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Globalization and Cross-border Cooperation in EU Law: A Transnational Research Agenda

by

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Abstract

This paper aims to analyse a specific dimension of the progressive transformation of the territorial/nation-state law by using the particular lens of cross-border cooperation as regulated under EU law.

In order to do so, I have structured the article into two parts: the first part recalls the main features of the so-called transnational law (polycentrism, non-exclusivity of state actors in the law-making process and in the implementation of legal rules, openness, emergence of hybrid legal phenomena which do not belong - exclusively at least - to the domain of hard or soft law), while the second part analyses the legal framework of cross-border cooperation, trying to locate in this ambit those characteristics of transnational law identified in the first part.

Key-words

cross-border cooperation, globalization, transnational law, European Union, openness, frontier

1. Goals of the paper

This paper aims to analyse a specific dimension of the progressive transformation of the territorial/nation-state law by using the particular lens of cross-border cooperation as regulated under EU law.

Through this perspective I am going to examine the impact of the polycentric "globalization process" on the "territorial ambit" (a key element in the constitutional state), understood as the surface which closes off the frontiers of applicable law and excludes other sources of power, meant as the unity which unifies and separates, marks and distinguishes.

The legal fragmentation produced by the globalization process leads us to reconsider the traditional concepts of "territory" and "frontier".

Against this background, the idea of "place" changes, transforming it into a "mobile arena" for law.

The ground of legal phenomena is not any more represented by the "frontier" but by common interests, i.e. those issues and needs which go beyond the mere territorial frontiers, as happens with cross-border cooperation among territorial entities within the European Union (EU) legal order.

This article treats the law of cross-border cooperation as a case study of this new transnational law.

Analysing the main features of this phenomenon leads us to some of the grey areas of law, i.e. taking into account new legal (or para-legal) instruments and the role played by soft law and the idea of "transit" as a "relevant" factor for law.

This cross-border relevance implies the necessity to move from the idea of law as a unitary phenomenon, whose validity is ensured by the existence of a *Grundnorm,* to a concept of law as something generated by a system of cooperative relations among different actors, provided with a different legitimacy or with a legitimacy that is not entirely consistent with the traditional understanding of democratic legitimacy which we have inherited from the tradition of the nation- state arena.

In this perspective, cross-border cooperation transforms itself from a legal "exception" (if compared to classic nation-state law) to a legal "rule" within the frame of what we could call the "*integrated law of the contemporary European legal space*" (Palermo, 2011).

As for the structure of this paper, the analysis will be divided into two parts.

In the first part, the main features of the so-called transnational law will be recalled (polycentrism, non-exclusivity of state actors in the law-making process and in the implementation of legal rules, openness, emergence of hybrid legal phenomena which do not belong - exclusively at least - to the domain of the hard law or soft law) while in the second part of the work I will analyse the legal framework of cross-border cooperation, trying to find in this ambit those characteristics of transnational law identified in the fist part.

2. A note on transnational law

As written by Benhabib, "*we are like travellers navigating an unknown terrain with the help of old maps, drawn at a different time and in response to different needs. While the terrain we are travelling on, the world society of states has changed, our normative map has not. I do not pretend to have a new map to replace the old one, but I do hope to contribute to a better understanding of the salient fault-lines of the unknown territory which we are traversing*" (Benhabib, 2004, 6).

These lines say a lot about the sense of frustration of jurists before the new legal scenario created by globalization[I].

The progressive complexity in intergovernmental relations is inevitably reflected in the difficulties encountered by lawyers to analyse the varied phenomenology of "second-modern constitutionalism"[II]. In the current era of globalization, it becomes crucial to understand not only how law works, but also how the relationship between society and law has been changed. As Zumbansen (2011) put it:

"*In other words, the advent of globalization prompts an investigation into the theory/ies of society which inform(s) our – and competing – understandings of law*".

In any case, if building new conceptual maps is a titanic - and sometimes useless - work, constructing a new legal grammar able to deal with new social needs would be a sort of never ending story.

However, in this last case it is sometimes necessary to reflect upon the changes of law and how it may work as an instrument for inducing changes in the reality.

The premise is that we are moving in a "warm order", that is a complex legal order reshaped by (social, legal, cultural) conflicts[III] and by the emergence of new legal situations. However, attempts at giving precise content to these emerging uncertainties and grey areas of law using classical Kelsenian/hierarchical (instead of a horizontal/reticular) conceptions are going to fail (Ferrarese, 2011).

Conflicts and negotiation seem to be the new procedural paradigms of the new a-systemic and reactive legal logic, which forces us to set aside the rigid and traditional toolbox of the lawyer or - at the very least - to enrich such a toolbox by adopting an approach more oriented towards an "agonistic pluralism" (Mouffe, 2005).

Although following distinct approaches, both conflicts, on the one hand, and negotiation, on the other, involve a "certain degree of relationality among individuals, contexts and rules. From a narrow legal point of view one could say that the relationship between conventional law[IV] and judicial law becomes more stringent and complementary to the positive law" (Pizzorusso, 2008, 36)[V]. Clearly these processes take place in a context where pluralism is not understood as mere juxtaposition of a multiplicity of parties, but as connection and interaction or conflict among them (Delmas Marty, 2006, 18).We are moving into a situation that De Sousa Santos (2002) terms "*interlegality*", where working spaces that operate simultaneously do not limit themselves to interacting but also intersect and interpret themselves.

My contribution is situated within a frame that conceives the legal dimension not as a monolithic block surrounded by state frontiers, but as a sort of archipelago of different islands connected - and at the same time separated - by the existence of a sort of space (Ferrarese, 1998).

