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The form of Transnational Law[1]

A forma do Direito Transnacional

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Abstract: This article aims to advance on the form of Transnational Law, starting from Aristotelian philosophical assumptions until its confluence with the manifestations of Transnational Law. Thus, Aristotle's support stems from the premise that, even in a space deeply marked by material aspects, the form stands out and functions as a vicar for another substance, being, therefore, an important finding for the theoretical development of Transnational Law and its normative sources. The present research is justified mainly for two reasons: the scientific and practical relevance that Transnational Law assumes contemporaneously, and, on the other hand, the existing gap regarding its form, whose consequences focus on denial or skeptical positions, as well as, in the confusion between analysis of social facts and Transnational Law, which impacts on the construction of standards on the sources of Transnational Law. For the development of this research, the inductive method was used, operationalized by the techniques of operational concept and bibliographic research.

Keywords: Form of Transnational Law – Law's Theory – Transnational Law – Law's Philosophy.

[1] Work produced from the Center for Studies on Law and Transnationality (UNIVALI/CNPq) in dialogue with the Max Planck Institute of Comparative Public Law and International Law (Germany).

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Resumo: O presente artigo objetiva avançar sobre a forma do Direito Transnacional, partindo de pressupostos filosóficos aristotélicos até a confluência com as manifestações do Direito Transnacional. Assim, o amparo em Aristóteles decorre da premissa de que, mesmo em espaço profundamente marcado por aspectos materiais, a forma se sobressai e funciona como vicário para outra substância, sendo, portanto, constatação importante para o desenvolvimento teórico do Direito Transnacional e suas fontes normativas. Justifica-se a presente pesquisa principalmente por dois motivos: a relevância científica e prática que o Direito Transnacional assume contemporaneamente e, por outro lado, a lacuna existente acerca da sua forma, cujos desdobramentos incidem em posições negacionistas e/ou céticas, bem como, na confusão entre análise dos fatos sociais e o Direito Transnacional, que impacta na construção de padrões sobre as fontes do Direito Transnacional. Utilizou-se, para o desenvolvimento da presente pesquisa, o método indutivo, operacionalizado pelas técnicas de conceito operacional e da pesquisa bibliográfica.

Palavras-chave: Forma da Lei Transnacional – Teoria do Direito – Direito Transnacional – Filosofia do Direito.

1 INTRODUCTION

Italo Calvino, in the unfinished text "*Lezioni americane – sei proposte per il prossimo millennio*" expressed a strong dismay at the inconsistency that is in the world itself, not only in language and images. He claims that this "virus attacks people's lives and the history of nations, makes all stories shapeless, haphazard, confused, without beginning or end. My discomfort comes from the loss of the form I see in life (...)" (Calvino, 2012, p. 73). It so happens that Calvino, from the perspective of Literature, allows us to confront the Law, and its manifestations, in the contemporaneity regarding the embarrassment of its forms.

The present study aims to advance on the form of Transnational Law, starting from Aristotelian philosophical assumptions until its confluence with the manifestations of Transnational Law. Faced with the classical philosophical notion of Aristotle, seeks to insert the legal sources of Transnational Law in the epistemological bases of form and matter and its relevance to the state of the art of this manifestation

of Law. However, this does not lend itself to presenting a list of legal sources for Transnational Law.

This research is justified mainly for two reasons: the scientific and practical relevance that Transnational Law assumes contemporaneously and, on the other hand, the existing gap about its form, whose consequences focus on denial and/or skeptical positions, as well as, in the confusion between analysis of social facts and Transnational Law, which impacts on the construction of standards on the sources of Transnational Law[2].

Thus, this article is based on the research problem synthesized in the possibility (or not) of meaning and structure for Transnational Law, capable of sustaining itself without making use of sensitive ways and its consequences for the normative sources of Transnational Law.

To face the problem of the form of Transnational Law the sequence of arguments below goes through classical philosophical foundations in communion with institutionalist models of the Theory of Law, to enable an understanding of the sources of Transnational Law. In addition to the debate over the existence of Transnational Law, which differs from the phenomenon of Transnationalism, the current research aims, without exhaustive pretensions, to decompose the forms of expression of Transnational Law. With this, it is believed to enable the consolidation of the debate on Transnational Law and its ways of acting, whether in national spaces or in transnational scenarios, in addition to labels such as "non-identified normative objects" (Frydmann, 2018).

