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TRANSNATIONAL LAW IN SUPPORT OF SCIENCE: SCIENCE IN SUPPORT OF TRANSNATIONAL LAW

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A discussion of how American legal processes have been used to regulate biomedical science may be useful in developing a response to the challenges presented by Judge Santosuosso in his seminal JIBL article¹ – the challenges, particularly in Europe, of increasing resort to transnational legal standards in dealing with biomedical issues. In many ways, the American legal system is “transnational.” The fifty states are each sovereign in their ability to regulate by law. The United States Constitution imposes no obligation on the states to achieve uniformity in legal regulation. And yet, lawmakers in every state draw upon the laws of their sister states for guidance in the framing of their own laws and regulations. This includes, most significantly, state judges, who cite the decisions of judges in other states as sources of “persuasive authority” when they develop case law for their own states. During the Nineteenth Century, when American society was being challenged by the technological developments of that era, e.g., the railroad, the telegraph, and mass-production and national distribution of goods by large corporations,

¹ Amedeo Santosuosso, *The Worldwide Law-Making Process in the Field of Science and Law: A Laboratory Bench (IBLARC)*, 6 JIBL 1 (2009).

American state courts worked in dialogue with each other to establish a body of fairly uniform principles of case law that responded to and facilitated those changes. While each state court had the power to prescribe such rules only for its own sovereign state, the Anglo-American common law tradition provided a strong justification for the export and import of rules between states. Lord Coke's notion of the common law being "fined and refined by an infinite number of grave and learned men"² encouraged judges to look for inspiration to any source of good legal reasoning for assistance in deciding the cases before them.

This process was significantly accelerated toward the end of the century when Dean Christopher Columbus Langdell established the "case system" as the fundamental method of law study at Harvard Law School. For Langdell, law was an empirical science and the data it studied were judicial decisions. Harvard increasingly attracted law students from across the country and purported to be a "national law school" teaching "national law." The basic principles of the law that the students were piecing together in their classrooms were, at one and the same time, the law of every American jurisdiction and no American jurisdiction. When students trained by the case system at Harvard (and the other law schools that began to follow Harvard's lead) were admitted to practice in states across America, they took with them their "national law" attitudes. Oliver Wendell Holmes, Jr., a Harvard Law graduate and one of the most famous and influential judges and scholars of the era brought the philosophical approach of American Pragmatism to a careful study of Anglo-American law and famously stated: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."³ By this, he meant not to promote cynicism, but to inspire a spirit of reform. If judges and lawyers approached the common law as a human artifact – designed to deal with the problems of the times when the decisions were made but, in some cases, no longer capable of usefully resolving modern disputes, they could engage in a dialogue that attempted to frame new, more appropriate and useful rules of law while remaining true to fundamental principles. Increasingly, legal treatises tended to be organized around

² SIR EDWARD COKE, COMMENTARY UPON LITTLETON 97b (Charles Butler ed., 18th ed., Legal Classics Library 1985) (1628).

³ O.W. Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

collections of judicial opinions that the authors struggled to organize into a body of consistent legal principles. Often, they pushed reform efforts as well – by choosing the “better” lines of cases where there was conflict or suggesting directions in which the law should move. In 1923 the American Law Institute (ALI), was founded “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.” Early on, the ALI developed a cooperative relationship with the National Conference of Commissioners on Uniform State Laws (NCUSSL), which shares many of the goals of the ALI.

I have discussed in detail several times in the past⁴ the fashion in which elements of the intra-American “transnational flow of legal standards” came together in developing law regarding the “right to die.” In all other areas of legal regulation of bioscience and medicine in the United States, we see, as well, the operation of such a flow of legal standards. The NCUSSL’s Uniform Anatomical Gift Act (2006) and The Uniform Determination of Death Act (1978, 1980) have been very influential with state courts as well as with state legislatures. The ALI’s Model Penal Code performed great service in the vanguard of efforts to reduce the extent of criminalization of abortion before *Roe v. Wade*.⁵ But, the main engine driving the growth of the law has been, and continues to be, the continuing dialogue among the state (and sometimes federal) courts that are forced to make decisions in the lawsuits brought by parties who seek legal solutions to the biomedical problems with which they are confronted.