Against this background, globalization, complexity and polycentrism are key to understanding the transnational context wherein jurists operate.

I will use the polysemic concept of globalization[VI] in the sense of "polycentric globalization" (Held, 1995, 62; Teubner, 2004, 13), where the keystone is not so much

given by "global unity" or the construction of a global legal order, but through an organizational and regulatory fragmentation[VII] in which the relationship between the different "parts" does not necessarily respond to a model of integration or convergence.

Does globalization affect the legal phenomenon (law) as such? Does it imply a sort of swansong of law? A good way to tackle this debate is to start from the reflections on the relation between globalization and politics offered by Beck, according to whom globalization would not represent the end of politics but, rather, the projection of national politics beyond the boundaries of the nation-state (Beck, 1999). Something similar may be said of law: law has been affected by globalization in the sense that is has been forced to change its nature and context without however abandoning its function.

This point has been explained in a very clear manner by Zumbansen, among others, who argued that "*rather than describing the advent of globalisation as an end-point of legal development, from a transnational perspective, it becomes necessary to de-construct the various law-state associations in order to gain a more adequate understanding of the evolution of law in relation and response to the development of what must be described as 'world society*'" (Zumbansen, 2011).

Thus, if globalization implies the end of methodological nationalism, then it may be suggested that only a transnational perspective allows jurists to understand the current legal dynamics.

In this section of the paper I will recall the main views on the very polysemic notion of transnational law, clarifying, in a second moment, in which sense this formula is employed in the present article.

In his seminal work, Jessup employed the term transnational law "*to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories*" (Jessup, 1956, 2).

This definition is very descriptive but still reveals the necessity to go beyond the traditional categories of jurists.

In a more recent attempt at systematizing the literature, Scott identified at least three possible understandings of the term "transnational law":

- Transnational law as "*transnationalized legal traditionalism*", in other words it would be the "*law as we know it that must deal with various phenomena consisting of 'actions or events*

that transcend national frontiers', to which one might perhaps usefully add to 'actions' and 'events' something like 'relationships amongst actors'"[VIII];

- Transnational law as "*transnationalized legal decisionism*"[IX] according to which it is "*understood as the resulting (institutionally generated) interpretations or applications of domestic and international law to transnational situations*" (Scott, 2009, 870); and
- Transnational law as "*transnational socio-legal pluralism*" which "*as being in some meaningful sense autonomous from either international or domestic law, including private international law as a cross-stitching legal discipline. Rather than focusing on Jessup's broad definition that sees transnational law as some kind of umbrella within which 'other [non-standard] rules' fall alongside public and private international law, this approach sees these 'other' rules as the true – or at least the quintessential – transnational rule*s"[X].

From a methodological point of view, all these conceptions present both advantages and disadvantages, stressing the very nature of transnational law as an approach to law rather than as a specific legal branch.

Indeed, for the purposes of this article I understand under transnational law "*a methodological lens through which we can study the particular transformation of legal institutions in the context of an evolving complex society*" (Zumbansen, 2011) rather than "*a distinctly demarcated legal 'field', such as, say, contract law, or administrative law*" (Zumbansen, 2011).

A methodological lens through which it is thus possible to study law which presents itself as more open (i.e. not confined to the territory of a nation-state), reticular (i.e. implying the redefinition of sovereignty from mere *ius excludendi alios* to the right to participate in decisions taken on supra-state issues), horizontal, and multilevel.

The basic idea is connected to the famous shift "*de la pyramide au réseau*" (Ost - van de Kerchove, 2002) and to the parallel emergence of a multi-layered and interlaced context where states are coupled with other subjects since "*no level of government can maintain a monopoly of relations with its component parts*" (Cassese, 2006, 10; own translation).

The proliferation of political actors (all equipped with rule-making power) leads to a progressive proliferation of legal norms.

This means that the law peculiar to the current *disaggregated State* (Slaughter, 2000) presents itself in terms of "process" in a constant production in order to respond to the

legal pluralism generated by globalization. As said by Zumbansen, "*This approach suggests a relativisation of a number of assumptions commonly associated with law. One is its territorial connection with a politically institutionalised system of rule creation, implementation and adjudication, which, in Europe, has, for a relatively long time, been framed as the state-law nexus. From a transnational perspective, this nexus becomes, as, not only around the world, but also in Europe itself, the legal sociological lens reveals an impressive array of non-state originating norms that have long been binding human and organisational behaviour*" (Zumbansen, 2011).

However, this does not lead to the fall of the state as a crucial legal and political actor.

States are at the same time affected by the aggregation processes induced by the supranational level (EU integration) and by intra-state devolution processes (decentralization etc.), which, from a broader perspective, prompt us to question the validity of the territorial limits of state-government action.

As a matter of fact the state, although partly affected by this kind of "sandwich syndrome", retains its role as gatekeeper.

The relationship between the processes of European integration and territorial decentralization is neither linear nor exempt from ambivalence.

If the 'centralizing' effect is the most immediately noticeable consequence of the progressive constitutionalization of the "European system", decentralization is, even if only indirectly, an important element of the federalizing process[XI] in action within the EU.

The growth of the role of European regions, supported by a progressive increase in European regional policy, has created a strong impetus towards decentralization and territorial differentiation producing thus a transformation and hybridity of the classic models of territorial organization and distribution of power.

In a context where states are 'too small' to control economic or financially relevant decisions, but 'too big' to achieve efficient social and cultural policies, regions are in a privileged position as they are able to adapt their micro-identity plans to macro-functional external requirements.

