnationality's legal implications.

2. Transnationality and transnational law: foundations of transjudicialism

The advent of globalization has led to an increased frequency of contact between legal orders, impacting various facets of daily life and scientific disciplines. This development signifies the emergence of a more cosmopolitan world. In this era, heavily

influenced by globalization, the phenomenon of transnationality has surfaced as a significant consequence. Our world is characterized by exchanges, communications, and borders that are sometimes flexible, and sometimes weakened by the phenomenon itself. These conditions facilitate the circulation of capital, goods, people, cultures, and principles of law, ethics, and morality, which in turn reciprocally influence judicial decisions across the globe.

Deterritorialization, an undeniable characteristic of transnationality, aligns with the permeable borders of States. This alignment fosters an environment of exchange and openness, blending internal and external events, thereby blurring or even erasing the already faint dividing lines between national and international law.

Within this context, Transnational Law emerges as the legal dimension of the transnationality phenomenon, offering insights into the scope and significance of transjudicialism in contemporary times. To comprehend the latter, it is necessary to delve into certain considerations about Transnational Law.

Harold Hongju Koh (2005-2006), a distinguished professor of International Law at Yale Law School, asserts that Transnational Law is a hybrid of domestic and international law and holds critical importance in modern societies. Koh employs digital-era metaphors to elucidate his theory, characterizing Transnational Law as: 1) Law "downloaded" from international to domestic law, such as international human rights norms internalized by numerous states; 2) Law that is "uploaded and then downloaded," akin to a rule originating from a domestic legal order that subsequently becomes part of international law; and 3) Law that is "horizontally transplanted" from one domestic system to another, citing the doctrine of unclean hands, which originated in British law and migrated to various other legal systems (Koh, 2005-2006, p. 2).

Reflecting upon these insights, it is understood that contemporary occurrences are transnational as they frequently extend beyond national borders and necessitate regular and significant engagement from all participants, including national, international, and supranational jurisdictional courts.

It is noteworthy that reflections on Transnational Law have been developing since the last century when, as early as 1976, Vagts and Steiner began reflecting on legal problems within the transnational scope through the work titled Transnational legal problems (Steiner; Vagts; Koh, 1994). The authors undertook complex studies on international law, conflict of laws over time and space, comparative law, jurisprudence,

and transnational business and transactions, adopting Jessup's[1] stance to analyze such situations.

In their work, the authors identify the characteristics and scope of transnational legal problems in domestic and international legal systems, using examples such as the maintenance of peace and control of violence related to Vietnam, the existing conflicts between the Congress and the Executive of the United States concerning international relations and agreements, and the discussion on human rights and their transnational scope. Remarkably, all of this transpired back in the 1980s.

In 1986, Vagts (1986) addressed the matter in his work Transnational Business Problems, examining the behaviors of the actors involved in transnational relations. At this moment, an analysis emerged that goes beyond the law, observing how this law arises from relations between the involved subjects.

Vagts identifies three defining elements of Transnational Law: 1) issues that transcend national borders; 2) issues that do not allow a clear distinction between Public and Private Law; and 3) issues that encompass open and flexible sources, like soft law (Cruz; Piffer, 2017, p. 53).

From an anthropological perspective, Ribeiro (1997) argues in his work titled "The Condition of Transnationality" that discussing this condition implies the possibility of altering conceptions about citizenship, with the aim of fostering a clear sensitivity and responsibility regarding the effects of political and economic actions in a globalized world (Ribeiro, 1997, p. 4).

In relation to the connection between globalization and transnationality, Ribeiro (1997, p. 4) acknowledges certain similarities but emphasizes that the distinctiveness lies in the fact that transnationality points to a central issue: the relationship between territories and the diverse sociocultural and political arrangements that guide the ways in which individuals represent belonging to sociocultural, political, and economic units. Furthermore, Ribeiro discusses transnationalism as an economic, political, and ideological phenomenon, and transnationality as the consciousness of being part of a

1 Philip Jessup (1965, p. 11) was the pioneer to write about transnationality and its legal dimension. When experiencing a historic moment of improvement and intensification of relations between States, Jessup expressed the difficulty involved in analyzing the problems of the world community and the law that regulated it, given the lack of an appropriate expression to designate the norms in question, since International Law would not prove appropriate for this. For this reason, the author began to use the expression Transnational Law to include all the norms that regulate acts or facts that transcend national borders, since, for him, transnational situations could involve individuals, companies, States, organizations of States or any other groups.

global political body, maintaining, in many ways, potential and virtual characteristics. This is why he prefers to consider "the condition of transnationality rather than its factual existence" (Ribeiro, 1997, p. 1).

