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Law, Community and Ultima Ratio in Transnational Law

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Abstract

The paper aims to examine the concept of transnational law and the way market forces affect the notion of community at the transnational level. Can the principle of *ultima ratio* operate in this context and how should this occur? Recent events, including the expansion of the anti-money laundering legislation and the measures enacted following the economic crisis, will be used as emblematic cases illustrating the development of transnational law and its impact on society. The analysis will also focus on a general discussion on whether the market can be considered an integral part of a transnational community and the extent to which principles and ideas generated in criminal law can contribute to a community-oriented approach.

Key words

Transnational law; market; democracy; community; soft law; legitimacy

Resumen

Este artículo pretende examinar el concepto de derecho transnacional y la forma en las fuerzas del mercado influyen en la noción de comunidad en el ámbito transnacional. ¿Puede el principio de ultima ratio operar en este contexto y cómo debería ocurrir? Los últimos acontecimientos, incluida la ampliación de la legislación contra el blanqueo de dinero y las medidas adoptadas a raíz de la crisis económica, se utilizarán como casos emblemáticos que ilustran el desarrollo del derecho transnacional y su impacto en la sociedad. El análisis se centrará también en un análisis general sobre si el mercado puede ser considerado como parte integrante de una comunidad transnacional y en qué medida los principios e ideas generadas en el derecho penal pueden contribuir a un enfoque orientado a la comunidad.

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Palabras clave

Derecho transnacional; mercado; democracia; comunidad; leyes blandas; legitimidad

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1. The concept of transnational law

1.1 Criteria for the identification of transnational law

Law is very hard to classify. Both its nature and content tend to change. They can vary depending on the object of our analysis but also on the eye of the observer. This means not only that ideological, cultural or scientific assumptions affect our statements about what, say, a piece of legislation should look like. For example, the application of a general principle or the enforcement of a contract will have to be adapted to the context which they refer to and their impact will be different; interpretation is not a mechanical hair-splitting device, but a social activity supported, wittingly or unwittingly, by a great variety of agendas. Another indication of the changeable nature of law is its permeability to temporal and systemic factors[1]. The idea of law in the 19th century is not identical with the idea that prevailed in the 13th century (Bellomo 1995). For a variety of reasons that cannot be examined here further, law is one of the "essentially contested concepts" that spur debate and critical approaches (Gallie 1956a, 1956b, 1968).

It has been noted however that some characteristics of law are much more resistant to change, because they belong to the deeper layers and require a longer period of time before being subject to significant modifications (Tuori 2002, p. 150). Still, what appears on the surface is what is more easily visible in the daily practice of lawyers and ordinary people. The phenomenon of *transnational* law as it has emerged from this practice has increasingly attracted the interest of specialists precisely because it challenges our common perceptions and inherited view of law.

Not surprisingly, however, transnational law is a controversial concept. First of all, doubts have been raised due to the difficulty of identifying its main features. Criticism has thus been levelled at it both negatively and positively. Negatively, it has been argued that it is impossible to distinguish transnational from both international and national law. Positively, it has been observed that any attempt to define it is doomed to fail because of its inherent ambiguity. Indeed, a considerable number of works have provided a variety of very different broad or narrow definitions of transnational law[2].

The main point of contention is the distinction (or the lack thereof) between transnational, national and international law. In the following pages we may try to sketch, rather schematically, how this distinction is commonly viewed.

The prevailing configuration of international law nowadays owes much to the positivistic approaches and the classical liberal theories adopted between the 16th and 19th century. The reason why the term "*inter*-national law" was coined and replaced the "law of nations" is that it seems to convey more convincingly the idea of "mutual transactions between sovereigns" (Bentham 1843) unrestrained by a superior authority. Reliance upon some more or less explicit form of voluntarism can be detected in the first works theorising international law (Grotius 2001, de Vattel 1916). In line with the spirit of their time, these works emphasised the moral qualities of free will and self-fulfilment. Individual forces were to be left free to compete: war, diplomacy and the market were the most typical grounds where the struggle for self-assertion could take place. Inter-national law as we know it is therefore law between independent equals, which act according to their own self-guiding principles and internal morality. They have no right to interfere in each others' activities and may recognise each other, as long as the commonly accepted criteria for statehood are met. The relationship between these sovereign entities was governed by a set of rules which reflected an established order, a *nomos*

[1] By "systemic" factors I mean those elements of law that have been identified by systems theory. See e.g. Luhmann (1989).

[2] As a small sample, see P. Jessup (1956); E. Stein (1981); H. H. Koh (1996, 1997); A. M. Slaughter (2000); O. A. Hathaway (2005); T. C. Halliday, P. Osinsky (2006); P. Zumbansen (2006); R. Dibadj (2008); C. Scott (2009); P. Zumbansen (2010).

whose internal ordering would consist in a regulated space corresponding to the European region (Schmitt 2003, p. 140). Only those entities which showed they deserved statehood were admitted in this very selective club. Obviously, universalistic aspirations inspired by natural-law rationalistic models have always been present and have operated as background assumptions which may (or may not) be interpreted as condensations of hegemonic ideals (Koskenniemi 2009). Universality, certainly until the end of the 20th century and arguably even afterwards, is a non-intruding, behind-the-scenes concept that appears and disappears like a karst river.

The so-called Westphalian system, relying on a carefully designed balance of sovereign wills, acquired progressively more complex features when the ideas of nation-State, culture, collective or general will and, as a result, self-determination of peoples and nationality were elaborated and refined across the centuries. Sovereignty as an indivisible attribute of States has been traditionally understood as either internal or external. In reality, formal equality has always been associated with the capacity of the most powerful nations to influence directly or indirectly the behaviour of the least powerful ones[3]. Modern international law is thus characterised by a strong reliance upon reciprocity and formal equality, a "thin" notion of universality and a sharp distinction between public and private authority as well as the internal and the external sphere of States.

The concept of transnational law does not fit with this conventional account. While this section does not intend to provide an exhaustive definition of this concept, it aims to focus on a few elements that may help in the analysis of new forms of law beyond the State. The following analysis proceeds on the assumption that State sovereignty is no longer an absolute principle and, as a result, some of the most prominent features of international law should be reconsidered, to the extent that, as will be seen, perhaps there is no longer need to draw a line between international and domestic law.

