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Notes on the relationship between globalisation and transnational law

Abstract: The paper aims to provide a bird-eye view on the complex relationship between globalisation and transnational law. The impact of transnational law on the effects of globalisation cannot be ignored. There is a multifaceted relationship between the two. The effects of globalisation are not always unilaterally from global to local. Based on the entry point taken, the result can have different manifestations and interpretations. Also, transnational law, at best, is the creation of a few powerful organization or private individuals who are in a position to influence and direct the creation of norms. In such a scenario, certain areas of concern cannot be left to the goodwill of the private individual. If such schemes are successful, it is argued that they will usher a new "threat for recolonization" of the "third world".

Keywords: Globalisation, Transnational Law, Trans-governmentalism, Transnational Regulatory Networks, Global Justice

1. Introduction

Globalisation is a complex phenomenon involving the intersectional co-evolution at various technological, cultural, economic, social and environmental levels. Therefore, any comprehensive definition of globalisation is destined to fail given the complexity. Among the various components of globalisation, the economic aspect has the most visible impact on the people, state and society in general. The contemporary wave of economic globalisation has exported the ideas and principles of law along with the goods and services[1]. This process, in turn, is beginning to bring specific changes at the level of legal culture and its institutional structures. The cultural perspective of legal society, emphasizes the political and economic significance of shifting conceptions and forms of

[1]W. Heydebrand, *From Globalisation of Law to Law under Globalisation*, in D. Nelken, ed., *Adapting Legal Cultures,* London, Hart Publishing, 2001, pp. 117-118.

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participation in an increasingly interconnected world[2]. The emergence of transnational law is one of the principal subsets of the impact of globalisation on the process of law-making and governance. Globalisation is minimizing and complicating the role of the state in ensuring greater freedom of trade, a reduced exercise of sovereignty over economic and policy affairs within the state[3]. At the same time, it is also de-settling the concept of "culture" beyond the European continental understanding, having political and economic consequences. It acts as an agency for nonconformists to fight against the indolent logics that breed injustice and oppression[4].

On the other hand, the greater preference towards the privatisation of the global governance has led to the emergence of the idea of protection of the vital interest of the people, which was traditionally ensured by the state, by transnational governance[5]. Under the traditional liberal democratic model, the constructed idea of the state with its overpowering authority and legitimacy to use violence and regulating market, was imbibed with the notion that such socio-political institution will help ensure the collective security and safeguard of the private property and body of an individual[6]. Therefore, human rights protection are historically directed against the state[7]. The state has to be traditionally responsible for the protection of fundamental rights of its population within the constitutional framework. The phenomenon has always influenced continental lawyers to reflect back on the established European legal traditions and in turn being compatible with idea of coexistence of rights[8]. In his book giving legal response to this paradox, Domingo Oslé remarks that, by virtue of the globalizing phenomena, the whole

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[2] R. Robertson, *Globalization: Social Theory and Global Culture*, London, Sage, 1992.
[3] S. Lakhaand, P. Taneja, "Balancing democracy and globalisation: The role of the state in poverty alleviation in India", *South Asia: Journal of South Asian Studies*, 32 (2009), 3, pp. 408-424.
[4] B.S. Santos, *A crítica da razão indolente: contra o desperdício da experiência*, São Paulo, São Paulo Cortez editora, 2018.
[5] L. Panitch, "Globalisation and the State", *Socialist register*, 30 (1994), p. 30.
[6]A. Rapaczynski, "The Roles of the State and the Market in Establishing Property Rights", *The Journal of Economic Perspectives*, (1996), 2, p. 87.
[7] J.G. Ruggie, "Business and human rights: the evolving international agenda", *American Journal of International Law*, 101 (2007), 4, pp. 4819-4840.
[8] See, e.g., M.R. Ferrarese, *Prima lezione di diritto globale*, Roma-Bari, Laterza, 2012. Ferrarese argues that sketching the new legal course to transnational law is often disorderly but it communicates and creates discourse, despite an absence of absolute "prima donna" like that of national legislations.

notion of international law, product of modern and enlightened Europe, will be replaced by a global, universal, and cosmopolitan law based on the ideas that guide transnational law[9]. With the increase in the role of privates and market undertaking the traditional tasks of the state, there has been a growing demand for covering the protection of legal rights and human rights beyond the idea of the law of the land of the country[10]. Italian jurist Sabino Cassese, reflects that it is not just the economy that has crossed borders, the same can be said of states themselves[11]. The military engagement under the banner of UN and NATO, for example, the "global war on terror", go beyond the traditions of nation[12]. There are thousands of secondary regulatory regimes, running parallel with its own "unbounded" system of rules and mechanisms to enforce them[13]. The states are the initial progenitors, but their action and influence go beyond the realm of the states. This is where the emergence of the idea of transnational law comes into being.