Following this line of thought, it is understood that the occurrence of transnationality as a complex and multifaceted phenomenon, and the application of principles related to Transnational Law as the expression of its legal dimension, gives rise to the practice of transjudicialism. This practice acknowledges that jurisdictional courts – national, international, or supranational – are increasingly influenced by the transnational phenomenon and utilize it as a tool to assist in the resolution of transnational pleas in a wide range of orders and jurisdictions.

Hence, it is incumbent upon us to scrutinize the salient features of modern discourses among jurisdictional courts and to underscore the significance of transjudicialism as a juridical tool that bolsters the resolution of prevailing transnational requisitions.

3. Transjudicialism in the dialogue between courts

It is undeniable that the new convergences highlighting the phenomenon of transnationality also impact the jurisdictional action of courts. This assertion is rooted in the constant expansion of interactions among these courts, given the increasing recurrence of these interactions and the overcoming of classical legal models – such as the adoption of the monist or dualist legal theory by a particular state – in the face of increasingly complex legal pluralism.

Another factor contributing to the importance of analyzing transjudicialism is the increase in the number and specialty of international and supranational courts, in parallel with the complexity of transnational relations that present themselves today.

As Burgorgue-Larsen (2010, p. 263) asserts, the dialogue between courts "takes place in a space where territorial, cultural, linguistic, and societal boundaries are increasingly receding," resulting in a movement of internationalization of national judges, influenced by the intensification of exchanges between magistrates, facilitated by new information technologies and the creation of judicial networks, for example (Delmas-Marty, 2007, p. 42).

According to Frydman (2016, p. 20), the dialogue between courts is verified from the citations that occur in various directions: horizontal, between jurisdictions of the same level (between constitutional courts or between the European System and the Inter-American Human Rights System, for example); vertical, which occur between jurisdictions of different levels ("from bottom to top", when a national court cites an international court; or "from top to bottom", when an international court cites a particular national court); and crossed, when a Human Rights Court cites a decision of an International Trade Court, for example.

Transjudicialism, being the result verified from the establishment of dialogues between courts, adopts Slaughter's (1994) classification of these dialogues for the purposes of this study, which the author names as transjudicial communication.

Thus, in terms of its form, transjudicialism is verified from horizontal, vertical, and mixed interactions:

Horizontal dialogues are the communications established between courts that have the same status (national, regional, international, or supranational), and the citation of foreign jurisprudence constitutes mere courtesy. For Slaughter (1994), the most developed form of such communication is among the constitutional courts of Europe, where judges meet in triennial conferences. These courts are not bound to follow or even take into account the jurisprudence of the other by any formal relationship, nor is it likely that they recognize the fruits of such communication by citation to each other's decisions.

Delmas-Marty, Lamy, and Pellet (2006), when dealing with horizontal dialogues, express that the manifestation of this true globalization of law are the communications, almost instantaneous, that are produced in the face of the recognition of the existence of values and principles shared among judges from different states and continents.

Regarding this form of dialogue, it can be affirmed that the use of arguments coming from other courts does not mean subservience, as the influence that is established is done from a horizontal perspective. It is also important to keep in mind that:

> [...] the use of what is decided by another court can lead to a recognition of total or partial agreement, or total disagreement. In fact, this last point is something that needs to be noted. Dialogue does not mean acceptance of what another court decides. It can lead to the opposite (Negative dialogue), denying the correctness of the decision made by another court or confronting the

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> foundations used in order to attack the robustness of the commented decision. The legitimization of the dialogue is affirmed from the recognition by the legal community, especially, but not only from it, that there is an exhaustive process of argumentation carried out by the courts and that also the arguments coming from alien courts can be part of a decision, even if contrary to what was decided beyond the borders of the national state (Conci, 2015, p. 127).