A first peculiar element is the tendency of these new forms of law beyond the State to operate regardless of the existence of national borders. For example, ever more frequently domestic courts enforce and implement decisions taken by foreign and international courts[4]. It is also not uncommon for courts to cite judgments adopted by international courts or influential courts of other countries[5]. Cross-fertilisation is an integral component of transboundary interaction and it is increasingly advocated as a tool of constitutional interpretation (Koh 2004). This process is not developing only at the judicial level: it involves international organisations, domestic legislative bodies, academics and governments.

The second element of the transnationalisation of law is the blurring of relevant distinctions that are normally identified within the discipline of international law. For example, transboundary relations can be regulated not only by so-called "hard law" measures, but also by non-binding instruments spanning between standard-setting, recommendations, experts' advice and legal opinions ("soft law"). Nowadays, the normative relevance of a wide range of sources of law has rapidly increased and this has made distinctions between public and private, as well as between domestic (or internal) and international (or external) matters less significant than in the past.

[3] The classic historical examples are the Concert of Europe (1815) and the Conference of Yalta (1945).

[4] See e.g. International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID) (1965), 17 U.S.T. 1270, 575 U.N.T.S. 159, whose Art. 54(1) requires State Parties to enforce judgments of international arbitral tribunals established according to the Convention itself; in the United States, 19 U.S.C. § 1516a(g)(7)(A) (2000) authorizes bi-national panels set up according to the North American Free Trade Agreement to direct US agencies to take action not inconsistent with the decisions of the panel.

[5] See e.g. *State v. Makwanyane*, 1995 (3) SALR 391 (CC) (S. Afr.), in which the South African Constitutional Court, in its analysis of the death penalty issue, took into account decisions adopted by other domestic and international courts, including the ECtHR and the UN Human Rights Committee; *Lawrence e.a. v. Texas*, 539 U.S. 558, 575 (2003) 41 S. W. 3d 349 (also referring to the ECtHR).

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Legal rules capable of producing cross-border effects are being elaborated by organisations such as the International Monetary Fund (IMF), the World Bank (WB), the Basel Committee on Banking Supervision, the International Labour Organisation (ILO), the World Trade Organisation (WTO), the Codex Alimentarius Commission, the International Civil Aviation Organisation (ICAO), the International Standardisation Organisation (ISO), the Internet Corporation for Assigned Names and Numbers (ICANN), bond-rating agencies such as Standard and Poor's, committees of experts and so on (Joerges and Neyer 1997)[6]. Moreover, standard-setting and self-regulation originate from multinational corporations as well (Berman 2007, p. 312). As a result, law tends to cover situations and behaviours that increasingly involve non-State, including private, actors.

A third element of the phenomenon under examination is the fact that a remarkable percentage of the normative rules embraced by it have an economic nature, although they reach beyond the scope of the so-called *lex mercatoria* (Trachtman 1996, Zaring 1998, Zumbansen 2006).

We may easily deduce from the previous pages that a traditional international law approach struggles to categorise transnational legal events and this also explains the temptation to understate their relevance. Next to the classic, positivist setting of the Westphalian order a relatively broad normative space possessing a regulatory or quasi-regulatory nature has been developing its own claims and rationalities.

The second reason why transnational law is deeply contested is that it can be associated with global governance and it therefore generates concerns related to the lack of democratic mechanisms and structures, particularly in terms of legitimacy and accountability (Walker, de Búrca 2007, Cohen, Sabel 1997).

Can the transnational law project claim to have ecumenical ambitions and in this perspective replace international law? Can arguments from hegemony be made in the same way as they are made in relation to the international law project, which, as mentioned earlier, has been characterised *both* as advancing claims of formal equality stemming from paradigms of universal reason *and* as an instrument for the stabilisation of power and dominance (Koskenniemi 2009)? Or, to put it in other words, is the development of transnational law the translation of a peculiar balance of powers or is it, instead, a sign of the unsettling of those powers? It has been argued that more flexible forms of law suit better the strategic moves of dominant States (Abbott, Snidal 2005, pp. 63-65). On this view, hegemonic or dominant States would only seek to regulate those areas which correspond more closely with their interests, as is the case with the United States-sponsored free trade and market-enhancing legislation (Abbott 2005, p. 135). The recent financial crises have prompted a great deal of proposals in favour of a better discipline of the market forces. Would this discipline simply mirror the United States agenda? The legal and political landscape seems more nuanced that an answer in the positive would suggest. Interests and agendas cannot always be discerned easily. First, the trend towards decentralised, less formal legal rules coincides with the gradual weakening of the position of the United States as a monopolistic hegemon, as it had emerged at the end of the Cold War, and the strengthening of other States or clusters of States.

Second, institutionalist and constructivist theories should not be dismissed too easily. International law is not merely a reflection of instrumental rationality: it simultaneously generates constraints through bilateral and multilateral frameworks that are shaped by specific interests and agendas but are also capable in turn to

[6] See also the website of the Bank for International Settlements (2013), which the Basel Committee belongs to, Internet Corporation for Assigned Names and Numbers (2013), Codex Alimentarius: International food Standards (2013), International Organization for Standardization, ISO (2013), Standard and Poor's Rating Services (2013).

influence actors' behaviour and policies. The institutional setting in which international law-making takes place aims to increase predictability and coherence (Keohane 1989, p. 10). It thus produces a type of legitimacy that is socially constructed by way of the prevailing normative expectations at any given time. In this sense, interactions will not be based simply on rational calculus, but also on a minimum degree of mutual trust deriving from past episodes and consolidated practice (Kratochwil 1989, Brunnée, Toope 2000).

To be sure, the capillary diffusion of informal rules and standards set by private, public and semi-public bodies might be interpreted as a means of implementing policies and enforcing values which belong to the most powerful nations or entities operating on their behalf. It becomes thus important to qualify the type of interaction that takes place within the transnational sphere.

Theoretical approaches on transnational law and governance have oscillated between at least three strands of thought, which can roughly be labelled as "community-oriented", "liberal" and "functional". Some authors conceive of "pluralistic" and diversified communities based on stable and continuous interaction fed by virtuous trust-enhancing practices as conceptual tools to explore the overlapping of transnational normative orders[7]. The risk in this case is that any move towards an even minimal substantive understanding of the common good may smack of 19th century-style universalism. In the view of some others, functionally differentiated regimes and societal rationalities are irreducible to one another: no overarching authority emerges and this results in the impossibility of identifying a meta-rationality that would operate as an instance of last resort (*ultima ratio*) (Fischer-Lescano, Teubner 2004). This view runs the opposite risk of denying any space for meaningful convergence and facing the "(…) absence of any intersubjectively shared values, norms and processes of understanding" (Habermas 2001, p. 142). The liberal approach attempts instead to emphasise the role of individual emancipation and self-fulfilment, but sometimes fails to give enough importance to the benefits that may derive from commonality.