2. Towards a definition of transnational law

The transnational or anational law, in its purest form, is defined as the law that has been created and accepted beyond the rigid boundaries of the Westphalian model of state or as a result of the international law. In other words, transnational law is a "privatised law" created as the result of the private actions of the individuals[14]. The example of such form of laws can be the contractual obligation undertaken under UNIDROIT Principles applied between the international merchants or the Islamic law of contract employed between the parties adhering to Islamic Banking and Finance[15]. On the other hand, the

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[9] R.D. Oslé, *¿Qué es el derecho global?*, Aranzadi, Cizur Menor, 2008.
[10] H.J. Chang, "Breaking the mould: an institutionalist political economy alternative to the neo-liberal theory of the market and the state", *Cambridge Journal of Economics,* 26 (2002), 5, pp. 5539-5559.
[11] S. Cassese, *Il diritto globale: giustizia e democrazia oltre lo Stato*, Torino, Einaudi, 2009.
[12] D. Zolo, *Globalizzazione. Una mappa dei problemi*, Roma-Bari, Laterza, 2006.
[13] M.R. Ferrarese, *Diritto sconfinato: inventiva giuridica e spazi nel mondo globale*, Roma-Bari, Laterza, 2016.
[14] D. Kalderimis, "Is Transnational Law Eclipsing International Law?", *Transnational Dispute Managment*, 6 (2009), p. 1.
[15] S.M. Athar, *Party Autonomy and Choice of Law in International Commercial Contract: A Case for Islamic Law of Contract*, 2017 (unpublished LLM Dissertation, South Asian University, New Delhi).

concept of transnational law in its broadest understanding is proposed by Philip Jessup in 1956. In his lectures delivered at Yale Law School, he proposed that the doctrinal boundaries of both the private international law and the public international law should give way to a broader concept of "transnational law" [16]. Therefore, Jessup's definition of transnational law includes "all law which regulates actions or events which transcend national boundaries" [17]. Although Jessup's analysis is vital as global conduct is now regulated by law and policies that arise from many different sources, this lens propose a superficial eclipsed role of state and international law. However, given the present international scenario, such assertions seem too aspirational in the contemporary political reality. Therefore, there is a need for providing a more nuanced definition for the transnational law that neither ignore the changing realities of the contemporary world nor limits itself to impractical narrowness. Glenn, in his comprehensive comparative analysis of world's leading legal traditions, both religious and secular, rejects the idea of nation-state law in favour of transnational law which he terms as "cosmopolitan law" [18]. In Glenn's methodology, each legal tradition is analysed in terms of its institutions setup and substantive law, its foundational principles and techniques, its understanding of the idea of "adaptive changes", and its teachings about engagement with other traditions and peoples[19]. The key component of the idea of a legal tradition is law as ideas, which are not always institutionalized as social practices[20].

Thus, the idea of legal tradition is characterized as non-conflictual and compatible with new and inclusive logic forms, beyond the traditional idea of "right to co-existence" towards "sustainable diversity" in law[21]. For the purpose of understanding transnational

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[16] D. Kalderimis, "Is Transnational Law Eclipsing International Law?", cit., pp.1-2.
[17] P.C Jessup, *Transnational law,* New Haven, Yale University Press, 1956.
[18] H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, New York, Oxford University Press, 2004.
[19] A. Halpin, "Glenn's Legal Traditions of the World: Some Broader Philosophical Issues", *Journal of Comparative Law,* 1 (2006), pp. 116-122.
[20] W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, Cambridge-New York, Cambridge University Press, 2009.
[21] H.P. Glenn, "A concept of legal tradition", *Queen's Law Journal*, 34 (2008), p. 427; H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, cit., p. 321.

law, the study of norms alone is not enough, applying equally to studies focused on theory and "aw in context" and to broader studies that analyse actual practices and institutions[22].

Under this definition of transnational law, it is important here to distinguish between transnational law and international law. International law is that branch of law whose primary function is the regulation of international relations. It emerges mostly out of the consent and practice of the state, through the signing of the treaties by the states or by the state action coupled by *opinio juris*[23]. However, various other international organizations, non-governmental organizations and, to a lesser extent, individuals also contribute to the development of the international law. Another way for the creation of binding law at international level is through the principle of good faith. Thus, the states follow certain practices, prohibition or boundaries of permissibility in good faith. The states feel obligated to follow its customary practice in good faith. It is the good faith which ensures that the state must develop the commitment it signed in the treaty. Apart from this, state respects the protection of human rights, protection of the environment and strives for the peaceful settlement of international disputes under the principle of good faith. Therefore, this principle has emboldened the rights and duties of the state towards other states, international organizations and individuals, including environmental and other global concerns. However, the enforcement mechanism and adherence of international legal order are highly dependant on the cooperation and commitment of the states. Without understanding the link between international law and state action, scholars cannot hope to give fruitful analysis concerning compliance of international law by states. Compliance in international law comes out of two primary concerns; either because of the concern of the reputation or to prevent direct sanction that follow the violation of international law, particularly for the less-powerful states[24]. Therefore, it can be argued that, although the international legal order has developed in leap and bound and has been

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[22] W. Twining, "A Post-Westphalian Conception of Law", *Law & Society Review*, 37 (2003), pp. 199-258.
[23] P. Malanczuk, *Akehurst's modern introduction to international law*, London-New York, Routledge, 2002.
[24] A.T. Guzman, "A compliance-based theory of international law", *California Law Review*, 90 (2002), p. 1823.

immensely influenced by the creation of international organizations such as United Nations and human rights case-law, global terrorism and environmental concerns, the centre of all the discourse still lies within the boundaries of the state.

Transnational law, instead, is the branch of law that deals with the protection of private interests beyond the encompassing idea of the state. It emerges and grows with minimum interference and assistance of the state, and its compliance mechanism is ensured without much interference of the state authority.