While traditionally constitutional and international legal scholars who have paid attention to the consequences of legal fragmentation associated with globalisation have limited their attention to the area of fundamental rights[XII], this work focuses on the impact that this phenomenon has on territorial organization.

3. The new territorial paradigm in the transnational "landscape"

Globalization processes determine a territorial fragmentation of the field. This involves setting up a "droit déraciné" (Irti, 2007, 7), i.e. not linked to restrictions or organic connections with physical/geographical places and therefore compatible with any space and the need to continue the "spatial expansion of trade" (Irti, 2006, 9 ff). Place becomes a "mobile scenario" of law, since it acquires different shapes and forms according to a logic that is not represented - as already written - by the concept of "frontier", but by that of common interests, needs and problems that transcend territorial borders.

One clear example is the experience of cross-border cooperation in Europe.

Border regions are changing their character from "frontlines" of state sovereignty into "contact zones" for border societies (Blatter, 2004). Transnational integration processes on the one hand, and decentralization on the other, influence the institutional-territorial state architecture with regard to the government of border areas.

One could wonder which are the most viable and normatively "attractive" responses and adaptations of the constitutional systems at national, subnational, supranational and international level within an increasingly stratified and fragmented legal arena characterized by a dissymmetry between "territory" and "space".

This is indeed a crucial point which leads us to question the meaning and function of territory: does law need a spatial foundation or can we conceive of a (new) spatial form[XIII] for law?

The "dislocations" (Focault, 2001, 21) of law produce a more "functional" characterization of the same.

The main veins of transnational law - case law and contract law (Ferrarese, 2010) - try to accommodate different needs for different places, also adding or disintegrating heterogeneous places through plural formulations[XIV].

The experiences of territorial cooperation in Europe reveal a new scenario where a sort of "post-modern regionalism" seems to emerge.

This post-modern regionalism is no longer based solely on the territorial element but on the possibility of creating a set of networks in which the distinction between "internal" and "external" becomes problematic (Cannon, 2005).

The analysis conducted here shows the issues and new challenges produced by the

impact of the development of European cross-border regionalism on an international system which is "in motion", due to the influence of globalization.

In order to do that I will insist on cooperative and competitive logics characterizing the relations among borderlands in Europe and also present them in the broader context of "European relational regionalism" (Russo, 2010, 178 ff).

Indeed, if on the one hand the European Union plays a role as a framework and catalyst for cooperation, especially through the use of cross-border and interregional cooperation programs such as INTERREG, cross-border regionalism is constructed from an effort in levelling launched by peripheral regions to reduce the gap between them and more central (and developed) regions, using the transnational opportunities offered by the creation of the single market and an increasing globalization (among others, see: Kramsch, 2001).

Basically, the idea is that the change in relations between different institutional levels (sub-national, national, supranational) does not necessarily cause a loss of power and control by the state, but determines a higher importance for the "peripheries", in a way that we are experiencing a complex development of the national legal systems rather than a decrease in their sovereignty (Cannon, 2005, 20).

4. A *case study*: the cross-border cooperation in the European Union

Although the phenomenon of *cross-border cooperation* (on cross-border cooperation see: Papisca 2009; Strazzari, 2011) is not exclusive to the EU, this area represents its maximum development in a way that we can consider true border regions to be "micro-laboratories" of European integration (García Álvarez - Trillo Santamaría, 2011, 3. See also: Van Der Velde - Van Houtum, 2003).

A long time ago, Kramsh and Mamadouh pointed out that "*borders and border regions would not be merely the passive objects of forces operating at higher spatial scales, but would themselves become active sites for the re-theorization of fundamental aspects of political life, bearing value in turn across a range of geographical spaces*" (Kramsch - Mamadouh, 2003, 42). Cross-border cooperation is a more specific dimension of the broader phenomenon of "cross-border regionalism" (Scott, 2002; Perkmann - Sum, 2002), the development of which could be considered a

viable response to processes of globalization and a consequent change of the traditional features of the state.

The "philosophy of borders" – a reflection of the idea according to which the exercise of a sovereign power monopolizes public governance (Mascia, 2009, 157) and peculiar to the nation-state - faces the functional requirements of cooperation and the creation of "cognitive regions"[XV] in a kind of "unbounded regionalism" (Deas - Lord, 2006).

Territorial border entities seem to have a greater degree of adaptation to ongoing processes of change since they show a tendency to coexist and interact with other categories of international actors and organizations. If this is true, they may be seen as Trojan horses in the process of reshaping the state within the broader dynamics of EU integration.

It seems necessary to make a small "methodological premise" regarding the use of the adjective of territorial cooperation in the European context. Already in the 1990s, Levrat (1994, 143) stressed the ambiguities in the terminology of cross-border cooperation. A confirmation of this can be found in the fact that after a quick research it is possible to highlight the terminological variety used in official documents governing this phenomenon: 1) "transfrontier cooperation" (cooperation between bordering territories: Madrid framework agreement 1980; Additional protocol; European programs INTERREG, INTERREG IIA, INTERREG IIIA); 2) "interterritorial cooperation" (Protocol n. 2); 3) "transnational cooperation" (INTERREG II C; INTERREG III B); "cross-border cooperation" (art. 307.1, TFEU); and 4) "interregional cooperation" (INTERREG IIIC).

However, based on the terminology used by both the Council of Europe and the EU, I use the expression "cross-border" *lato sensu* to refer to the interaction between different territorial subjects (sub-national and even state-level) belonging to different states aimed at carrying out common actions or cooperation programs.