For the development of this research, the inductive method was used, operationalized by the techniques of operational concept and bibliographic research.

[2] Without prejudice to associations that may occur with the synthesis of Hans Kelsen for the use of the expression "form of law", it is important to warn that this article intends not to be linked with kelsenian normiactivist positivism, since it precisely faces lines of transnational law, which, according to this author, is not feasible with Kelsen's precepts. For the proper counterpoints: (Kelsen, 2000, 309-310).

2 THE LAW FORM

How is the Law manifested? Law is not just appearance or what is visible through content. Nor it would just be placed in the world of ideas. Therefore, the analysis of the form and its attributes of internal articulation, constitutive command and principle of unity, which is why the genesis of the investigation starts from Aristotle, emerges as a determining argument for such questioning. Starting with the work Metaphysics, it will follow, in sequence, the incident topics in the Law's *proprium*.

While the problem of the norm, as a product of a recognized and stable will, which presents itself in a logical space of normativity and human action, configures the hypothesis of authority that defines the beginning of Law, according to which authority must be understood as an ordering source, the question remains open on how this Law manifests itself. (Staffen, 2021, p. 465).

As Manuel Atienza (2013, p. 171) has already warned, the concept of form is complex and obscure, but it deserves to be understood as one that is preserved even when abstracting the concrete meaning of the propositions that compose it and the context in which it is makes it unique.

Beginning with the lessons of Aristotle, notably in the work Metaphysics, the definition of a sensitive substance constantly ensures the reference to certain material elements that, from a material point of view, condition the performance of functions proper to the object in question. With this, the subjugation of matter to the demands of form, matters in a high degree of importance against the material attributes of existence of sensitive substances.

In contrast to Plato, who classified the material element under the condition of appearance and non-being, Aristotelian metaphysics, in turn, by escaping from the centrality of presence, establishes, in summary, that form is endowed with a special function to the establish

in the communion of material elements means for the constitution of the object's identity.

The form (eidos) is what is universal in the sensible individual, the form determines the identity of a thing, assuring that that thing is in its essence and that it is preserved in the thing itself. Thus, the form is the universal and the thing, the singular, and it is up to thought to intellectually separate form from thing (Chauí, 2002, p. 356).

In this sense, before the gathering of the material conditions that permeate the object's existence, the form stands out with emphasis, after all, it enables the occurrence of the object's identity principle, so that the absence of form prohibits establishing the objectivity of the object.

Also, through such construction it is possible to understand the material connections involved in the physical plane. However, following the lines of metaphysics, the statement above emphasizes nuclear attributes to form, even where it did not seem to have, to stand out against the material elements involved. For Aristotle, it is not possible to refer to matter in its own definition.

Therefore, according to Aristotle, every definition of sensitive substance includes material aspects and formal aspects (Aristotle, 2015, p. 37), which is presented in the maxim "this in this". In this sense, what is extracted is the orientation that a material element cannot be taken in isolation, whose core is in the lesson on the homonymy of the parts (see examples of water or hooked nose, contained in Metaphysics, book Z).

On the other hand, in Physics, Aristotle problematizes the tension between material elements and the end, that is, "in view of what" a thing is made. Therefore, form and end become interchangeable, and form (end) becomes visible or manifest in the definition, as matter is shown to be assured in the definition of sensitive substances (Zingano, 2003, p. 282-283).

Aristotle (2015, p. 307) conceives, even in sensitive substances that matter enables the unity of the object. In fact, he maintains that matter is commanded and conditioned by form, whose demand of

its functions is the cause of matter, however, it does not serve as a cause for the end (the form). In this way, identity is guaranteed by form, while unity is due to matter, which allows us to summarize those two objects can be identical in form, however, due to a material discontinuity, they present two units of the same form.

Therefore, using Metaphysics as a reference, the conclusion is drawn that matter is conditioned and commanded by form, even where matter appears to enjoy greater relief and prominence. Aristotle (2015, p. 363-365) uses the example of the syllable BA as a condition to demonstrate this synthesis: the syllable "BA" would not be reduced to B and A, or in the order of its disposition B and A and not A and B; but rather by the relation of these elements B and A ordered and conditioned by the form. The form is not a new element, nor is it reduced to the order of disposition, "but it is the cause of B and A forming the syllable BA, in the order in which they meet" (Zingano, 2003, p. 286).