Transnational law dealing with trade, as discussed and dealt in this paper, can also be distinguished from mercantile law or *lex mercatoria. Lex mercatoria* refers to the collection of norms, procedures and institutions that have been developed by and for global commerce, mainly by the merchants and the parties of the transnational trade without any state interference. The foundational theory of the development of uniform rules of trade independently, i.e. without the role of the state, is highly contested[25]. There is a fine line of distinction between transnational law and *lex mercatoria.* However, the concept of *lex mercatoria* shares important overlapping with the transnational law jurisprudence. Although *lex mercatoria* has been passionately projected as the proper law of trade by some legal scholars, the overwhelming majority believes that these rules can, at best, be called general principles or norms of contract rather than a proper law of contract[26]. The controversies surrounding the origin and development of *lex mercatoria* makes one precautious to apply *lex mercatoria* as the proper law governing the commercial contract. Transnational laws have instead continued to be applied in arbitration forums for more than three decades and continue to develop through the increasing power of the non-state actors in international conduct in specific private issues like BIT regimes and WIPO structure for the protection of intellectual property[27].

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[25] N.H.D. Foster, "Foundation Myth as legal formant: The medieval Law Merchant and the new Lex Mercatoria", *forum historiae iuris*, 2005, available at: https://forhistiur.net/2005-03-foster/ (December 26, 2022).
[26] E. Gaillard, "Transnational Law: A Legal System or a Method of Decision Making?", *Arbitration International*, 17 (2014), 1, pp. 59-72.
[27] J. Kokott, "Participation in the World Trade Organisation and Foreign Direct Investment: National or European Union Competence", in P.H. F. Bekker, R. Dolzer, M. Waibel, eds., *Making Transnational Law Work in the Globalising Economy,* New York, Cambridge University Press, 2010.

Transnational law must also be distinguished from its juxtaposed concept of localised law and practices of the society and the community. In the words of Ehrich, these are the "living law" or the "law in action" in the society[28].

Chimni has famously argued that there is a third world within the third world[29]. Thus, there is a need for distinguishing between the phenomenon of transnationalisation of law and localisation of law. These two paradoxically opposed processes seek to ensure justice from the two extreme points of observation. For transnational law, the position of departure is from the global to the local. It talks about the universality of values, upholding the tried and tested best practices and norms, ensuring fair and equitable treatment of the subjects and objects of law[30]. The localisation of law seeks instead to look into the rights and interests of the individual from the local level. It seeks to empower the local communities to guard their interest against the state and global hegemonic interests towards decentralisation and fragmentation of laws, in order to address local needs[31]. Scholars in transnational law assert that the local struggles and claims such as mining and community issues have emerged in the global policy arena, particularly in the global South. As such, the global policy arena relating to the corporate and local community rights over their natural resources is characterized by contesting the regime of transnational law[32]. This phenomenon can be seen in the protection of the rights of the tribal, indigenous communities and the laws of the indigenous or cultural communities beyond the idea of the state and international agencies.

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[28] E. Ehrlich, K.A. Ziegert, *Fundamental principles of the sociology of law*, London-New York, Routledge, 2017.
[29] B.S. Chimni, "The past, present and future of international law: a critical third world approach", *Melbourne Journal of International Law*, 8 (2007), p. 499.
[30] *Ibid.*
[31] G. Lafer, "Paradigm wars: Indigenous peoples' resistance to globalisation", 2006, available at: http://www.wethepeopleeugene.org/wp-content/uploads/2011/11/handout-2-July-27.pdf (December 12, 2022).
[32] D. Szablowski, *Transnational law and local struggles: mining, communities and the World Bank*, Bloomsbury, Bloomsbury Publishing, 2007.

3. The sovereignty of the state in the globalized world

The idea of the state, according to social contract theory, emerged to protect private property and security of an individual. In the conventional setup, law is propounded exclusively by the nation-state, with each state exercising sovereign and structural arrangement of power within its territory. Weber understands the law as a normative regime recognized by a formal institutional apparatus and enforced by a bureaucratic coercive mechanism[33]. The idea of the state as a welfare institution emerged in the post-colonial world at nearly the mid of the Twentieth century. Thus, the model of governance and the role of law is to ensure a socialist and egalitarian order. These ideas of the welfare state model took multiple manifestations in the third world countries. India, for example, adopted its concept and role of state based on the three primary principles: Gandhian principle of no harm and village empowerment; socialist values of the protection of community rights; and liberal rights of the individuals. The newly independent states aspired to transform their governance regime from the model of a police state to a welfare state.

Lately, however, globalisation provides more means of collaboration, expands social space and intensifyes the degree of economic, socio-legal and cultural interaction. The force of globalisation creates a phenomenon that is highly legal in its content[34]. Even the idea of the welfare state cannot be appreciated ignoring the dominant role of transnational regimes like World Bank, WTO treaties framework and alike. International law, traditionally speaking, does not penetrate inside the national sovereignty. Instead, its rules are centered around the nation-states through good faith or consent.

Further, the obligation under international law will not be operationally effective until it is integrated into the domestic legal order of the state. Thus, international law,

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[33]M. Weber, "Bureaucracy", in A.S. Wharton, *Working in America. Continuity, Conflict, and Change in a New Economic Era,* London-New York, Routledge, 2015, pp. 29-34.
[34] D. Zolo, *Globalizzazione*, cit.

with all its merits, remains confined to its inherent foundational limitation centered around the nation-state model and fails to describe the world that exists today[35].