I prefer to use the qualification "border" because the concept refers to the idea of a cooperation having both internal and extra-territorial character (Strazzari, 2011, 153).

Although the phenomenon has an international origin (since it started with the Madrid Convention in 1980 and subsequent Protocols), its change of "nature" has happened thanks to EU law which conceives of it as a means to supplement its policy of economic and social cohesion: "*In general terms, the European cohesion policy has generally been seen as an instrument for strengthening the regional dimension of the EU Member States and as a way to enhance*

multilevel governance" (Strazzari, 2011, 170)[XVI]. Without going into the macro-theme of European cohesion policy, I merely take it into consideration in order to emphasize the legal "substrate" of this cooperative phenomenon in relation to the role of sub-state actors in the European framework.

This happens especially after the entry into force of the Lisbon Treaty which qualifies cohesion not only as "economic" and "social", but also as "territorial" (art. 3 TEU[XVII], art. 4 TFEU[XVIII], art. 14 TFEU[XIX], and Tit. XVIII TFEU[XX]).

Although connected to a "functional regionalism" (Toniatti, 2003), procedures and regulations for the development of regulations concerning structural funds "*understand the regional level as an active and necessary (i.e., not contingent) subject of integration*" (Palermo – Carmona Contreras, 2008, 77; own translation).

The key change has been represented by a progressive "institutional presence" of the regions on the EU scene, beginning with the role assigned to them in European regional policies and "*the fact that this important milestone in the evolution of the constitutional community has occurred beyond the provisions of the Treaties, in the absence of institutional involvement, and has developed through the establishment of a procedural framework requiring regions to attend or participate in the decision over and management of one of the most economically important policy at European level*" (Palermo – Carmona Contreras, 2008, 77; own translation).

Indeed, INTERREG initiatives, launched in 1989, are the first step in the "Europeanisation" of the territorial cooperative phenomenon.

The purpose of this program is very clear: to promote cross-border, transnational and interregional cooperation among border regions placed in locations within and outside the EU through financial supplies. However, these initiatives cannot be considered legal instruments aiming at facilitating cross-border cooperation, since they are limited to the financial support for projects aimed at promoting a balanced development and integration of the territories without affecting the presence of stable institutions for cooperation. Although the creation of specific legal instruments of cooperation was not the aim of these initiatives, these have played an important role and above all show us how different sources with different purposes can, in fact, encourage the development of multilevel law.

In this sense, another important step is represented by the creation of a European Grouping of Territorial Cooperation (EGTC), by which a radical change of the legal

framework in the ambit of territorial cooperation occurred with regard to all the already existing Community instruments[XXI].

Since then, the EU's role has changed, transforming itself from mere indirect economic support into direct and broad support on the basis of an *ad hoc* legal instrument.

"*The EGTC is to be seen as an instrument for integrated territorial (multilevel) governance in coherent areas split by borders. [It] is expected to contribute to legal strengthening of cooperation in a given area and to increased visibility and legitimacy of such cooperation*" (INTERACT, 2008, 133).

Regulation No. 1082/2006 (thereinafter the Regulation) establishes the frame for this legal experience. I will analyse this Regulation in a functional way for the purpose of this essay referring, as for the rest, to the huge literature on the subject (for an overview see EURAC, 2009).

The first factor to be taken into account is the pluralism of actors involved in the bottom-up creation of the organism of cooperation, as expressed by the wording of Art. 3 of the Regulation:

"*An EGTC shall be made up of members, within the limits of their competences under national law, belonging to one or more of the following categories:*

(a) Member States;

(b) regional authorities;

(c) local authorities;

(d) bodies governed by public law within the meaning of the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts" (art. 3, par. 1).

However, as already said with regard to transnational law in general, this polycentrism does not diminish the central role of the state that can prohibit the participation of sub-state entities if it considers this participation not to be consistent with the Regulation or national law or for reasons of public interest or public order. This confirms a strong state discretion in this area despite the changes induced by the European integration:

"[…] the Member State concerned shall, taking into account its constitutional structure, approve the prospective member's participation in the EGTC, unless it considers that such participation is not in conformity with this Regulation or national law,

including the prospective member's powers and duties, or that such participation is not justified for reasons of public interest or of public policy of that Member State. In such a case, the Member State shall give a statement of its reasons for withholding approval" (art. 4, par. 3).

One consequence of such polycentrism of actors is the plurality, material and subjective, of sources. On the one hand, indeed, there are different legislators that contribute to the definition of the regulatory framework (also for the *renvoi* of the Regulation to national law). On the other, we find ourselves before a jungle of legal acts of a different nature and belonging to different fields: the Regulation, the national acts of implementation, the statute and the convention of each EGTC.

This produces a "paradoxical" effect: although the Regulation and the relevant EU provisions aim to create a common framework for action in the field of territorial cooperation, even in this area EU law has inevitably to deal with the existing constitutional diversity at national level; this situation results in the creation of legal heterogeneity and asymmetry.

In fact, the reference to national law (Art. 7, 2[XXII]) is a *renvoi* to a context where sub-national authorities enjoy a distinct and fragmented constitutional *status* (for example, there are regions with legislative powers and mere administrative regions[XXIII]).