However, regardless of the differences between the approaches mentioned above, the discussion on the relevance of community values for international law has been going on for a long time. For example, de Vattel emphasised international law's purpose of having a "society of nations", which, although free and independent, have a duty to contribute to the happiness and perfection of all other nations by way of mutual assistance (de Vattel 1916, pp. 33-37). It should therefore come as no surprise that similar issues may be addressed in contemporary debates focusing on transnational law.

1.2. The multifarious nature of transnational law

Transnational legal processes occur within a somewhat parallel dimension to the Westphalian order. They revolve around two fundamental hallmarks: the notions of "network" (Hamann, Fabri 2008, p. 481) and conflict. While the second notion will be dealt with more extensively in section 2 of this paper, this section will address some of the most significant issues stemming from the development of networks.

"Networks" are understood in this work as associated with decentralisation and deformalisation, as opposed to "hierarchy", which is associated with centralisation. They are composed of cellular entities, mostly committees, expert groups, think-tanks, Boards, governmental and non-governmental organisations, corporations, consultancies, agencies and so on that may or may not interact with each other and may or not be aware of each others' existence. The activities performed in this network space and the actors involved in them may overlap and may stretch across a wide range of policy areas such as corporate accountability (for example, for violation of human rights in a third country), trade, environment, financial stability,

[7] See e.g. R. Cotterrell (1997); J. A. Scholte (2008).

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internet regulation, welfare policies, sport and leisure, culture and education. The normative claims made within this network space may exist alongside the normative claims made within the sovereignty-based pluralistic system that has been developed in the past centuries. Their scope of action does not even need to be legal. Indeed, the idea of "network" has been used to define certain types of organised criminal groups, terrorist entities and business firms[8]. At the same time, it can easily apply to the institutional and operational structures that deal most closely with them[9].

Several branches of law are affected by this phenomenon either simultaneously or separately. Prominent examples are private law and economic law, criminal law and human rights. What is interesting about them is, first, that each conveys a distinct conception of what "public goods" ought to be classified, produced and distributed. They can be identified with specific rationalities distinct from each other.

Second, the line between private and public law, as already suggested, is blurring. This was already evident in the work of Jessup, who was one of the first to employ the concept of transnational law. He characterised this form of law as "all law which regulates actions or events that transcend national frontiers", thus embracing national and international law, public and private law (Jessup 1956).

The representation of a private and public legal sphere corresponds to different modalities of power and interpenetration of social and legal rules. Traditionally, public law is said to regulate the relations between the State and the individual, while private law would pertain to the relation between individuals. This mind frame somehow suggests that the "private" reflects individual interests as opposed to the "public", which would instead be associated with the idea of "community". However, this representation is largely fictitious and historically determined[10]. The reality is that neither can the public be automatically identified with the "socially useful", nor can the private be dubbed socially irrelevant (Dewey 1954, pp. 12-17)[11]. In fact, the emergence of a public and private authority in their modern interpretation is linked to the change of the social and political context and the resulting emergence of a "self-regulating" market in the 19th century (although this trend has always faced competing protectionist forces opposing it) (Polanyi 1944, p. 68). Moreover, the role of the State as a *super partes* entity committed to the common good was essential for the elaboration of the ordo-liberal approach, which aimed at carving out a domain of unfettered action for the private[12]. In international law, it has been suggested that the separation of a private and public field is a derivation of the positivist emphasis on territorial sovereignty and the growing diversity of national legal systems (Mills 2006, pp. 23, 41). On this view, identifying private international law with domestic law, rather than as a part of public international law, was part of a move towards the development of a global market economy, aiming to free private transactions from the operation of State law (Mills 2006, p. 44)[13]. Nowadays, the decline of the division between the public and the private would be emblematic of a shift in the balance of power in the form of an "expansion of capitalism through the promotion of private regulatory authority" and an increased legitimacy of the private as a source of authority (A. C. Cutler 1997, p. 279).

[8] See e.g. P. Williams (1998, p. 73); Europol (1998, 2007)
[9] See e.g, Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the establishment of a Network for legislative cooperation between the Ministries of Justice of the European Union OJ C 326 20.12.2008; Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network, OJ L 348 24.12.2008.
[10] See, among many, Duncan Kennedy (1982), M. Horwitz (1982).
[11] Dewey warned against "(…) identifying the community and its interests with the state or the politically organized community".
[12] See e.g. D. J. Gerber (1994).
[13] See also A. C. Cutler (1997, p. 279).

There are thus many reasons to believe that the public-private division is a remnant of the establishment of the nation State as a modern reference point. That reference point is currently deeply contested from a variety of perspectives. This implies that there might be a need to re-define ideas of community or communities through legal pluralist lenses (Cotterrell 1997). In light of what has been said beforehand, one may wonder in what terms the relationship between market values and community values operates at the transnational law level. After all, suggestions have been made in the sense that, for example, investment law can also serve the purpose of protecting peace and security, environment, human rights and good governance (Schreuer, Kriebaum 2011)[14]. On the one hand, the appearance and strengthening of a global market may lead to processes of empowerment and disentanglement of corporative interests. The market may emerge as an "open space" where the individual unleashes his/her ambitions of self-fulfilment. Transnational law seems to offer an ideal terrain for such developments, precisely because it suggests new ways of conceiving the relationship between individual freedom and authority. In this sense, while advancing ideas of a cosmopolitan *Gemeinschaft* may look like an unrealistic or even dystopian proposition, the notion of "community" may be adapted to a prismatic, ever-changing transnational reality. One may consider whether it is worthwhile to employ concepts such as "networks of communities" (as modalities of social interaction operating outside State borders) (Cotterrell 2008, p. 12) or "rough consensus and running code" (as a form of spontaneous law-making based on a minimum shared understanding of transnational actors and not dissimilar from customary international law) (Calliess, Zumbansen 2010, especially p. 134). Transnational law may thus be reassessed as a powerful instrument of emancipation of the individual agent in the context of a pluralistic and fragmented society.