Globalisation has drawn attention to this problematic supposition and helped to fill the void by providing immense opportunity to private players, which are in conflict with the traditional function of the sovereign state. In today's world NGOs like Amnesty International or Human Rights Watch play an active role in setting standards for human rights protection within the national sovereignty. Organizations such as OECD set up rules for international tax regimes and corporation such as Google create global standards for using cyberspace. Thus, the transnational system promotes transnational trade, cosmopolitism among individuals, comparative studies and global movements and support for individual rights, labour standards and environmental concerns. However, it far cries to convincingly believe that the states have lost their traditional role or have been replaced by the transnational legal regime in the age of globalisation. There are various flaws in making these assumptions. In doing so, there is the question of "legitimacy" and "effective enforcement" mechanism at the transnational level. The problem of legitimacy and of finding the correct applicable law and what shall be the justification of applying this law is not satisfactorily answered even by the most passionate supporters of transnational law[36]. One means to address this issue of legitimacy can be to find the source of norms applied under a given transnational law. However, it is highly difficult to locate the source of transnational law with abject certainty.

Also, there are certain vital issues and areas which need to be protected within the nation-state system, like the concept of Permanent Sovereignty over Natural Resources

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[35] R. Higgins, "Conceptual thinking about the individual in international law", *Review of International Studies*, 4 (1978), 1, pp. 1-19.

[36] See for e.g., P.C. Jessup, *Transnational law*, cit. Also, H.J. Steiner, D.F. Vagts, H.H. Koh, *Transnational legal problems: materials and text*, Foundation Press, 1994. It is important to highlight that although, both Jessup and Vagts advocated the need for transnational law, the concept proposed by Jessup seems to be more radical in its approach. The transnational law as proposed by Vagts comes in line with his lifetime endeavour for developing the school of Hegemonic International Law inspired by the works of Carl Schmitt on international law.

(PSNR) [37]. Transnational law should not define the use of natural resources nor its obligation to cause no transboundary environmental harm[38]. It is primarily the right of the state, recognized by the concept of PSNR and various international instruments[39]. On a more critical level, transnational law creates a new form of re-colonization of the developing countries[40]. It is argued that original sovereignty of the right to use natural resources rests with the local communities and even the state cannot exercise the protection of the rights to use and exploit the natural resources without the permission of individuals. The Nilgiris hills, the conflict that arose in the Chhota Nagpur Plateau relating to the exploitation of natural resources in India, are all linked up with this issue of who exercises the sovereignty over the natural resources[41].

Although there has been a broad claim of ensuring global justice through the transnational legal regime, the transnational administration has not made itself answerable for the protection of human beings as a matter of rights[42]. Consider the regime of the World Bank, for example. The World Bank in its policy documents refused to recognize human rights obligations[43]. The policy document states that the World Bank ensures the minimum damage to the environment and promotes community-development

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[37] E. Duruigbo, "Permanent sovereignty and peoples' ownership of natural resources in international law", *George Washington International Law Review*, 38 (2006), p. 33. Also, A. Anghie, *Imperialism, sovereignty and the making of international law*, Cambridge, Cambridge University Press, 2007, pp. 37-38.

[38] F.X. Perrez, "The relationship between 'permanent sovereignty' and the obligation not to cause transboundary environmental damage", *Environmental Law*, (1996), pp. 1187-1212.

[39] See, for e.g., UN General Assembly Resolution 1803 (XVII), "Permanent Sovereignity Over Natural Resources", December 14, 1962.

[40] B.S. Chimni, "Third world approaches to international law: a manifesto", *International Comparative Law Review*, 8 (2006), p. 3. Professor Chimni argues that the threat of re-colonisation is haunting the third world. This threat has a deteriorating effect on the welfare of the third world peoples.

[41] G. Cederlöf, D. Sutton, "The Aboriginal Toda: On indigeneity, exclusivism and privileged access to land in the Nilgiri Hills, South India", in B.G. Karlsson, T. Bahadur Subba, eds., *Indigeneity in India*, London, Kegan Paul, 2005, pp. 159-186.

[42] It is also very difficult to fix responsibility or claim justice against the big corporations and privates by a general person whose right has been violated. It becomes more complicated when the transnational law fails to recognise human rights as a legal claim. D.W. Jackson, M.C. Tolley, M.L.Volcansek, eds., *Globalizing justice: Critical perspectives on transnational law and the cross-border migration of legal norms*, New York, SUNY Press, 2010.

[43] World Bank, "Environmental and Social Framework", July 20, 2016, available at: https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/third_draft_esf_for_disclosure_july_20_2016.pdf (consultato il December 12, 2022).

programs based on the principle of sustainable development for securing long-term "investment project financing". In other words, human rights within the jurisprudence of World Bank have no legal recognition, but they may be voluntarily observed via the means of policy objectives without any legal cover, claims for economic sustainability and securing investment in the long term for the World Bank.

4. The existence of the Transnational Regulatory Networks

The Transnational Regulatory Networks (TRNs) also known as trans-governmental regulatory networks are primarily the post-World World II phenomenon for administration and management of international economic order[44]. TRNs can be distinguished from the earlier and most influential attempts to formulate a regulatory economic mechanism which has been the partial success of Bretton Woods conference[45]. This paved the way for the eventual establishment of treaty-based international organizations like the International Monetary Fund, the World Bank but not the International Trade Organization[46]. Trade continued to be governed however by GATT regulations untill the establishment of World Trade Organization[47]. The WTO regime incorporated within itself the regulation of intellectual property and services[48]. Similarly,