As we know, judicial use of transnational sources to make domestic law is vulnerable to the charge that is “like fielding questions by looking out over a crowd and picking out your friends.” In answer to this criticism, Judge Santosuosso has pointed to the behavior of scientists, who would be embarrassed not to consider all relevant elements of the world-wide body of scientific knowledge in building and assessing their own experiments. But, the analogy here breaks down if the scrutiny of the legal

⁴ See, most recently, C. Baron, *Bioethics and Law in the United States: A Legal Process Perspective*, 4 DIRITTO PUBBLICO COMPARATO ED EUROPEO 1653 (2008).

⁵ 410 U.S. 113 (1973).

community is based upon reason alone – not employing as well adequate means for judging whether borrowed norms have been empirically successful in the jurisdiction from which they have been borrowed and whether they are likely to be empirically successful in the jurisdiction into which they are being transplanted. “For the rational study of the law,” Justice Holmes advised law students in 1897,” the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”⁶ In the United States, this prophecy has been significantly, if imperfectly, realized. In 1908, the precedent-setting “Brandeis Brief,” citing statistical and sociological data, was filed before the U.S. Supreme Court in *Muller v. Oregon*.⁷ In 1916, Roscoe Pound, a scientist and the leading proponent of the study and practice of “Sociology of Law,” was appointed Dean of Harvard Law School. In that same year, Holmes, who had brought his social science perspective to the Supreme Court in 1902, was joined on the Court by Louis Brandeis. And, in 1938, when Holmes retired from the Court, he was replaced by another sociological jurisprude, Benjamin Cardozo. In legal academia, the experience of the Depression, Roosevelt’s “New Deal,” and World War II accelerated the trend toward “law and social science” in teaching and research—and Yale, Columbia, and the University of Chicago law schools assumed leadership with faculties that included adherents of the new “American Legal Realism.” From the mid twentieth century to the present, new attempts to bring science to bear on law, such as the “Legal Process Movement,” the “Law and Economics Movement,” and “Social Science in Law Movement,” have come to influence the teaching and study of law in substantially every law school in the United States.

Of course, attempting to make law on the basis of social science data brings with it its own dangers. Statistics can overwhelm important intuitions, lend themselves to manipulation, or mislead those who are not trained properly to critique and interpret them.⁸ But this simply requires that institutions be developed for providing those who

⁶ Holmes, *The Path of the Law*, at 469.

⁷⁷ 208 U.S. 412 (1908).

⁸ See generally, *THE USE, NONUSE, MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS* (Michael J. Saks and Charles H. Baron, eds., 1980).

participate in the law making process with the skills and resources necessary for adequately protecting against those dangers.

SCIENCE, TECHNOLOGY AND OUR GLOBAL VILLAGE: THE CHALLENGE OF REGULATORY COSMOPOLITANISM

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In our global village, as the barriers to trade are lowered, we experience a deeper connectedness and interdependence. Although it is trade rather than technology that has acted as the principal driver of these changes, modern technologies are far from marginal. Yet, one senses in these developments more than one paradox. To be sure, there is the familiar paradox that technological advances can be both used and abused—advances in the field of nuclear technology, for example, can be used as a source of energy but also abused as weapons of mass destruction. However, there is also a less familiar paradox in that, while these technological advances serve to bring us closer together, they also force us apart. Thus, while advances in the technologies of transportation and communication bring us closer together, advances in the biotechnologies (and, quite possibly, in nanotechnologies and neurotechnologies) tend to drive people apart by highlighting deep cultural differences. Where cultural differences breed fear, suspicion, and conflict, and where advanced military technologies are at the disposal of the conflicted parties, we have a recipe for serious damage and disruption to the global peace.