In addition to horizontal interactions, transjudicialism is verified through vertical dialogues. These occur between national and supranational courts, such as those that occur between the courts of the member states of the European Union in the face of decisions of the European Court of Justice – ECJ and, although to a lesser degree of verticality, when there is citation of the precedents of the European Court of Human Rights by the member states of the European Convention on Human Rights (ECHR) or by states outside the European Union (Supreme Court of Argentina, Brazil, etc).

It is interesting to consider the importance of establishing vertical dialogues, notably when the theme refers to Human Rights, first because the need to address issues related to the phenomenon of transnationality is vital for the future of the human race (Garcia, 2011), and second, because transnational demands, being related to the issue of the effectiveness of so-called diffuse and cross-border rights, are essential issues for the defense of the realization of Human Rights, classified as "new rights" (Garcia, 2009, p. 179).

On this subject, Alvarado (2015, p. 252-253) states:

> Due to the profound metamorphosis that the global legal scenario has undergone, the interdependence between national legal systems and international law is increasingly evident. This close link is particularly relevant in the field of human rights where, thanks to the growing interaction of national and international judges, today we can speak not only of national or international protection systems, but of multilevel protection models whose success depends on the articulation of constitutional law and international human rights law (IHRL).
> From our point of view, the judicial interaction that allows the articulation of the protection scenarios should be understood not only as an exercise of comparative law or as a migration of ideas but as a true interjudicial dialogue.

For the author, this dialogue presents itself as a particular type of transjudicial communication that arises from the need to articulate the work of judges from

different legal systems who face cases with common points. Thus, starting from a common normative framework, its effectiveness requires a certain type of articulation.

Therefore, vertical dialogues are established in the face of mutual, although not obligatory, use of norms and jurisprudence as a result of a full conviction among those involved about the existence of shared objectives in a legal framework of reference whose articulation is essential (Alvarado, 2015, p. 254).

In this way, using these forms of dialogue, Allard and Garapon (2006) expose that the trade between judges is intensifying, driven by a growing feeling or awareness of a common democratic or civilizational heritage.

Judges assert themselves as first-line agents in the globalization of law in a society of courts. The opening of the local order to horizontal dialogue with other jurisdictions and vertical dialogue with supranational jurisdictions is a condition, requirement, and presupposition for the formation of a ius commune in matters of social rights, for example (Ilik; Viglianisi Ferraro, 2021).

Furthermore, in addition to horizontal and vertical dialogues, there are also mixed dialogues, which are established when the preceding forms can be combined in various ways. In these cases, supranational courts can function as an instrument or stimulus for horizontal communications, as well as act as disseminators of principles and not merely international judicial precedents.

Mixed communication can also occur when the existence of common legal principles in the involved national legal orders is assumed, which can be disseminated by a supranational court. In this conception, the latter acts as a conductor of experiences from a limited set of universal principles that can then be communicated to national courts through a vertical complaint procedure.

In addition to the form in which dialogues between courts are established, another classification factor for understanding transjudicialism is the degree of reciprocal involvement between the parties establishing the dialogues, which can be: direct, monologues, or intermediaries.

Direct discourses can be verified by the interaction between the Court of Justice of the European Union (CJEU) and its Member States, "representing a genuine 'dialogue', communication between two courts that is effectively initiated by one and responded to by the other" (Slaughter, 1994, p. 113). The main distinctive characteristic between this type of dialogue and other forms of judicial communication is the awareness of the

existence of the dialogue and its realization, that is, its initiation and response, either voluntarily or due to an obligation to the European Union.

An example of this direct dialogue, identifying a considerable degree of involvement, was the case of Article 177 of the Maastricht Treaty. However, a significant change in this panorama was verified from the Lisbon Treaty (Porras, 2009).