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[44] P.H. Verdier, "Transnational regulatory networks and their limits", *Yale Journal of International Law*, 34 (2009), pp. 113.
[45] M.D. Bordo, B. Eichengreen, *A Retrospective on the Bretton Woods System: Lessons for International Monetary Reform*, Chicago, University of Chicago Press, 2007.
[46] S. Woolcock, "The ITO, the GATT and the WTO", in S. Woolcock, N. Bayne, eds., *The New Economic Diplomacy: Decision Making and Negotiation in International Economic Relations*, London-New York, Routledge, 2017, pp. 117-134.
[47] A. Blank, G.Z. Marceau, "A history of multilateral negotiations on procurement: from ITO to WTO", in B.M. Hoekman, P.C. Mavroidis, eds., *Law and policy in public purchasing: The WTO agreement on government procurement*, Ann Arbor, University of Michigan Press, 1997, pp. 31-55; S. Reisman, "The birth of a world trading system: ITO and GATT", in O. Kirshner, ed., *The Bretton Woods-GATT System*, London-New York, Routledge, 2015, pp. 82-86; S. Woolcock, "The ITO, the GATT and the WTO", in N. Bayne, S. Woolcok, eds., *The New Economic Diplomacy*, cit., pp. 117-134; M.D. Bordo, *The Operation and Demise of the Bretton Woods System; 1958 to 1971*, National Bureau of Economic Research, 2017, Working Paper 23189 http://www.nber.org/papers/w23189 (December, 26, 2022).
[48] S.Y. Kim, *Power and the Governance of Global Trade: From the GATT to the WTO*, Ithaca, Cornell University Press, 2010.

there are treaty-based regional organizations like the European Union, the Asian Development Bank, the Shanghai Cooperation Organization and a series of international legal instruments such as networks of national regulators to assist these regional organizations in financial services regulation[49]. However, there remained many economic areas where the treaty mechanism and formal consensus by the state has not be successful, such as, transnational securities, anti-trust and competition as well as banking regulations[50]. This is where the TRNs have the major role to play. Informal networks of organizations like the Basel Committee on Banking Supervision promote cooperation in banking regulation and supervision and International Organization of Securities Commission (IOSCO) regulates and enforces transnational securities exchanges. Whereas, some trans-governmental regulatory networks like the International Competition Network (ICN) suggest policy convergence among the competent authorities.

Anne-Marie Slaughter, if not the only theorist, is the most celebrated voice in proposing a normative understanding to TRN[51]. However, as with the transnational law in general, the understanding and scope of transnational regulatory authorities (TRN) varies amongst scholars[52]. In its most broad sense, TRNs are claimed to be a contemporary phenomenon marked by severability of the state into its agency or institution to regulate and solve complex world problems[53]. In this view, individual government agencies and actors negotiate directly with their foreign counterparts and

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[49] A.M. Corcoran, T.L. Hari, "The Regulation of Cross-Border Financial Services in the EU Internal Market", *Columbia Journal of European Laws*, 8 (2002), p. 221; L. Quaglia, "The 'old'and 'new' politics of financial services regulation in the European Union", *New Political Economy*, 17 (2012), pp. 515-535. Also see G.S. Smith, "The Shanghai Cooperation Organisation", in M. Hosli, J. Selleslaghs, eds., *The Changing Global Order*, Berlin, Springer, 2020, pp. 177-191.

[50] E. Lee, "The soft law nature of Basel III and international financial regulations", *Journal of International Banking Law and Regulation,* 29 (2014), pp. 603-612.

[51] A.M. Slaughter, "The real new world order", *Foreign affairs*, (1997), September-October, pp. 183-197; A.M. Slaughter, "The accountability of government networks", *Indiana Journal of Global Legal* Studies, 8 (2001), pp. 347-367.

[52] M.L. Djelic, K.S. Andersson, eds., *A World of Governance: The Rise of Transnational Regulation*, Cambridge, Cambridge University Press, 2006.

[53] A.M. Slaughter, T. Hale, "Transgovernmental networks", in *M*. Bevir, ed., *The Sage handbook of governance*, London, Sage, 2011, pp. 342-351.

reach informal understandings relating to their areas of responsibility. Their expertise and insulation from domestic political pressures allows them to solve problems that traditional international organizations cannot adequately address[54].

TRN, due to its unique decentralized and dispersed characteristics with participants that are domestically accountable, can effectively address global concerns that the individual government may not address alone. However, due to its unique nature, transnational regulatory authorities often imbibe limited democratic accountability and imperfect global representation in the creation and administration of norms[55]. The standards established by these various bodies are usually simply "best practice" guidelines, "memoranda of understanding", general "frameworks" and "principles" which are not legally binding between regulators, do not require ratification by legislatures, and allow significant flexibility of implementation at the national level. Critiques have raised concerns of shift towards disaggregated global technocracy, wherein experts act outside of the limits of the domestic political structures and the normal foreign affairs process. This can be ratified by increasing the participation by more inclusive and universal membership model. The TRNs have no international legal personality beyond that which is conferred on their organization within the respective national law, as they are neither state nor independent from state. The guidelines, instruments or proposals passed by these TRNs create no legal obligation and do not require the rigorousness of treaty ratification process. Also, Slaughter argues that an important distinctive feature of TRNs is that these networks do not formally monitor the implementation of their decisions or provide dispute-resolution procedure in case of conflict. However, even from the domestic theory, they are preferable to "global policy networks" that bring together governments, privates like transnational corporations and international NGOs, as they also act unaccountable and amorphous but their influences and bindingness is more stringent. According to Raustiala, technological innovation,

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[54] A.M. Slaughter, "Disaggregated sovereignty: Towards the public accountability of global government networks", *Government and Opposition*, 39 (2004), pp. 159-190.
[55] P.H. Verdier, "Transnational regulatory networks and their limits", cit., p. 113.

marked with complex challenges faced by domestic regulations and economic globalisation, has facilitated the emergence of transnational regulatory networks[56]. Zaring remarks that TRNs are quintessential to the contemporary order but they also challenge the regulators using networks to bypass domestic constrains and pursuing self-regarding goals[57]. Verdier argues that while it is acknowledging that TRNs have been an important phenomenon in the present regulatory order, they are however unlikely to be effective in areas that raise significant distributive or enforcement problems[58]. She cautions legal scholarship on TRNs should avoid taking their output at face value and should instead draw on specialized legal scholarship on the substantive areas involved, which is often critical of the effectiveness of informal international standards. When the domestic interest of the states converges to the norms of TRNs, the TRNs have proved to be highly effective mechanisms to international cooperation for solving complex world problem. However, the effectiveness of TRNs to secure cooperation and compliance when the state interest diverges remains inherently limited. Therefore, the hope that they may create global governance capacity beyond the functional usefulness in restricted cases, seems highly aspirational.