However, on the other hand, enhancing private autonomy may still carry the risk of facilitating the diffusion of ideological discourses which, even if decoupled from specific State interests, have the potential of undermining input, throughput or output democracy.

Considering transnational law as instrument of emancipation of the individual agent in the separate transnational regimes ought to go hand in hand with the promotion of the idea of *civic* membership and the related rules on responsibility and transparency. This would require a shift from market citizenship to a participative type of citizenship which, while taking into account the virtues of communicative rationality, is also aware of its limits and attempts to go a step forward in the search for sustainable and constructive forms of interaction in the transnational sphere.

It is argued here that criminal law can perhaps help forge a community-oriented dimension of transnational law[15]. There should be more reflection on the possibility to construct a form of civic community at the transnational level that not only relies on shared values and a common moral ground, but also enables individual emancipation through the tools provided by human rights[16]. In order for this to happen, criminal law ought to be conceived not in functional or utilitarian terms[17], but as a Kantian-style project focused on the respect for the individual as an autonomous moral agent. Any attempt to build or represent a community postulates a shared commitment to specific values by its members, as well as their conviction that they are part of the same community and are therefore responsible towards each other (Duff 2001, p. 43). This implies that punishment at the transnational law level, just as it is argued at the national level, ought to be able to

[14] The authors, however, concede that there are no empirical data supporting the view that the protection of foreign investments may promote indirectly economic growth and, as a result, enhance the quality of the rule of law of the host State (Schreuer, Kriebaum 2011, p. 1088).
[15] See also M. Fichera (forthcoming A).
[16] See e.g. B. Bryde (2011, p. 213).
[17] See the classic approach in H.L.A. Hart (1959-60, 2008).

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communicate a censure to those that breach community values, and enable them to reconcile themselves with the other members of a community and be re-admitted to such community (Duff 2001, p. 201).

2. Ultima ratio and ordering

Transnational conflicts can occur along a vertical line, between domestic law and international law, and along a horizontal line, between different branches of law, or different policy areas. Depending on which rationality they rely on and the jurisdictional context within which they operate, courts tend therefore to provide different answers.

Human rights can be an example of this. The European Court of Human Rights (ECtHR) often manages conflicts through the margin of appreciation mechanism (Shany 2005, Arai-Takahashi 2002, p. 233, Hutchinson 1999, p. 645), which uses "fuzzy logic" reasoning rather than the traditional binary reasoning (legal/illegal, true/false) (Delmas-Marty 2009, p. 57). Conflicts require transparent devices of resolution and this, in turn, demands a high degree of accountability. Mireille Delmas-Marty has observed that for this to happen there would have to be "(…) a more precise definition of common interests which, by reference to human rights and global public goods, could provide the basis for the concept of international crime; a pluralist application adapted to the practical conditions specific to each national and regional normative level; and favouring process of interaction and harmonisation. This implicitly includes the concept of a national margin of appreciation, which preserves pluralism while ordering it" (Delmas-Marty 2009, p. 114). She advocates forms of ordering based on hybridisation and flexibility. One may wonder whether the principle of *ultima ratio* (last resort) may also be useful in this enterprise. After all, both *ultima ratio* and the margin of appreciation evoke the need for measure, balance, control. They can serve therefore as tools to resolve the conflictual character of the legal pluralistic world. In this light, can *ultima ratio* perform a normative function in transnational law?

One of the main challenges of transnational legal theory is the fact that law is faced with its "other", with non-law (Calliess, Zumbansen 2010, pp. 31-32), the un-regulated, and the un-defined. Law sprouts in an area with no borders, no ups and downs, and no public sphere. Communication is broken, except some fragments that circulate now and then between legal systems. Inevitably, when faced with its "other", law's nature is affected. The very confrontation with the "other" means a form of recognition which is also a partial incorporation. When law and non-law come together, they may overlap and interpenetrate. Moreover, law is sometimes said to operate in a normative sense: it proclaims what it ought to be but is not (yet). In its very statements, law challenges its "other" and tries to colonise it.

Ultima ratio can operate in connection with this relationship between law and its "other". Here we are not faced with a conceptualisation of *ultima ratio* as an overarching rule, but rather as a principle (in the Dworkinian sense) (Dworkin 2005, pp. 24 ff) or meta-principle which does not necessarily assume the possibility of systematising different sources.

In criminal law, last resort is a guideline for criminalisation and its purpose is to limit a State's intrusive power of punishment to those cases in which punishment is the last available means to produce the desired effect[18]. Normally, a conduct will be criminalised only when there are very important reasons to do so, for example because the legal response is proportionate to the blameworthiness of the conduct itself. When there are elements leading to the conviction that other tools should be employed, then criminal law should simply step back. These tools can belong to a variety of disciplines, including private law or administrative law. In a certain sense, law shows an attitude to flexibility here: it does not intervene to alter radically the

[18] See among many A. Ashworth (2000), D. Husak (2004), N. Jareborg (2005).

external socio-political environment, but tries to shape it gradually, so that law itself becomes an integral part of this environment, rather than an external splinter that has been spatchcocked into it.

The principle of *ultima ratio* thus reflects a certain way of conceiving the relationship between the public and the private. The former ought to interfere in the domain of the latter as least as possible and with the least possible intrusive means. When it does interfere, this should occur in accordance with some general clearly defined criteria. It is also a manifestation of a common good-oriented rationality (Jareborg 2005, p. 522): criminalisation and, more in general, enforcement measures need to be justified in light of some general interest, for example because they protect values that rank high in the constitutional system.

In transnational law, *ultima ratio* as a general principle applying in connection with the notion of community would be interpreted in the sense that flexible legislation, rather than classic instruments of State law, should be the preferred tool of action and both "soft" and "hard" legal measures would be adopted only when they are strictly necessary or a more efficient way of addressing a particular issue which is important for the common good. Necessarily, *ultima ratio* goes along with subsidiarity and proportionality: for example, transnational legislative measures would interfere in the domestic sphere only when measures at the local level seem inadequate or insufficient for the safeguard of community values. This suggests that many, diverse communities can co-exist at different levels. For example, measures deeply affecting local communities would have to go through a democratic process of incorporation into the specific legal and cultural context which they are addressed to. This would be particularly important when it comes to devising forms of responsibility in private law, criminal law or human rights schemes.