Since then, any jurisdiction, including those that are not of last instance, may submit to the CJEU, in the terms of Article 267 of the Treaty on the Functioning of the European Union – TFEU, a question involving the interpretation of European law, called a preliminary ruling. This modality is a process exercised before the CJEU, allowing a national jurisdiction to question the said Court about the interpretation or validity of European law. It is also open to national judges of the Member States who can access the CJEU about the interpretation or validity of European law in an ongoing process. The preliminary ruling thus favors cooperation and active communication between national jurisdictions and the CJEU, aiming at the uniform application of European law (Gromek-Broc, 2023).

In turn, monologues are verified in cases of horizontal dialogues, already presented previously. According to Slaughter (1994, p. 113), "they are more properly conceptualized as monologues than dialogues", being understood as "the most ordinary of transjudicial communication" (Lupi, 2013, p. 275), as it consists of borrowing in the sense of using the experiences of foreign national courts or supra and international courts, for example, in order to be useful to the conviction about the decision rendered.

In this case, there is no concern or need for reaction from the Court that issued the original decision, since the foundations or reasoning adopted are incorporated into the reasoning discourse, without any repercussive expectation regarding the Court of origin. In these cases, it is understood that a simple "appropriation" of the foreign source does not facilitate the exchange of ideas, which would formalize the dialogue. However, it can be a seed to be harvested in the future by another Court that is interested in this topic, since current events, although multiple, are recurrent to the most different jurisdictional territories.

There are also intermediated dialogues, in which an international Court diffuses, intermediates the propagation of certain decisions to other national courts. According to Slaughter (1994, p. 120), although it looks more like a monologue, the international Court consciously carries out this dissemination, with a specific audience of nationalcourts and governments. This can occur within the legal system of the European

Union, when some national courts of member states of the Union begin to perceive that the decisions of the CJEU make more use of the experience of some States than others.

As already mentioned, the dialogue between courts, here referred to as transjudicialism, is situated in a contemporary context of multiple occurrences, not stagnant, encouraged by the dimensions of globalization, which show no possibility of equalizing. Therefore, "the diversity of external sources of law and the analysis of foreign legal experience should not lead to a simple appropriation and imitation" (Rothenburg, 2014, p. 43), but rather contribute to the consolidation of a global legal order.

4. Transnational law, transjudicialism, and the prominence of a global legal order

The current volume of transnational disputes generated by globalized society has brought national judges into contact with each other as never before, marking a difference not only in degree but also in the nature of their interactions. As Slaughter (2003, p. 204) cites, "The global economy creates global litigation," whether in the public or private sphere, involving various branches of law such as commercial, business, human rights, etc.

For the author, although the global community of courts does not yet encompass all countries, or even all international courts, there is an emergence of a global legal order. In this case, each court remains in charge of its specific jurisdiction and is grounded in a specific body of law, but they are also increasingly part of a larger transnational legal system (Slaughter, 2003, p. 204).

This assertion is due to the fact that these information exchanges that establish dialogues between courts through transjudicialism, whatever their form or level of interaction, end up generating a pluralism of legal orders, resulting in harmonies and dissonances that set the tone for the current global legal order and demonstrate the notable importance of Transnational Law to dispose of, or also understand, these modern demands (Mead; Maxwell, 2022).

We cannot forget the teachings of Vagts and Steiner (1994), exposed in 1976, in the already cited work Transnational legal problems. When launching its 4th edition in 1994, Vagts, Steiner, and Koh used examples to demonstrate the transnational legal problems of the time, such as the transnational character of the General Agreement on Tariffs and Trade – GATT and the International Monetary Fund – IMF, demonstrating

that the analysis is not restricted only to law, as, according to them, the approach to transnational legal problems should take into account the behavior and relationships established between all actors involved in transnational relations.

More than two decades after the cited reflections, the increase in transnational relations and the complexity that involves them is indisputable. Globalization, as a phenomenon facilitating transnationality, has led to the emergence of a global economy characterized by the formation of free markets for capital, finance, and labor, in addition to the growing internationalization of technologies and the multiplication of new political and social actors surrounded by a multitude of new social and cultural connections (Benhabib, 2006, p. 4).