5. Impact of globalisation in the democratic law-making process and federalism

Since globalisation is a complex interwoven phenomenon, that impacts the local and global at the same time, it is important to analyse the impact that it has on the democratic law-making process and the federal structure of governance within the national boundaries. First, globalisation is a two-way process as there is no denying that

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[56] K. Raustiala, "The architecture of international cooperation: transgovernmental networks and the future of international law", *Virginia Journal of International Law*, 43 (2002), 1. pp. 1-92.
[57] Cfr. e.g. A. Newman, D.T. Zaring, "Regulatory Networks: Power, Legitimacy, and Compliance", in J. Dunoff, M. Pollack, eds., *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, Cambridge, New York, Cambridge University Press, 2013, pp. 244-264, available at SSRN: https://ssrn.com/abstract=2293580 (December 26, 2022).
[58] P.H. Verdier, "Transnational regulatory networks and their limits", cit., p. 112.

the impact can be from global to local and viceversa. Second, globalisation impacts the policy and procedure of decision-making and law-making process at the national and international level. Third, it does not claim nor ensure that greater protection of the rights of the local population accorded within the nation-state while advocating uniformity of law and the adoption of, for example, best practices while addressing a particular global issue.

One of the scepticisms surrounding the legitimacy and acceptance of transnational law is that private organizations draft them. Although intergovernmental agencies like UNIDROIT or UNCITRAL write some transnational laws, most of them are prepared by private organizations. Some of these agencies, such as the Principle of European Contract Law headed by the Danish jurist, Ole Lando, praised widely as a neutral, impartial academics with the purest intention. However, most of these transnational laws so developing agencies do not necessarily have such novel vision. Most of the norms advocated, are from the corporate and big multinational firms, defining and ensuring their interest beyond the rigidity of the sovereign laws of the state. The regime of International Investment Law is one of such spheres and an example of the nexus between transnational law and safeguard of the interest of the few over the rights of the individual[59].

The idea of liberal democracy states that the law-making shall be done through commitment and democratic process of acknowledging the different opinions. However, transnational law may pass beyond those boundaries. It may seek to ensure that the rights of the individual shall be protected beyond the collective rights of the democratic state. The politics of bringing in the protection of the intellectual property rights within the framework of the WTO is one example. United States of America entered into the negotiation of WTO, after the failure of the International Trade Organization (ITO), only to ensure that its knowledge-economy and technologies are protected globally under the re-negotiated TRIPS agreement[60]. An example of how transnational policies impact the

[59]See M.S. Sornarajah, *The international law on foreign investment*, Cambridge, Cambridge University Press, 2017.
[60]Class notes lecture for LLM Batch 2015-2017 by Prof. Dr. V.G. Hegde, *The Policy Approach to Intellectual Property Law,* Professor, South Asian University, September 21, 2016.

welfare policy within the domestic sphere is the pressure that was created to sign Trade Facilitation Agreement (TFA) at WTO Bali round which was the problematic impediment for India to bring in the law on the Right to Food for its citizens.[61]

6. Impact of Globalisation and Transnational Law on Trade Laws

It is argued that the emergence of transnational law is a consequence and response to the maturing of the global economy. The globalisation of trade, free movement of goods and capital, the global transfer of technology, labour mobility and transnational investments has created a need for the emergence of a transnational order beyond the sovereign states. These laws so developed are deeply fragmented and discrete. However, since these laws emerge out of the need to safeguard the common identifiable interest, each sphere of transnational law, addressing a particular issue, create a common delimited boundary, around which common, if not unified, norms are developed.

Globalisation has resulted in the emergence of transnational norms to facilitate global trade on both the private and public level. At the private level, the International Arbitration tribunals, based on the principle of "party autonomy" has led to the sprawling and creation of the jurisprudential tenets and norms to provide justice or legal dispute to the party. Second, the development of commercial practices and various international organizations is also a vital source of transnational law[62]. Third, transnational corporations use standard forms of contract, recognized by the global business community even if not approved and backed by the sovereign state[63]. Fourth, the developing and emerging field of *lex sportiva internationalis* that seeks to regulate the disputes associated with the Olympic games and other sports events. Then there has been a critical area of construction and energy, ranging from post-war building and energy

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[61] B. Pritchard, *et al*., "'Stepping back and moving in': the role of the state in the contemporary food regime", *The Journal of Peasant Studies*, 43 (2016), 3, pp. 693-710.
[62] G. Bamodu, "Transnational law, unification and harmonisation of international commercial law in Africa", *Journal of African Law,* 38 (1994), 2, pp. 125-143.
[63] A. Rosett, "Unification, harmonisation, restatement, codification, and reform in international commercial law", *American Journal of Comparative Law*, 40 (1992), p. 683.

agreement to the development project contract. The dispute resolution jurisprudence of Bilateral Investment Treaties (BITs) arbitration is regarded as one of the significant achievements towards the global investment regime.