The relevant discipline of territorial cooperation is thus based on the interaction between the "minimum requirements" of the EGTC, established by the Regulation, and national law, and this conducts to an evident legal complexity:

"*These provisions create a European-wide legal basis with certain common obligations for transfrontier cooperation applicable in all states, which has never existed so far […]. the Regulation is restricted by the limitations stemming from national law (since the final decision on whether an entity is entitled to participate in an EGTC is in the hands of the national state and is dependent on the respective national legislation). Furthermore, many characteristics of an EGTC are determined by the respective national law of the state, where the EGTC has its headquarter. Therefore, an EGTC with the same members and same tasks will have different features if it has its headquarter in state A or state B because of the different legal framework provided by each state*" (Engl, 2009).

Concerning the material plurality of sources (*hard law*, *soft law*), the Regulation designs an atypical and complex architecture as shown by Art. 2:

"*1. An EGTC shall be governed by the following:*

a) this Regulation;

(b) where expressly authorised by this Regulation, the provisions of the convention and the statutes referred to in Articles 8 and 9;

(c) in the case of matters not, or only partly, regulated by this Regulation, the laws of the Member State where the EGTC has its registered office.

Where it is necessary under Community or international private law to establish the choice of law which governs an EGTC's acts, an EGTC shall be treated as an entity of the Member State where it has its registered office.

2. Where a Member State comprises several territorial entities which have their own rules of applicable law, the reference to the law applicable under paragraph 1(c) shall include the law of those entities, taking into account the constitutional structure of the Member State concerned".

This "cascade system" confirms the atypical nature of the Regulation, more similar to a directive, since it needs to be completed by national legal norms and the para-legal discipline of this cooperative body (EGTC convention and statute). As a consequence, this interordinamental interaction presents many problematic issues for judges in charge of interpretation and application of this "patchy" legal framework (Strazzari, 2011, 154).

5. Final remarks

In this article I presented the law of cross-border cooperation in EU law as an example of transnational law. To do this, I structured the article into two sections: in the first part I made clear what is meant by transnational law (taking into account the main definitions existing in the literature and trying to clarify the relationship between transnational law and classic branches of law). In the second, , I offered a brief and functional analysis of the regulation on cross-border cooperation in the light of what had been presented as being the features of transnational law. This also explains the selective approach adopted with regard to the provisions of the relevant EU Regulation. These conclusions certainly do not exhaust the subject, but the purpose was to find openness, incompleteness of state law, polycentricism and fragmentation of sources - characteristics of transnational law as such - in the legal phenomenon of cross-border cooperation.

In the conducted analysis cross-border cooperation presents itself as a multi-level, dynamic and complex ambit where different legal systems meet: international law

(especially if we focus on the origins of such cooperation), EU law, and national laws characterized by a different "territorial constitution" represent a complex and composed chemistry.

In order to study this phenomenon it is necessary to employ a procedural perspective, conceiving of this combination of legal provisions in a dynamic way, because it is impossible to understand the relation among levels in a non-hierarchical manner where no level has supremacy over another.

This situation reflects the decline of an exclusively hierarchical reading of the relationship between legal orders. With this, I am not arguing for the end of the principle of hierarchy as such but, rather, for the end of the exhaustiveness of this principle as the sole criterion of analysis. This connects to the parallel, not exhaustivity, of state law in the transnational background[XXIV].

This situation is often described as the outcome of legal pluralism produced by what was called "second modernity" or "liquid modernity" (Baumann, 2000) of law. In the representation given by some authors, "solid modernity" has an *endemic tendency to totalitarianism*[XXV], due to its heavy, solid, compact and systemic character that we find represented in the era of the "civil code" (especially in those produced under totalitarianism[XXVI]) in which, for example, the general principles of legal order served as points of "closure" for a self-referential system in which sovereignty was conceived as a "right to the have the last say" on the definition of legally relevant situations present in a given territory. Today, however, sovereignty presents itself rather as a "right to participate" in decision-making processes concerning legal situations that are no longer constrained to the territory of a single state. In this context, state law appears as "open" not only with regard to the fundamental rights dimension but also on "territorial" issues. As said by Ferrarese: "The loss of solidity manifests itself as a fall in terms of 'physicality' of the world, i.e. as a reduction of barriers, fall of barriers, overcoming or porosity of borders, and emancipation from rigidity" (Ferrarese, 2002, 54; own translation).

The emergence of issues not simply governable by state actors inevitably lead to the use of logical relationships and cooperation with the abandonment of the legal-rational tradition inherited from legal positivism. Cross-border cooperation in areas not only "genetically" predisposed to overcome national boundaries - transport, tourism,

environment, etc. - but also those traditionally belonging to a state sphere of decision-making, such as health, is a good example of this[XXVII].

It is not the case that the law of cross-border cooperation has been described as something which "reverses what can be called the 'nation-state exception' in the history of mankind"[XXVIII].

This scenery can be represented through a multi-layered scheme where each territorial entity has an interest in participating in the progressive institutionalization which has changed the structure and goal of territorial cooperation.

The functional nature of this kind of cooperation has given territorial cooperation a broader character and confirms the success of the relational logic as a general method of political decision in multi-layered legal contexts.

Like in other areas of European integration, in this case the origin of the phenomenon equally has an economic nature: one of the reasons that led to the development of territorial cooperation was the lack of competitiveness of cross-border territories.

The decrease of the "border effect", together with the existence of distinct "*differentials in terms of unitary costs of production*"[XXIX], if carried out within territorial cooperation responds well to the political strategy of "spillover" and step-by-step development.

Against this background, the EGTC has created an interesting dynamic, first of all because it gave a new boost to initiatives of cross-border cooperation already in existence and also because of gathering attention to the idea of territory and by giving internal and external frontiers new blood.