In our global village, how are we to regulate for peace and security? While science and technology might present some options for shields or shelters, and while international relationships might stabilise as a result of an equilibrium of fear, I suggest that our best hope lies in cultivating the cosmopolitan value of respect for peace and security and then embedding this in the regulatory environment. By this, I mean that regulation at all levels needs to be compatible with universal values (such as respect for peace, for human rights and human dignity) but, equally, that there needs to be respect for legitimate local difference. This implies a global village constituted by certain fundamental values in which there is nevertheless room for cultural diversity (so long as that diversity is compatible with the governing fundamental values). If peace is to reign, we need to be intolerant of violations of the fundamental values and tolerant of legitimate local difference.

Yet, in a postmodern world of normative pluralism, how are cosmopolitans to make their case for universal values? While we might try to extend the minimal international agreement that is represented by *jus cogens* (for example, we might try to argue from the principle that genocide is categorically wrong to a broader principle for peace), this is not really the answer; what cosmopolitans need is a case that rests on stronger ground than de facto acceptance—universal values must be justified by an argument that no rational person can (coherently) reject. In support of whatever universal values are put forward, there must be an argument that is akin to a scientific demonstration or proof.

Is there such an argument? Applying the reasoning of the Chicago moral philosopher, Alan Gewirth, we can develop the idea that, as agents, each of us necessarily has an interest in the preservation of what I would call the global commons, meaning those essential conditions that are conducive to the freedom and well-being of all agents, and that enable each of us to act in our own way. Whether we are acting in self-interested or in other-regarding ways, the integrity of the commons is a matter in which we each have a stake. The commons, so conceived, comprises a number of elements—for example, a life-sustaining natural environment, secure food and water, public health and medicines, and, of course, peace and security—which are to be respected as a matter of universal value. What this argument offers is not a demonstration that the peoples of the world universally accept a principle of respect for the global commons; rather, the argument is in the form of a logical proof. No agent can coherently deny that they need the support of the commons; no agent can coherently deny that damage to the commons is a cause for concern; no agent can coherently deny that the commons should be respected; and no agent can coherently deny that the regulatory environment should be designed for the defence and preservation of the commons.

With reference to the cosmopolitan project for peace, in what sense is science and technology—and, concomitantly, the methodology and mind-set of science and technology—a threat and an opportunity? Science and technology itself is a threat insofar as it develops weapons of destruction; but the scientific and technological mind-set might

be a force for peace if its commitment to reason overcomes those irrationalities that can fuel conflicts and threaten security. However, this mind-set can also threaten the cosmopolitan project. Let me highlight briefly four such dangerous tendencies.

First, even if the philosophy of logical positivism is no longer taken seriously, it is striking that it was a philosophy that chimed in with a certain understanding of the scientific enterprise. In that context, it was plausible to suggest that, unless a statement is susceptible (in principle) to verification or falsification through the application of sense-experience, it has no truth-value and it cannot add to our knowledge or understanding of the world. This leaves value-judgments of the kind that cosmopolitanism advances as no more than a sideshow. Given that logical positivism is unable to survive its own epistemological standards, we have no reason to believe that it undercuts the idea of fundamental value that is central to the cosmopolitan project. Nevertheless, we need to caution against any tendency to cite science as a reason for treating cosmopolitan values as mere emotion or ideology or something trivial of that kind; if cosmopolitan values cannot be coherently denied by agents, there is no better reason for respecting them.

Secondly, insofar as the scientific and technological mind-set engages with ethical and moral reason, it is to utilitarian modes of reasoning that it tends to be attracted. Possibly, this is because the Benthamite calculus seems to have some rigour and to resemble the risk/benefit calculations that are made by expert committees charged with assessing possible harms to health, safety and the environment. Whatever the reason, we need to nip in the bud any idea that utilitarianism should be considered seriously as an expression of fundamental or universal values. For, the Gewirthian argument that gets us to universal values is driven by individual rights not by the general utility; and, although there are utilitarian arguments to be advanced in support of the commons, utility has the notorious tendency to license practices that put the interests of science above those of the individual.