There has been substantial evidence for the development of the transnational Islamic law regime in the contracts governing Islamic finances and banking[64]. However, there have been scholars who have argued the contrary[65].

So, why do the individual organization and persons prefer to be governed by transnational laws which are diffuse, diverse, uncertain and non-binding on the state? There is a high degree of chance that the state may refuse to recognize and enforce the judgement passed by the arbitration or any other international tribunal on the principle of absence of proper law[66]. There can be many reasons for the development of such practice. First, transnational law provides more flexibility and is more adaptable to change than its contemporary regimes of state law and international law. The decisions arrived through the arbitration applying transnational law are enforceable by the New York Convention on the enforcement of International Arbitration Award. Therefore, the problem of non-recognition of law does not usually arise under arbitration regime as it is based on the concept of "party autonomy". However, the question of "legitimacy" and "recognition" is important qualifying quotient for the litigation process. The decision arrived by applying transnational law is unlikely to succeed in litigation. Transnational law regime protects the private parties against the retrospective enforcement of the law by the state which may be detrimental to the interest of the party[67].

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[64] J. Ercanbrack, *The transformation of Islamic law in global financial markets*, Cambridge, Cambridge University Press, 2015; G. Jehle, "Innovation, arbitrage, and ethics: The role of lawyers in the development of a new transnational Islamic finance law", *Geogetown Law Journal*, 104 (2015), p. 1345.

[65] K. Balz, "Islamic Law as the Governing Law under the Rome Convention: Universalist Lex Mercatoria vs. the Regional Unification of Law", *YB Islamic & Middle East Law*, 8 (2001), p. 73.

[66] See, e.g., Beximco Pharmaceuticals Ltd. V. Shamil Bank of Bahrain EC [2004] EWCA Civ 19 in which the British Arbitration Council failed to recognise the enforcement of the contract based on Islamic Principles as these principles were regarded as "guiding principles" without legal enforceability, certainty and predictability.

[67] P. D'Rosa, "The recent wave of arbitrations against Argentina under Bilateral Investment Treaties: Background and principal legal issues", *The University of Miami Inter-American Law Review*, 36 (2004), 1, pp. 41-74. Argentina has been subjected to various Investment Treaty claims by the foreign investment parties in pursuance of the dispute resolution clauses of BITs to which Argentina is the party.

At the public level, too, transnational law has created a significant influence. The skeleton laws of the WTO treaty regime provide the minimum standards and guidebook for the development of domestic laws and policies. The EU regulation and guidelines have been instrumental in developing transnational legal governance in the diverse areas of human rights, trade, public health, competition laws, energy laws, public security and dispute resolution mechanisms.

7. Global justice through transnational law

The emergence of transnational law has also impacted the adjudication process, at both the substantive and procedural levels[68]. It has led to the adoption and reformulation of the sovereign state laws. One of the key examples of this in South Asia is the creation of hybrid tribunal in Bangladesh and Sri Lanka and the formulation of the laws towards a post-war justice jurisprudence in Nepal. Apart from this, even the international courts have immensely benefitted from transnational law regimes in developing their procedural, adjudicatory, substantive and institutional practices.

The term global justice is highly contested and subjective. Scholars in global justice fall into three camps: the statists, the cosmopolitans or the "pluralist internationalist" [69]. The statists advocate that the principles of justice can only be held with the states and its agencies, while cosmopolitans believe that justice applies equitably to all people[70]. The third category, as proposed by Risse, argues that humanity has collective ownership of the earth and demands aligning norms towards redistributive justice on the ground of universal humanity. At the epistemological level, it seeks to

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[68] G.C. Hazard Jr., ed., "Introduction to the principles and rules of transnational civil procedure", *NYU Journal of International Law & Polity*, 33 (2000), p. 769. Also, R. Sturner, "Transnational Civil Procedure: Discovery and Sanctions Against Non-Compliance", *Uniform Law Review*, 6 (2001), 4, p. 871.
[69] M. Risse, *On Global Justice*, Princeton, Princeton University Press, 2012.
[70] F. Megret, "International *Justice*", in J. d'Aspremont, S. Singh, eds., *Fundamental Concepts for International Law-The Construction of a Discipline*, Oxford, Oxford University Press, 2017; S. Maffettone, "Normative approaches to global justice", in M. Telò, ed., *Globalisation, Multilateralism, Europe*, London, Routledge, 2016, pp. 165-184.

create an idea of universalisation of values and ethics[71]. However, in doing so, it severely undermines the binary of cultural diversity and the concept of justice. Rawl's idea of justice prioritizes the individual interest over social interest[72]. However, Ronald Dworkin's idea of justice would place the collective interest over individual interest.[73] It is this notion of the diversity of the idea of justice that even the Universal Declaration of Human Rights has imbibed a comprehensive understanding of civil and political rights, on the one hand, and social, cultural and economic rights, on the other. Also, taking the Scandinavian legal realists' approach to justice as an abstract metaphysical idea devoid of being reduced to a stable theoretical formulation, justice is, at its best, a claim for which an individual or a community feels entitled[74]. Apart from the epistemological debate about the concept of justice, there are institutional and subjective challenges to the idea of justice. The contestation of economic and human rights is manifested in various trade, finance, construction, energy and investment law regimes. Apart from this, there has been significant debate and discussion regarding the contested boundaries of environmental law, on the one hand, and the WTO and trade rules, on the other[75]. The praxis test for the reconciliation of these conflicting theories of justice is unlikely to succeed in the future. Therefore, the objective understanding of global justice is hard to achieve.