However, there are risks associated with the introduction of a general *ultima ratio* mentality. They derive mainly from three hurdles. The first is the difficulty in applying this principle to transnational legal processes, characterised by "dispersed" responsibility, i.e. a form of responsibility that is more difficult to detect. In particular, it is difficult to sanction specific behaviours through coercive mechanisms, when not only proving, but also detecting the causal link between the commission of an act and the agent leads to uncertain results. The second hurdle is a certain degree of unease in defining community values and forms of shared understanding, as has been pointed out in much of the recent and classic works on the idea of community. As has been noted in the previous section, one could rely, for example, on an instrumental perspective, focusing on contractual relations converging towards a common aim; on the commitment to certain types of values, e.g. constitutional; or on affective or cultural bonds. No conceptualisation of community can be easily adapted to the transnational dimension. The third hurdle derives from the general trend towards the securitisation of law[19]. This difficulty is connected with the prevalence of discursive practices in our society that tend to emphasise forms of decisionism in times of emergency either outside the legal framework set by contemporary democracies or within them but at odds with their fundamental principles. One should always bear in mind the limits of the so-called "danger-averting" rationality, which has been frequently observed in criminal law in recent times but has expanded in other branches of law as well. Danger-averting rationality encourages forms of legislation that: a) do not respond to a particular need in the present, but instead to a potential risk that *might* occur in the future but is not clearly defined or b) react to a threat that is not evident, or that has been constructed as such without an appropriate debate in a public forum on what it really consists of.

[19] See e.g. M. Fichera (forthcoming B).

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The area of financial regulation, banking and investment is emblematic of what has been observed beforehand. Financial and banking activities occur at remarkable speed across the world and are able to involve several countries simultaneously. "Market forces" determine movements of capital and other material or immaterial goods and it is not always easy to understand their internal mechanisms. Various forms of transnational legislation have been devised precisely with a view to adapting to this complex reality. As a result, it is possible to observe types of law which would not be classified as such under the classic positivist formula. They are characterised by enhanced flexibility, non-bindingness and blurring of the line between public and private law.

For example, soft law is a common way of regulating the financial sector. Despite the lack of binding enforcement mechanisms and sanctions, it has been employed with relative success in the context of money laundering and financing of terrorism (Beekarry 2011, Delston, Walls 2009, Mitsilegas, Gilmore 2007). It has been observed that the features of soft law allow it to achieve a lower and less demanding level of consensus than the one that is associated with hard law (Delston, Walls 2009, p. 90). Money laundering has expanded considerably in the last decades and the Recommendations elaborated by the Financial Action Task Force (FATF), a special body that operates under the auspices of the Organisation for Economic Cooperation and Development (OECD), are a good example of *transnational* criminal law (in the narrow or phenomenological sense, i.e. that type of criminal law that concerns cross-border crime). Unsurprisingly, the identification of such discipline is by no means uncontroversial. Some authors argue that employing such a wide definition would leave aside the complexity of cross-border offences and their local and national characteristics (Fijnaut 2000, p. 120). Others include within it only those activities that have actual or potential cross-border elements (Boister 2003, p. 955)[20]. These activities would often involve private individual conduct and affect private interests (Boister 2003, p. 966) as well as those acts that are normatively (instead of phenomenologically) transnational in the sense that, even when they only occur within the national borders, they constitute a threat to shared national interests or cosmopolitan values which is nevertheless not considered sufficiently serious as to rank them as "international" in the proper sense (e.g. torture) (Boister 2003, pp. 967-968). Although only treaties and conventions have been mentioned by most commentators, there are no serious reasons to exclude from transnational criminal law the FATF Recommendations[21]. These Recommendations call upon States to perform specific actions, such as the criminalisation of money laundering and the financing of terrorism, the supervision of financial institutions and the report of suspicious transactions. They have a certain degree of intrusiveness into the domestic sphere, as they require States to adopt "effective, proportionate and dissuasive" sanctions, whether criminal, civil or administrative (Financial Action Task Force 2012b). They can also be addressed to private agents, such as banks or lawyers and prescribe a specific behaviour that is judged necessary to assist in identifying evidence and other information. Moreover, mutual evaluation and "name and shame" practices seem to be effective (Levi, Reuter 2006, p. 306).

A second example is the set of measures adopted during the recent financial crisis. A large variety of statements and agreements at the EU level, for example concerning the Eurozone[22], has been accompanied by legislative measures at the domestic level, whose constitutionality has sometimes been questioned by domestic courts[23]. One of the main issues has been that of "shadow banking", also known as

[20] He refers, for example, to the conventions against drugs trafficking, corruption or financing of terrorism, i.e. merely positive law.
[21] See the recently revised 2012 FATF Mandate (Financial Action Task Force 2012a) and Recommendations (Financial Action Task Force 2012b).
[22] See e.g. European Council (2011a, 2012a, 2012b).
[23] See e.g. BBC News (2012).

"market-based financing", i.e. "the system of credit intermediation that involves entities and activities outside the regular banking system"[24]. The Financial Stability Board (FSB), in particular, was established in April 2009 as an upgrade of its predecessor, the Financial Stability Forum (FSF) and was tasked with implementing regulatory and supervisory policies in the financial sector. It brings together representatives of several international financial institutions and its Secretariat is hosted by the Bank for International Settlements in Basel, Switzerland (Financial Stability Board 2013). Since the beginning of the financial crisis it has published reports containing recommendations and guidelines concerning standard-setting, codes of good practice and the monitoring of transparency, effectiveness and financial stability. These recommendations, directed towards State and non-State entities, concern *inter alia* making financial markets and products more transparent and strengthening standards for governance, risk management, capital and liquidity. They are part of a global effort to curb the negative effects of the crisis and have also been debated and elaborated within the EU institutions. The debate has focused not only on how to regulate the financial sector, but also, for example, on whether economic measures should be growth-oriented (including measures that bring European States' borrowing costs down) or whether austerity measures are sufficient[25].