Thirdly, scientists often present their work in a narrow instrumentalist way, saying that they have the technology to do such and such a thing but that, in the final analysis, it is

for the community to decide whether this is a technology that it wishes to adopt. Up to a point, such an attitude is respectful of democratic principles. However, where a technology would be destructive of fundamental values, it is irresponsible for the scientific community to proceed in this way. As a model of pure instrumental rationality, science is dangerous; there needs to be responsibility too.

Finally, cosmopolitanism, whether interpreted as a legal or as a moral project, presupposes that humans are agents, that they are in control of their actions, and that they are accountable for the choices that they make; and this presupposition is central to the Gewirthian coherence argument for fundamental values. If science and technology challenges this premise, as it might do further to developments in the new brain sciences, it is again a threat rather than an opportunity. However, unless we are to attempt to suppress scientific inquiry—surely an option that is neither legitimate nor practical—we simply have to live with this particular threat.

Regulation, like science, aspires to be a rational enterprise and, other things being equal, this must be a step in the right direction. For, if we can educate and inform in ways that reduce superstition, speculation, and, with that, the levels of global irrationality, then this should serve to defuse conflict. However, the instrumentalism that is characteristic of the scientific mind-set (conjoined with its tendency towards positivism and utilitarianism) is a dangerous feature if left on its own. Above all, we need a revived confidence in the potential of substantive rationality to articulate the fundamental values that will guide regulatory cosmopolitanism, improving the prospects for global peace and tolerance of legitimate local difference.

MULTILEVEL CONSTITUTIONALISM AND ‘DEMOCRATIC PEACE

Lessons from European Economic Integration for Reforming the UN System

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I. INTRODUCTION AND SUMMARY

The European tradition of legal philosophy, since ancient Greece, perceives law as an instrument for promoting a just social order. In the 21st century, the 500 million EU citizens increasingly define ‘principles of justice’ by means of ‘European constitutional law’ in terms of human rights, constitutional democracy and multilevel judicial protection of rule of law. As predicted by the Kantian theory of multilevel constitutionalism based on cosmopolitan rights, the most important achievements of the multilevel constitutional guarantees in the European Community (EC) Treaty, the European Union (EU) Treaty, the European Economic Area (EEA) Treaty as well as in the European Convention on Human Rights (ECHR) have been ‘democratic peace’ and social welfare based on rule of law, with due respect for the diversity of national human rights guarantees, national constitutional traditions and for ‘reasonable disagreement’ among citizens with diverse worldviews.

The EC succeeded in transforming the Westphalian ‘international law among states’ and centuries of power politics in Europe into multilevel constitutional protection of ‘democratic peace’ by progressive ‘constitutionalization’ of European economic law. The United Nations (UN) Charter provides a global legal framework in the name of ‘We the Peoples of the United Nations’ (Preamble) with, *inter alia*, human rights obligations of all 192 UN member states, a collective security system and optional jurisdiction of the International Court of Justice (ICJ) for the settlement of international disputes. Yet, the state-centered focus of UN law and the power-oriented UN practices failed to effectively ‘constitutionalize’ foreign policies and to protect human rights in many UN member states - just as, in the 1950s, the proposals for creating a European Defense Community and European Political Community were rejected by powerful European states (e.g. by the French Parliament in 1954). The 1994 agreement establishing the World Trade Organization (WTO) confirms the European experience that piecemeal transformation of intergovernmental power politics into multilevel judicial protection of international rule of law and peaceful cooperation is democratically easier to realize in the area of mutually beneficial, international economic cooperation among citizens than in more politicized areas of international foreign and security policies. As explained by Kantian legal theory and

confirmed by European integration law, democratic peace in the 21st century depends on ‘constitutional transformation’ of intergovernmental power politics into multilevel constitutional protection of human rights and peaceful conflict resolution. State-centered ‘top down approaches’ must be complemented by citizen-oriented ‘bottom up approaches’ to the regulation of the ‘collective action problems’ in the supply of international public goods, such as a mutually beneficial world trading system based on international rule of law, prevention of climate change through reduction of green house gas emissions based on decentralized ‘carbon markets’, more effective judicial remedies of citizens against violations of human rights, and more effective democratic participation in, and parliamentary control of, global economic governance.