There is another legal regime for global justice that transnational law claims vivid contribution, despite all the acknowledge difficulties. It is the universal human rights regime claimed through the cross-border legal arrangement. The various human rights discourses that have transcended the national boundaries include, but are not limited to, development of individual complaint procedures, corporate accountability for human rights violations, global inequality and social justice, transnational regulation of migrants and refugees, the transnational criminal law and global health under the human rights

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[71] S. Maffettone, "Justice as Solidarity: Between Statism and Cosmopolitanism", in J. Salamon, ed., *Solidarity Beyond Borders: Ethics in a Globalising World*, London, Bloomsbury Academica, 2015, p. 27.
[72] J. Rawls, *A theory of justice*, Harvard, Harvard University Press, 2009.
[73] R. Dworkin, *Justice for Hedgehogs*, Harvard, Harvard University Press, 2011.
[74] A. Ross, *On law and justice*, Berkeley, University of California Press, 1959.
[75] J.J. Kirton, M.J. Trebilcock, *Hard choices, soft law: Voluntary standards in global business, environment and social governance*, London-New York, Routledge, 2017.

paradigm. Transnational laws have immensely contributed to this area of vital human interest. The transnational approach has led to the creation of various regional treaties and practices surrounding the rights of an individual, *inter alia*, the European Fundamental Rights framework, the creation of the European Court of Human Rights, The African Union Charter on Human Rights, The American Declaration of Human Rights, the development of International Criminal Law jurisprudence. However, the critiques argue that these transnational law mechanisms have contributed little towards a substantial difference in furthering the cause of human rights.

Simultaneously, the transnational implantation of liberal democratic values, a global project by hegemonic powers like the US, has only added to the woes of various societies and nations in the global South[76]. The general imposition and transmission of the rule of law, the transnational transfer of norms and institutions, has created havoc for the people of Latin American states, Vietnam, Afghanistan, Iraq and Libya. The condition of Libya and Iraq in the contemporary time is the glaring example of abuse of the global justice regime in the name of humanitarian interventions and human rights protection[77].

8. Conclusion

The impact of transnational law on the effect of globalisation cannot be ignored. It has a vital role in the running of global affairs and securing the rights of the individuals regarding their private affairs and human rights claims. Simultaneously, this calls for a precautious approach towards transnational law in the uneven world. The Westphalian

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[76] D.F. Vagts, "Hegemonic international law", *American Journal of International Law*, 95 (2001), 4, pp. 843-848. Vagts argues that the Americanisation of International Law is creating a leadership if not a command, denting to the concept of sovereign equality of states. Vagts pauses to take a position if the USA is a hegemon or should be a hegemon in international affairs, but merely addresses the legal implications if it turns out to be. His forty years of write-ups were instrumental in shifting US policy towards a more aggressive and hegemonic power by undermining international law and advocating for transnational law. See also, A. Anghie, "Rethinking sovereignty in international law", *Annual Review of Law and Social Science*, 5 (2009), pp. 291-310.

[77] Y.H. Zoubir, "Libya in US foreign policy: from rogue state to good fellow?", *Third World Quarterly*, 23 (2002), 1, pp. 31-53. Also, A. Paulus, "The war against Iraq and the future of international law: hegemony or pluralism", *Michigan Journal of International Law*, 25 (2003), p. 691.

model of governance has its inherent limitations and concerns. However, the resilience of the state-model to adapt to the ever-changing need of the society must also be acknowledged. It is argued that transnational law provides useful substantive and procedural guidelines for the enforcement of issues in the private sphere. Despite the high claims, these laws are also subjected to state acceptance and recognition. Even the most promising subset of transnational law, the *lex mercatoria,* cannot be seen divorced from the sphere of *lex loci* of the state and has not matured to be treated as a proper law, despite its regular application and recognition by the various arbitration chambers. There is a need for the identification of a pluralistic approach for appreciating the growing role of transnational law along with the different legal regimes of private and public international law and the municipal legal system. There is a need for proper recognition and limitation of the sphere of operation of each norm and ample placement of each legal system to work in symphony with one-another. Therefore, an approach towards the harmonious construction of conflicting legal principles needs to be undertaken. Transnational law can neither be understood as a law that originated in total vacuum and interference of the state, nor it is operating without the minimum support and consent of the nation-state. The pragmatic view can be that it goes hand in hand with the other legal systems at international and national level. Also, the effect of globalisation is not always unilaterally from global to local. Based on the entry point taken, the results can have different manifestation and interpretations, like the Rumi's story of men touching the various part of the elephant in the dark room tells. Based on what part of the elephant one touched, there will be a variety of opinions on the inference and conclusions related to the effects of globalisation. Also, transnational law, at best, is the creation of a few powerful organizations or private individuals who are in a position to influence and direct the creation of norms. In such a scenario, certain areas of concern cannot be left to the goodwill of the private individuals. If such schemes are successful, they will usher a new "threat for recolonization" haunting the third world. The growing networks of international organizations – economic, political and socio-cultural – may be reduced to an instrument in the hands of a few emerging transnational capitalists to the disadvantage

of the large human population[78]. It is important to take the advocacy for transnational law as an over-powering legal order, as proposed by Philip C. Jessups or Detlev Vagts, with a pinch of salt.

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[78] B.S. Chimni, "International institutions today: an imperial global state in the making", in E. Kwakwa, ed., *Globalisation and International Organizations*, London-New-York, Routledge, 2017, pp. 41-78.