Thus, the analysis of the current global legal context demonstrates the loss of centrality of state legal systems in regulating transnational relations, whether public or private law (Riedman, 1996, p. 65). As Cruz and Oliviero warn, more than talking about overcoming state law, it is preferable to talk about its transformation, which finds an explanation in the hegemony exercised, especially by the economic factor in the field of legal reasoning (Cruz; Oliviero, 2012, p. 19).

Thus, in the absence of a central authority legitimized to exercise legal power, judges, through transjudicialism, tend to adapt the content of legislative and constitutional formulations to new normative references arising from transnational events. "In this context, normative production modifies its historical characters and assumes two external traits: the absence of a 'stable territorial link', on the one hand, and the pluralism of the legal systems of reference, on the other" (Cruz; Oliviero, 2012, p. 20). This is the current global legal order.

The verification of the prominence of this global legal order will provide compelling elements of consolidation to Transnational Law as a hybrid system, in the words of Koh, which cannot be evaluated according to the criteria of national, international, or supranational legal systems. The lack of eventual support in the international political field, suggested by some who still believe in the effectiveness of state law (at the national and international level), ceases to make sense for the simple fact that Transnational Law is closely linked to transnational events (notably social and economic), from which it receives the necessary impulses to substantiate its indispensability.

As Slaughter (2003, p. 204-205) emphasizes, judges are the first to recognize a change in their own consciousness by feeling like part of a larger transnational system. However, for a global legal order to consolidate, judges will have to take a step

forward and recognize, explicitly or implicitly, a set of common principles that define their mutual relations. These relations include not only horizontal relations between national courts but also vertical relations between national courts and their supranational counterparts.

In this order, the deleterious effects of the fragmentation of state law, both at the national and international level, and the adoption of transjudicialism as a tool to assist in the resolution of demands that – directly or indirectly – are affected by transnationality – contribute to the formation of an authentic global legal community.

The idea that such transjudicial interactions could culminate in the formation of a global legal community is based on the principle that all judges are engaged in the same task of judging and resolving conflicts on issues that transcend the borders of the national state. In this scenario, international precedents would not be mere precedents, but authentic decisions invested with superior (universal) persuasive authority, which would give rise to a true emerging global jurisprudence (Slaughter, 2003, p. 195) as an integral part of Transnational Law.

5. Final considerations

The examination of the transnationality phenomenon in this paper emphasizes the necessity for innovative arrangements that respond to demands not solely reliant on State-affiliated legal models. Its is proposed that Transnational Law today is the legal embodiment of transnationality, and due to its inherent flexibility and lack of subordination to a pre-established legal space, it forms a crucial bedrock for transjudicialism.

Through this investigation, it can be validated that transjudicialism, arising from the dialogues between various courts irrespective of the form adopted or the degree of involvement established, is increasingly influenced by the transnational phenomenon. As such, it should be strategically utilized to assist in the resolution of transnational claims across diverse orders and jurisdictions.

Furthermore, the amplification of transjudicial practice fortifies the pluralism of legal orders, mirroring a consolidated global legal order's existence. Thus, decisions addressing conflicts and demands transcending state boundaries could be steered by transjudicial practice, culminating in the emergence of a true global jurisprudence, integral to Transnational Law. This contribution aims to significantly shift the

theoretical dialogue surrounding transnationality and its legal dimensions, providing a radical new perspective on the impact of transjudicialism.

Future researchers should consider expanding this discourse by examining the practical implications and challenges of transjudicialism within various socio-political contexts, such as emergent democracies and authoritarian regimes. The impact of advanced technologies on transjudicial communication, particularly within the context of digital technologies, artificial intelligence, and machine learning, could also be a worthwhile avenue for future inquiry. Detailed case studies should be incorporated to provide a more comprehensive understanding of transjudicialism in action.

Challenges related to transjudicialism, such as language barriers, differences in legal cultures, concerns about sovereignty, and fears of legal homogenization, need more exploration and possible solutions. Finally, the future trajectory of transjudicialism needs to be mapped, with potential predictions and recommendations for its evolution considering ongoing geopolitical changes, technological advancements, and shifts in international law. It is imperative that future research continues to scrutinize and refine the theoretical frameworks of transjudicialism and Transnational Law to ensure they remain adaptable to the dynamic nature of global legal orders.

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