II. NEED FOR ‘CONSTITUTIONALIZING’ INTERNATIONAL LAW

Albert Einstein famously remarked: ‘We can’t solve problems by using the same kind of thinking we used when we created the problems.’ This contribution argues that the increasing number of international crises in the world trading system, financial system, environmental system and UN system are the logical consequences of the power-oriented ‘Westphalian system’ of ‘international law among states.’ Just as the psychologist Sigmund Freud replied to the question of Albert Einstein – how peace with social justice can be secured universally – that the answer lay in common values permeating all societies, so must the Westphalian conceptions of international law be reconciled with the cosmopolitan and constitutional conceptions underlying the worldwide recognition of human rights and adoption of national constitutions by all 192 UN member states.

The human rights commitments in the UN Charter as well as in the ‘constitutions’ (*sic*) establishing various UN Specialized Agencies - like the ILO Constitution committed to labour rights and ‘freedom of expression and of association’; the WHO Constitution committed to ‘fundamental rights of every human being’ including ‘enjoyment of the highest attainable standard of health’; the FAO Constitution aimed at ‘ensuring humanity’s freedom from hunger’; the UNESCO Constitution committed to ‘the democratic principles of the dignity, equality and mutual respect of men’ and ‘the education of humanity for justice and liberty and peace’) -, like the setting up of the ICJ as ‘the principal judicial organ of the United Nations’ (Article 92 UN Charter), reflected the postwar ambitions – as stated in the Preamble of the UN Charter - ‘to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.’ Yet, neither UN member states nor UN institutions were willing to protect these constitutional principles effectively (e.g. by means of

judicial remedies and UN Security Council supervision) vis-à-vis the pervasive abuses of power inside many UN member states and UN bodies; hence, UN law failed to evolve into a ‘constitution of the international community’ capable of effective protection of human rights, democratic governance and international rule of law. There remain many structural impediments to transferring principles of constitutional, representative, participatory and deliberative democracy to worldwide organizations like the UN and the WTO. As the postwar attempts at promoting and protecting human rights and international rule of law by ‘foundational UN constitutionalism’ remain unlikely to succeed, constitutional limitations of abuses of foreign policy powers must be sought more pragmatically through ‘piecemeal reforms’, as illustrated by the progressive transformation and ‘constitutional reforms’ of European economic law in spite of the popular rejection of the ‘foundational EU Treaty Constitution’ of 2004 in the Dutch and French *referenda* of 2005.

III. EUROPEAN MULTILEVEL CONSTITUTIONALISM AS A MODEL FOR ‘CONSTITUTIONALIZING’ INTERNATIONAL ECONOMIC LAW?

Does the supranational constitutional law of the EU (as interpreted by national and European courts), or do the more decentralized constitutional structures of EEA law (as interpreted by the EFTA Court) and of the ECHR (as interpreted by the European Court of Human Rights), offer models for functionally limited international economic integration beyond Europe and for worldwide organizations for the collective supply of international public goods? The European experiences with overcoming ‘collective action problems’ impeding joint supply of international public goods have enhanced the acceptance of compulsory, international jurisdiction for peaceful settlement of disputes and judicial protection of ‘rule of law’ in worldwide international trade law (e.g. in WTO law, the North American Free Trade Agreement, the South American and South African common markets) and investment law (e.g. in more than 2500 bilateral investment agreements providing for compulsory investor-state arbitration of investment disputes). Many international public goods (like a liberal world trading system, protection of the environment and of human rights) cannot be achieved merely through intergovernmental negotiations without independent guardians of the public good (like the EU Commission and EU Courts in the European common market) and decentralized, rights-based enforcement systems empowering citizens and courts to protect transnational rule of law.

Arguably, the universal UN membership and UN human rights obligations could enable a progressive transformation of the UN Charter into a constitution not only of the United Nations as a worldwide organization, but also of the international community as a whole (i.e. binding on all subjects of international law and human beings) – provided the UN and UN member states succeed in narrowing the existing gap between the UN human rights objectives and their practical disregard in UN power politics