The law of cross-border cooperation is characterized by an inherited ambivalence: its differentiated and plural structure (plurality of sources, actors, actions and practises), on the one hand, is accompanied by a unitary and pragmatic function on the other:

"*the law of CBC is a pluralistic (multiactor and multilevel) law, which, in its essence, boils down to a 'procedural skeleton' represented by cooperation mechanisms of domestic law but goes far beyond that. It thus follows that, on the one hand, the more effective the cooperation procedures, the swifter the CBC. On the other hand, however, while the bones of the law of CBC are essentially the domestic cooperation procedures, the flesh around them is represented by the political capacity of the cooperating bodies as well as by the activities of all the involved actors that contribute to create the whole picture*" (Palermo, 2012, 84).

The law of cross-border cooperation thus represents a relevant case study to understand new dynamics of transnational law for different reasons and as a matter of fact: "*the new law of CBC epitomizes the integrated legal order of the 21st century: a multisource, multilevel, multi-actors, multidisciplinary and multinational legal system, yet a unitary phenomenon, where soft law and actual practices also play an essential role. The study of the law of CBC is key to understanding of the legal reality of the present and future*" (Palermo, 2012, 88).

Its open nature makes cross-border cooperation a useful perspective to analyse the a-systematicity (meant as the end of the closed system) of the legal sources in transnational law.

The crisis of the state has produced the end of the state monopoly on legal sources applicable in its own territory. This phenomenon has at least two effects.

On the one hand, state law cannot - completely at least - cover the discipline of the activities on state territory. On the other hand, it highlights the importance of new legal phenomena involving different subjects and institutions and, more generally, the emergence of a new reticular governance.

In this context, we cannot find a basic norm which centralizes and redistributes the law making power (an example of this is given, at international level, by the *Codes of Conduct*[XXX] and, for what concerns our ambit of investigation, the conventions and statutes of the ETGC).

This implies the relativization of the distinction between "external" and "domestic" law and between "law" and "non-law" *as a result of the "already mentioned relativisation of a territorial grounding of law in a particular jurisdiction*"[XXXI]. This implies that the state and its law must interact not only with other states (entities provided with general purposes and universal competence over their territory), but also with different actors (public/non-public; on this, see Cafaggi, 2010) gradually emerging in the supra-state arena.

This is why the phenomenon of cross-border cooperation allows us to deal with the challenges by which lawyers in the scenery of transnational law are confronted. In this sense, jurists cannot limit themselves to a mere apologetic or formal approach to analyse these new phenomena but they have to employ a critical perspective through which it is possible to isolate problematic elements, going beyond the mere descriptive plan and acting as a "brake", to employ the famous metaphor of Bruce Ackerman (1989).

Among the main challenges there is above all that to ensure greater consistency in the jungle of sources of the law of cross-border cooperation and to guarantee greater clarity about the role played by some organizations such as the Council of Europe, without necessarily incurring a sense of frustration generated by a frantic search for a final decision-maker able to ensure the "certainty" of this law[XXXII]. One could think of different ways of doing this: conceiving of cross-border cooperation as a fertile ground for the development of dynamics similar to those advocated by supporters of the so-called global administrative law (enhancing, for instance, the procedural character of the law of cross-border cooperation; on GAL see: Krisch - Kingsbury, 2006; Cassese, 2005); those suggested by scholars interested in global constitutional law, thus understanding cross-border cooperation as a platform for the creation of a uniform discipline aimed at protecting certain assets provided with constitutional relevance in a multi-level context (see for instance Kumm, 2009; for an account of the debate between global administrative and constitutional lawyers see Krisch, 2010); or even conceive of the law of cross-border cooperation as an autonomous legal field, treating it "*as a specific legal branch rather than just a 'common pattern*"'(Palermo, 2012, 88).

This debate goes beyond the goals of the present article but shapes the research agenda of jurists today, which is why I limit myself to a brief consideration, stressing that the non-sectoral character of the law of cross-border cooperation has the merit not to exclude *a priori* a possible contribution by scholars coming from different disciplines (constitutional, administrative, comparative, and international lawyers, among others) in this respect.

To conclude, the law of cross-border cooperation represents a turning point in the progressive efforts made by lawyers at adapting their toolbox to new categories of transnational law.

Jurists, like Alice in "Through the looking-glass, and what Alice found there" by Lewis Carroll, "*must accept the dissolution (non-operativity) of her categories (moving towards something means going away from it, talking flowers and inanimate things; in order to understand, it is necessary to read backwards) and develop new cognitive and normative strategies in order to reduce the complexity of the world of the mirror*"[XXXIII].

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I "*Legal inquiries into the future of law in an era of globalisation are regularly confronted with accounts of law's alleged weakness to extend itself effectively beyond national, jurisdictional boundaries. At the same time, lawyers are not the only scholars by far who reflect on the regulatory challenges of today, which are often summarised under the heading of 'global governance'. An investigation into the nature and scope of legal regulation in this context is unavoidably exposed to questions of origin and function, on the one hand, and to questions of relations, compatibility and inter-disciplinarity, on the other. In this often polemic and heated discourse of disciplines and narratives, an effort to re-construct a discipline's approach and methodology offers insights into both the trajectories and the characteristics of a particular discipline's 'take' on the problems which are at stake in a fast evolving highly asymmetric global arena*". Zumbansen, "Defining the Space of Transnational Law".

II As Martinico put it "by 'second modernity constitutionalism' I refer to post national constitutionalism or constitutionalism beyond the State dimension" (Martinico, 2011).