One of the most important achievements in the EU following the financial crisis has been the adoption of legislative measures that seek to regulate forms of aid and other mechanisms of support for those States that need it. An example of this is the European Stability Mechanism (ESM), which is due to enter into force in June 2013 and will replace the existing European Financial Stabilisation Mechanism (EFSM) (European Council 2010, 2011b). It is interesting to observe that the new mechanism will involve the private sector. For example, in some situations the negotiations between a Member State and the private creditors will be carried out according to a plan in compliance, amongst others, with the principles of proportionality, transparency and fairness (Ruffert 2011, p. 1784). In this context, it has been argued that Member States' activity supporting Member States is not sufficiently justified by the emergency and should not breach relevant provisions of the Treaty on the Functioning of the European Union (TFEU) (Ruffert 2011, pp. 1785-1788).

In both cases mentioned above, the principle of *ultima ratio* can allow the adoption of "hard" and "soft" legislative measures only when they possess a sufficient degree of legitimacy and transparency and are important for the protection of values judged fundamental for the community. However, "soft" measures should be generally preferred when the degree of consensus over the adoption of specific measures (e.g. rules on the responsibility of individuals for damages to the general interest of the community) is not very high.

3. Conclusion

This paper has attempted to offer a brief account of the recent developments of transnational law as a concept which is not merely different from international law and domestic law, but somehow embraces them and makes any traditional distinction between them meaningless. These developments are closely linked to the decline of State sovereignty and the emergence of new sites of authority and forms of law-making. There has already been some debate concerning the possibility of applying a community-oriented approach to transnational law. It is argued here that criminal law can be provide some guidelines in this direction, not only concerning the elaboration of forms of responsibility that take into account the general interests of the community and the need to protect them, but also in terms of the promotion of individual autonomy. In particular, the principle of *ultima ratio*

[24] Financial Stability Board (2011); G20 (2011, para. 30); European Commission (2012, p. 3).
[25] See e.g. P. Krugman (2012), R. Lastra (2012); S. Schwarcz (2010).

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may serve this purpose, in the sense that transnational legal processes should not be intrusive and should be justified through the principles of subsidiarity and proportionality. Significant examples can be found in the areas of financial legislation and anti-money laundering legislation, in which soft law has proved to be rather effective.

Some problems may however be detected. They originate from the fact that in transnational law it is not always possible to sanction specific conducts through coercive mechanisms, due to evidence-gathering difficulties. Moreover, any attempt to refer to community values and forms of shared understanding faces the challenge of defining what these values are and how consensus should be built around them. Finally, this paper has pointed out that security-oriented discursive practices present some difficulties when they spread beyond the criminal law sector. In other words, they may lead to the emergence of forms of decisionism in times of emergency either outside the legal framework set by contemporary democracies or within them but at odds with their fundamental principles. Danger-averting rationality encourages forms of legislation that are enacted even when the existence of a risk or threat to common values has been declared without an appropriate discussion in a public forum.

Bibliography

Abbott, F., 2005. NAFTA and the Legalization of World Politics: A Case Study. In: J. L. Goldstein *et al.*, eds. *Legalization and World Politics*. Cambridge: MIT Press, 135-164.

Abbott, K. W., Snidal, D., 2005. Hard and Soft Law in International Governance. *In*: J. L. Goldstein *et al.*, eds. *Legalization and World Politics*. Cambridge: MIT Press, 37-72.

Arai-Takahashi, Y., 2002. *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR*. Antwerp; New York: Intersentia.

Ashworth, A., 2000. Is the Criminal Law a Lost Cause. *Law Quarterly Review,* 116 (2), 225-256;

Bank for International Settlements, 2013. *Bank for International Settlements* [online]. Available from: http://www.bis.org/ [Accessed 23 January 2013].

BBC News, 2012. Portugal court rules public sector pay cut unconstitutional. *BBC News* [online], 6 July. Available from: http://www.bbc.co.uk/news/world-europe-18732184 [Accessed 23 January 2013].

Beekarry, N., 2011. The International Anti-Money Laundering and Combating the Financing of Terrorism Regulatory Strategy: A Critical Analysis of Compliance Determinants in International Law. *Northwestern Journal of International Law and Business,* 31 (1), 137-194.

Bellomo, M., 1995. *The Common Legal Past of Europe, 1000-1800*. Washington: The Catholic University of America Press.

Bentham, J., 1843. *Introduction to the Principles of Morals and Legislation*, Chapter XIX section XXV. *In*: J. Bowring, ed. *The Works of Jeremy Bentham* Vol. I. Edinburgh: William Tait, orig. 1780.

Berman, P.S., 2007. A Pluralist Approach to International Law. *Yale Journal of International Law* [online], 32 301-329. Available from: http://ssrn.com/abstract=970688 [Accessed 23 January 2013].

Boister, N., 2003. Transnational Criminal Law. *European Journal of International Law* [online]*,* 14 (5), 953-976. Available from: http://www.ejil.org/pdfs/14/5/453.pdf [Accessed 21 January 2013].

Brunnée, J., Toope, S. J., 2000. International Law and Constructivism: Elements of an Interactional Theory of International Law. *Columbia Journal of Transnational Law,* 39 (1), 19-74.

Bryde, B., 2011. Transnational Democracy. In: U. Fastenrath, *et al*., eds. *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*. Oxford University Press, 211-223.

Calliess, G., Zumbansen, P., 2010. *Rough Consensus and Running Code: A Theory of Transnational Private Law*. Oxford: Hart.

Codex Alimentarius: International food Standards, 2013. *Codex Alimentarius: International food Standards* [online]. Available from: http://www.codexalimentarius.org/ [Accessed 23 January 2013].

Cohen, J., Sabel, C., 1997. Directly-Deliberative Polyarchy. *European Law Journal,* 3 (4), 313-342.

Cotterrell, R., 1997. A Legal Concept of Community. *Canadian Journal of Law and Society,* 12, 75-91.

Cotterrell, R., 2008. Transnational Communities and the Concept of Law. *Ratio Juris,* 21 (1), 1-18. Available from: http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9337.2007.00377.x/pdf [Accessed 22 January 2013].

Cutler, A. C., 1997. Artifice, ideology and paradox: the public/private distinction in international law. *Review of International Political Economy,* 4 (2), 261-285.

de Vattel, E., 1916. *The Law of Nations, or the Principles of National Law applied to the Conduct and to the Affairs of Nations and Sovereigns.* Trans. C. G. Fenwick. Carnegie Institution of Washington, orig. 1758.

Delmas-Marty, M., 2009. *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World*. Oxford: Hart.