III I am referring to "systemic conflicts", i.e. conflicts produced between different legal orders and provided with a relevant impact on the fundamental principles of the orders involved in the conflict. They are positive and natural conflicts which contribute to the development of the system in the sense employed by Halberstam with regard to the role played by conflicts in the multilevel legal orders in Europe and US (Halberstam, 2009, 326 ff.) On the concept of "systematic conflict" (although in a different context) see Reuten - Williams (1994).

IV By "conventional law" I do not refer to the law of Treaties or to the law of conventions as understood in English constitutional law. Rather, by this formula I mean law (norms, standards, criteria) created by agreements stipulated or accepted by subjects put on equal footing or at least characterized by a relation which cannot be read in pure hierarchical terms.

V As stressed by Frediani (Frediani, 2010, 214 ff) the progressive valorization of the contractual instrument is due to its "agility" and "flexibility" in adapting quickly the legal framework to the changes affecting the social and economic context", lending itself to that "adaptive function" that the law is called upon to play in the global legal space.

VI There is a massive body of literature on the idea of globalization, among others, see: Beck, 1999; Giddens, 2001; Robertson, 1992; Sassen, 2007; Zolo, 2006; Ferrarese, 2011; Ferrarese, 2000; Held-Mcgrew, 2007; Held, 2007; Cassese, 2006.

VII In this sense "*"global" […] is not unity but ubiquity. It is not a whole with a global meaning able to transmit to the distinct parts of the totality*" (Irti, 2006, 60; own translation).

VIII "*The first of the three approaches begins with a focus on empirical context and environment – in other words, transnational phenomena attracting or indeed, in some cases, seeking to avoid regulation – and then, with some strong if implicit premise that such phenomena are heightening and broadening with every passing day .This approach then asks how/where 'law', as we currently know and practice it, fits into the picture. This approach might focus on the first sentence of Jessup's seminal framing of a meaning for 'transnational law' by saying it is 'all law which regulates actions or events that transcend national frontiers'*" (Scott, 2009, 870).

IX "*A second approach to transnational law would concede that the legal traditionalist may be correct to say that the 'law' dealing with transnational phenomena can always in some respects be analytically traced to one or more domestic legal systems and/or public international law*" (Scott, 2009, 870).

X "*This approach sees in 'transnational law' something more than decisions plus extrapolations from decisional results in transnationalized contexts. Rather, transnational law is imagined as in some respects occupying its own normative sphere. For example, a not uncommon way of speaking about transnational law is as a kind of law of the interface or, as I have elsewhere described this strand of thinking, law that is neither national nor international nor public nor private at the same time as being both national and international, as well as public and private*" (Scott, 2009, 873).

XI On the concept of "federalizing process" see: Friedrich, 1968; La Pergola, 1987.

XII A very interesting study going into this direction is that by Gordillo. The author argues that: "*This situation creates an apparent complexity in the management of interterritorial relationships, a complexity that also affects, in a significant manner, legal security. For individuals (either an individual or a legal person, from a foundation to the largest corporation) perhaps the most important thing is to live under a firm order making predictable the legal consequences of their actions. Because talking about 'fragmentation of international law', 'legal pluralism' or orders that organize their coexistence through 'counterlimits' or 'contrapunctual law' principles or, more generally, the so-called 'global governance' that some call 'governance' (to give some examples that we shall discuss in this book) is undoubtedly of great interest to the doctrine, and tries to understand*

some realities and influence them, there is no doubt that these ideas have inspired the solutions that supranational courts have given in the litigation that has arisen. But it raises some doubts about the fact that these doctrinal models or theoretical constructions may provide confidence (in terms of legal certainty) to multinational companies and investment funds that operate in a context that could be described as transnational" (Gordillo, 2012, 3-4) and "*first, the messy interordinal overlap prevents individuals from having a clear idea regarding their particular 'charter of rights and obligations', that is, what fundamental rights are recognized and what obligations they have. Secondly, the very existence of different levels of protection of fundamental rights according to the applicable legal order does not seem a priori objectionable. Now the problem arises when the minimum rights considered by some orders as indispensable are not respected – this is where the application of an EC/EU regulation (being a direct development of a UN sanction) does not comply with one or more of the fundamental rights recognized as such in the national Constitution*" (Gordillo, 2012, 7).

[XIII] In the words of Irti, the choice between "spatial foundation of law" and "law in spatial form" is the same as the choice between the "place of the group that determines and structures the norms" and the "norms that are projected into the space of men" (Irti, 2006, 20 ff; own translation).

[XIV] In this "*law tends to create singular relations with places […] and places can be inhabited by legal plural and variable relations*" (Ferrarese, 2011, 388; own translation).

[XV] Scott, 2000. For a definition of cognitive regions see: Väyrynen, 2003: "These authors define regions with the help of such concepts as trust, common identities, and shared values as these are embedded in cross-border networks. Such imagined or cognitive regions – often produced by the spread of liberal values and interests – are delineated by non physical markers. The existence of a cognitive region does not necessarily require that its members occupy a common space for it can be formed through non spatial interactions. A major type of cognitive region is the security community whose members expect change to occur peacefully and disputes to be resolved non-violently".

[XVI] On cohesion policies and role of regions see: Hooghe - Marks, 2001; Leclerc, 2003.

[XVII] Art. 3 TEU, 3: "*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.*

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced".

[XVIII] Art. 4 TFEU, 2, lit. c: "*Shared competence between the Union and the Member States applies in the following principal areas: ...(c) economic, social and territorial cohesion*".