Delston, R. S., Walls, S. C., 2009. Reaching Beyond Banks: How to Target Trade-based Money Laundering and Terrorist Financing Outside the Financial Sector. *Case Western Reserve Journal of International Law* [online], 41 (1), 85-118. Available from: http://www.heinonline.org/HOL/Print?collection=journals&handle=hein.journals/cwrint41&id=91 [Accessed 29 January 2013].

Dewey, J., 1954. *The Public and its Problems*. Ohio University Press.

Dibadj, R., 2008. Panglossian Transnationalism. *Stanford Journal of International Law,* 44 (2), 253-300

Duff, A., 2001. *Punishment, Communication and Community* Oxford University Press.

Dworkin, R., 2005. *Taking rights seriously*. London: Duckworth.

European Commission, 2012. *Green Paper on "Shadow Banking", Brussels, 19.03.2012 COM (2012) 102 final* [online]. Available from: http://ec.europa.eu/internal_market/bank/docs/shadow/green-paper_en.pdf [Accessed 24 January 2013].

European Council, 2010. *Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism* [online]. Available from: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:118:0001:0004:EN:PDF [Accessed 24 January 2013]

European Council, 2011a. *Euro Summit Statement* [online]. Available from: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/125644.pdf [Accessed 24 January 2013].

European Council, 2011b. *European Council Decision of 25 March 2011 (2011/199/EU)* [online]. Available from: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:091:0001:0002:EN:PDF [Accessed 24 January 2013].

European Council, 2012a. *Statement of the members of the European Council* [online]. Available from: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/127599.pdf [Accessed 24 January 2013].

European Council, 2012b. *Towards a genuine economic and monetary union: Report by President of the European Council Herman Van Rompuy* [online]. Available from: http://ec.europa.eu/economy_finance/focuson/crisis/documents/131201_en.pdf [Accessed 24 January 2013].

Europol, 1998. *Europol Organised Crime Situation Report*. The Hague: Europol.

Europol, 2007. *OCTA: EU Organised Crime Threat Assessment 2007* [online]. The Hague: Europol. Available from: https://www.europol.europa.eu/sites/default/files/publications/octa2007.pdf [Accessed 21 January 2013].

Fichera, M., forthcoming A. Criminal Law Beyond the State: the European Model. *European Law Journal*.

Fichera, M., forthcoming B. Security Issues as an Existential Threat to the Community. In: M. Fichera, J. Kremer. *Security and Law in Europe: Reconsidering the Security Constitution*. Antwerp: Intersentia.

Fijnaut, C., 2000. Transnational Crime and the Role of the United Nations. *European Journal of Crime, Criminal Law and Criminal Justice,* 8 (2), 119-127.

Financial Action Task Force, 2012a. *Financial Action Task Force Mandate (2012-2020)* [online]. Available from: http://www.fatf-gafi.org/media/fatf/documents/FINAL%20FATF%20MANDATE%202012-2020.pdf [Accessed 23 January 2013].

Financial Action Task Force, 2012b. *The FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* [online]. Available from: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%20%28approved%20February%202012%29%20reprint%20May%202012%20web%20version.pdf

Financial Stability Board, 2011. Shadow Banking: Strengthening Oversight and Regulation. Recommendations of the Financial Stability Board [online]. Available from: http://www.financialstabilityboard.org/publications/r_111027a.pdf [Accessed 24 January 2013].

Financial Stability Board, 2013. *Financial Stability Board* [online]. Available from: http://www.financialstabilityboard.org/ [Accessed 24 January 2013].

Fischer-Lescano, A., Teubner, G., 2004. Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law. *Michigan Journal of International Law,* 25(4), 999-1046. Available from: http://www.heinonline.org/HOL/Page?handle=hein.journals/mjil25&id=1013&collection=journals&index=journals/mjil [Accessed 29 January 2013].

G20, 2011. *Communiqué: G20 Leaders Summit, Cannes, 3-4 November 2011* [online]. Available from: http://www.g20.org/load/780986747 [Accessed 24 January 2013].

Gallie, W. G., 1956A. Essentially contested concepts. *Proceedings of the Aristotelian Society,* 56 (1), 167-198.

Gallie, W. G., 1956B. Art as an essentially contested concept. *The Philosophical Quarterly,* 6 (23), 97-114.

Gallie, W. G., 1968. *Philosophy and the Historical Understanding*. 2nd ed. New York: Schocken Books.

Gerber, D. J., 1994. Constitutionalising the Economy: German Neo-liberalism, Competition Law and the "New" Europe. *The American Journal of Comparative Law,* 42, 25-84. Available from: http://works.bepress.com/david_gerber/26/ [Accessed 22 January 2013].

Grotius, H., 2001. *On the Law of War and Peace*. Trans. A. C. Campbell. Ontario: Batoche Books, orig. 1625.

Habermas, J., 2001. *The Postnational Costellation: Political Essays*. Massachusetts: The MIT Press.

Halliday, T. C., Osinsky, P., 2006. Globalization of Law. *Annual Review of Sociology* 32, 447-470.

Hamann, A., Fabri, H. R., 2008. Transnational networks and constitutionalism. *International Journal of Constitutional Law,* 6 (3 & 4), 481-508.

Hart, H.L.A., 1959-1960. Prolegomenon to the Principles of Punishment. *Proceedings of the Aristotelian Society,* 60, 1-26.

Hart, H.L.A., 2008. *Punishment and Responsibility*. Oxford University Press.

Hathaway, O. A., 2005. Between Power and principle: An Integrated Theory of International Law. *University of Chicago Law Review,* 72 (2), 469-536. Available from: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1855&context=fss_papers [Accessed 22 January 2013].

Horwitz, M., 1982. Comments: The History of the Public/Private Distinction. *University of Pennsylvania Law Review,* 130, 1423-1428.

Husak, D., 2004. The Criminal Law as Last Resort. *Oxford Journal of Legal Studies,* 24 (2), 207-235.

Hutchinson, M. R., 1999. The Margin of Appreciation Doctrine in the European Court of Human Rights. *International and Comparative Law Quarterly,* 48 (3), 638-650.

International Organization for Standardization, ISO, 2013. ISO International Organization for Standardization [online]. Available from: http://www.iso.org/ [Accessed 23 January 2013].