[XIX] Art. 14 TFEU: "*Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services*".

[XX] Devoted to economic, social and territorial cohesion (Art. 174-178 TFEU).

[XXI] For example, the European Economic Interest Grouping (Regulation EEC 2137/85 of the Council of 25 July 1985 concerning the creation of a European Economic Interest Grouping (OJ n. L 199 of 31 July of 1985) or the European Cooperative Society (Regulation EC n. 1435/2003 of the Council of 22 July 2003 on the Statute for a European Cooperative Society (OJEU n. L 207 of 18 August 2003).

[XXII] Art. 7, 2, Regulation No. 1082/2006: "*An EGTC shall act within the confines of the tasks given to it, which shall be limited to the facilitation and promotion of territorial cooperation to strengthen economic and social cohesion and be determined by its members on the basis that they all fall within the competence of every member under its national law*".

[XXIII] As pointed out by Strazzari: "*The involvement in CBC of subnational units, enjoying legislative powers or even treaty-making power, can turn out to be a problem for those countries whose subnational units are merely entitled to administrative powers. In these cases, intervention at the national political level can become convenient, at least when the cooperation concerns matters beyond the competences conferred to the domestic subnational units. The political backing-up of the central government can also be necessary to avoid any potential infringements of the national foreign policy. CBC may become a highly sensible political*

issue when it involves subnational units with significant economic resources and powers" (Strazzari, 2011, 169). See for instance the content of the Karlsruhe Accord and of the Valencia Treaty between Spain and Portugal.

[XXIV] "*In order to unpack the claims of an increasingly de-territorialised or, autonomous nature of regulatory governance, it is necessary, on the one hand, to re-visit the arguments which were launched by some scholars who connected the claim of an 'exhaustion' of law and of the nation-state's regulatory power with an emphasis on 'social norms*'" (Zumbansen, 2011).

[XXV] "*That heavy/solid/condense/systemic modernity of the 'critical theory' era was endemically pregnant with the tendency towards totalitarianism*" (Bauman, 2000, 25).

[XXVI] See for instance Art. 12 of the Provisions on the Law in general of the Italian Civil Code.

[XXVII] See for instance the Directive 2011/24/EU of the European Parliament and of the Council, dated 9 March 2011 on the application of patients' rights in cross-border healthcare and the EGTC "Hospital de la Cerdanya" 2011/S 59-096124 http://www.boe.es/boe/dias/2011/02/11/pdfs/BOE-A-2011-2663.pdf.

[XXVIII] Palermo, 2012, 72. Palermo refers to Ortino, 2002, 76.

[XXIX] Blanco González, 2008, 15 ff. The creation of common and hyperspecialized structures between regions with similar problems can contribute to the creation of competitive advantages especially if supported by complementary factors like the "fluid exchange of information," "cooperative culture" and "unique hierarchical dependence" (own translation).

[XXX] "*An example taken from the corporate law context may serve as an illustration: the much lamented, regulatory "failure" of traditional, state-based legal-political intervention into multi-national corporations (MNC) has long been serving as an argument for the need to develop either distinctly "post-national", institutionalised governance forms or to strengthen further the grip of self-regulatory and soft instruments, which have only a voluntary binding nature*" (Zumbansen, 2011).

[XXXI] "*Importantly, this trajectory of legal evolution can be studied as a process of law's transnationalisation. Despite its prima facie appearance as being relevant exclusively within the nation state's framework of legal ordering, the just alluded-to scholarly projects in legal sociology, legal theory and anthropology, and philosophy of law are reflective of the changing environment of legal systems. This transformation is foremost perceived as one of eroding boundaries, boundaries between form and substance, between public and private ("states" and "markets"), but is, at its core, concerned with the contestation, de-construction and relativisation of the boundaries between law and – non-law. At the height of the regulatory state with its climactical belief in juridification and in law as social engineering, law today is often seen as having become irrelevant in the face of global challenges*" (Zumbansen, 2011).

[XXXII] "*Finally, it would be wrong, from such a perspective, to expect international or supranational actors to become the ultimate decision-makers because the very essence of CBC runs counter to the presence of such an ultimate authority. Too often in the political discourse, but also in the academic literature, the new international and supranational sources of CBC law are still looked at from a hierarchical perspective, from which it is simplistically expected that the international actors will replace the state power as the supreme authority. But the international norms cannot provide a substitute for that which they are contributing to the dissipation of. What is all the more essential is the very presence of international norms, dealing with the phenomenon of CBC, that provide a common framework for reference and seek to establish common procedures. The recurrent frustration expressed in the literature about the role of the Council of Europe in the field of CBC and the excessive enthusiasm for the EGTC are two sides of the same coin. They stem from the wrong point of departure, which implies that the main player and the source of law could be identified. Such an approach is linked to a very statist reading of the law, in which a Grundnorm is always to be found for which one level of government is democratically accountable*" (Palermo, 2012, 85).

[XXXIII] Scamardella, 2009. See for instance the following passage from Carroll's book: "'I think I'll go and meet her', said Alice, for, though the flowers were interesting enough, she felt that it would be far grander to have a talk with a real Queen. 'You can't possibly do that', said the Rose: 'I should advise you to walk the other way'. This sounded nonsense to Alice, so she said nothing, but set off at once towards the Red Queen. To her surprise, she lost sight of her in a moment, and found herself walking in at the front-door again. A little provoked, she drew back, and after looking everywhere for the queen (whom she spied out at last, a long way off), she thought she would try the plan, this time, of walking in the opposite direction" (Carroll, 1871, 21).

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