Internet Corporation for Assigned Names and Numbers (ICANN), 2013. *Internet Corporation for Assigned Names and Numbers* [online]. Available from: http://www.icann.org/ [Accessed 23 January 2013].

Jareborg, N., 2005. Criminalization as Last Resort (*Ultima Ratio*). *Ohio State Journal of Criminal Law,* 2(2), 521-534. Available from: http://moritzlaw.osu.edu/students/groups/osjcl/files/2012/05/Jareborg-PDF-3-17-05.pdf [Accessed 22 January 2013].

Jessup, P., 1956. *Transnational Law*. New Haven: Yale University Press.

Joerges, C., and Neyer, J., 1997. From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology'. *European Law Journal,* 3 (3), 273-299.

Kennedy, D., 1982. The Stages of the Decline of the Public/Private Distinction. *University of Pennsylvania Law Review,* 130, 1349-1357. Available from: http://duncankennedy.net/documents/Photo%20articles/The%20Stages%20of%20the%20Decline%20of%20the%20Public_Private%20Distinction.pdf [Accessed 23 January 2013].

Keohane, R., 1989. *International Institutions and State Power* PUBLICATION PLACE Boulder: Westview.

Koh, H. H., 1996. Transnational Legal Process. *Nebraska Law Review* [online], 75, 181-207. Available from: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2902&context=fss_papers [Accessed 23 January 2013].

Koh, H. H., 1997. Why Do Nations Obey International Law. *Yale Law Journal* [online], 106, 2599-2659. Available from: http://digitalcommons.law.yale.edu/fss_papers/2101/ [Accessed 23 January 2013].

Koh, H. H., 2004. International Law As Part of Our Law. *American Journal of International Law,* 98 (1), 43-56.

Koskenniemi, M., 2009. *From Apology to Utopia*. 3rd ed. Cambridge University Press.

Kratochwil, F. V., 1989. *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*. Cambridge University Press.

Krugman, P., 2012. The Crash of the Bumblebee. *The New York Times* [online], 29 July. Available from: http://www.nytimes.com/2012/07/30/opinion/krugman-crash-of-the-bumblebee.html?_r=0 [Accessed 23 January 2013].

Lastra, R., 2012. Legal and Regulatory Responses to the Financial Crisis., *Queen Mary University of London, School of Law Legal Studies Research Paper* [online], 100/2012. Available from: http://ssrn.com/abstract=2020553.

Levi, M., Reuter, P., 2006. Money Laundering. *Crime and Justice: A Review of Research*, 34, 289-375.

Luhmann, N., 1989. Law as a social system. *Northwestern University Law Review* 83, 136-150.

Mills, A., 2006. The Private History of International Law. *International and Comparative Law Quarterly,* 55 (1), 1-50.

Mitsilegas, V., Gilmore, B., 2007. The EU Legislative Framework Against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards. *International and Comparative Law Quarterly* 56 (1), 119-140.

Polanyi, K., 1944. *The Great Transformation: the political and economic origins of our time*. Boston: Beacon Hill Press.

Ruffert, M., 2011. The European Debt Crisis and European Union Law. *Common Market Law Review,* 48 (6), 1777-1805.

Schmitt, C., 2003. *The nomos of the earth in the international law of the Jus Publicum Europaeum*. New York: Telos Press.

Scholte, J. A., 2008. Reconstructing Contemporary Democracy. *Indiana Journal of Global Legal Studies* [online], 15 (1), 305-350 Available from:

http://www.repository.law.indiana.edu/ijgls/vol15/iss1/13 [Accessed 23 January 2013].

Schreuer, C., Kriebaum, U., 2011. From Individual to Community Interests in International Investment Law. In: U. Fastenrath *et al*., eds. *From Bilateralism to Community Interests: Essays in Honour of Judge Bruno Simma*. Oxford University Press, 1079-1096.

Schwarcz, S., 2010. *The Global Financial Crisis and Systemic Risk. Leverhulme Lecture, 9 November, Faculty of Law, Oxford University* [online]. Available from: http://ssrn.com/abstract=1707051 [Accessed 23 January 2013].

Scott, C., 2009. Transnational Law as Proto-Concept: Three Conceptions. *German Law Journal* [online], 10 (7), 859-876. Available from: http://www.germanlawjournal.com/index.php?pageID=11&artID=1147 [Accessed 23 January 2013].

Shany, Y., 2005. Toward a General Margin of Appreciation Doctrine in International Law? *European Journal of International Law* [online], 16 (5), 907-940. Available from: http://www.ejil.org/pdfs/16/5/330.pdf [Accessed 23 January 2013].

Slaughter, A. M., 2000. A Liberal Theory of International Law. *Proceedings of the Annual Meeting (American Society of International Law),* 94, 240-253.

Standard and Poor's Rating Services, 2013. *Standard and Poor's Rating Services* [online]. Available from: http://www.standardandpoors.com/ [Accessed 23 January 2013].

Stein, E., 1981. Lawyers, judges, and the making of a transnational Constitution. *American Journal of International Law,* 75 (1), 1-27.

Trachtman, J. P., 1996. The International Economic Law Revolution. *University of Pennsylvania Journal of International Economic Law* [online], 17 (1), 33-62. Available from: https://www.law.upenn.edu/journals/jil/articles/volume17/issue1/Trachtman17U.Pa.J.Int%27lEcon.L.33%281996%29.pdf [Accessed 22 January 2013].

Tuori, K., 2002. *Critical legal positivism*. Aldershot; Burlington: Ashgate.

Walker, N., Búrca, G. de, 2007. Reconceiving Law and New Governance. *Columbia Journal of European Law,* 13 (3), 519-537.

Williams, P., 1998. Organising Transnational Crime: Networks, Markets and Hierarchies. In: P. Williams, D. Vlassis, eds. *Combating Transnational Crime: Concepts, Activities and Responses.* London ; Portland, OR : Frank Cass, 57-87. First appeared as a special issue of *Transnational Organized Crime*, 4 (3-4), 1998.

Zaring, D., 1998. International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations. *Texas International Law Journal,* 33 (2), 281-330.

Zumbansen, P., 2006. Transnational Law. In: J. Smits, ed. *Elgar Encyclopedia of Comparative Law*. Cheltenham; Northampton: Edward Elgar, 738-754

Zumbansen, P., 2010. Transnational Legal Pluralism. *Transnational Legal Theory,* 1 (2), 141-189.