As a result, form precedes matter, with form even more being than matter itself (Aristotle, 2015, p. 293). Thus, what is verified is the hypothesis of "*apodose"*, in which scenario, the form allows a vicarious for a substance of another nature, being in the field of the sensitive substance the first substance, even if it only occurs immanently to the compound.

It is not by chance that Aristotle (2015, p. 307) defines the form (*eidos*) as quiddity, that is, the first substance. Thus, form is the form of a compound, which has given it immanence with something endowed with matter that constitutes it. So much so that, "while the form is always immanent to the compound, the non-sensitive substance is transcendent in relation to sensitive substances" (Zingano, 2003, p. 290). The finding of a non-sensitive substance, in turn, does not inhibit the possibility that its effects are felt in the world, giving rise to the transcendence that permeates such reasoning.

Such a conception results in the emergence of autonomy guaranteed by form, after all, even though sensitive substances are involved in matter and their definitions flow from evidence, form, by prioritizing

the principle of identity, guarantees, conditions and gives materiality to the substance. In this scenario, in addition to defending autonomy, Aristotle laid the foundations for the study of function.

Peremptorily, Aristotle (2015, p. 351) asserts that form will always be immanent to the compound, equally preexisting the generation of the compound. In such a way, form is eternal, which is tied to its pre-eminence. Therefore, form is detached from matter, even though it is subsequently recognized that merge in the plane of existence.

In summary, what is imposed from the Aristotelian argumentation in That physics and metaphysics makes the shape that stands out from the notably material space in a unique clarity, to enable a vicarious to another substance, showing that the shape is not reduces to matter. In fact, form commands and coordinates matter, determining that form is declared as something (Aristotle, 2015, p. 365). Put in another way, form can be understood as internal articulation, constitutive command, and principle of unity.

Such an appointment, in turn, introduces a profound contribution to the Law, so that it cannot be overlooked. Illustratively regarding the norm, as prescribed by Santi Romano (1946, p. 10), the norm is linked to the maximum of the unit in which it is understood and given. Therefore, it becomes possible to assess the objectivity of the legal, which is formed in its own intrinsic unit.

Thus, Santi Romano's institutionalist theory advances through the construction of Aristotle, which can be reduced to the Latin brocade "*forma dat esse rei*". He warns, as appropriate, that the juridical is an intrinsically formal judgment that, if supported only by empirical evidence, allows itself to be seduced by the risk of self-annulment and innocuity (Romano, 1946, p. 14-15), which yields a controversy with Giorgio del Vecchio (1921, p. 06) who glimpses the existence of a centripetal circularity.

In response, Santi Romano, from the philosophical signifier of "form", states that in Law, on the one hand, the normative form presents itself to conform what is outside the form, imposing due

respect, constituting an envelope; on the other hand, the form matters in the consciousness that incorporates the coexistence of the system in which the parts must unify, with identity and unity.

Without prejudice to the influences that language, signifiers, and meanings may have on form, it must be stressed that form imposes a sense of juridicality, which deductively descends from form. Thus, the way of form gives Law mechanisms of objectivity, explaining the phenomenon from the signifier (Del Vecchio) or from the legality of institutions (Roman).

3 THE FORM OF TRANSNATIONAL LAW

Without prejudice to the various texts dedicated to the issue of the existence, or not, of Transnational Law, the impacts and consequences arising from globalization, new actors and the like, a point that remains neglected refers to investigations related to the sources of this Law in construction and its form.

To the extent that Transnational Law contests the homogenizing hegemony of the national State, typical of the Westphalian political model and the Hegelian philosophical line, for normative production, it opens a path for considering previously marginal manifestations as juridical and normative of social and institutional dynamics. In this sense, the proposition of normative sources of Transnational Law stems from the institutional capacity of its institutions in the exercise of their authority, including social manifestations. Therefore, as a first premise, the normative sources of Transnational Law arise from the many social institutions acting in the scenarios of globalization.

On the other hand, since Transnational Law is a multilevel phenomenon, dynamic, specialized, flexible, predominantly horizontal and in constant communication with other legal systems, systems, and regimes, it is not surprising that its normative sources are anticipators of identical behaviors.

Still in the introductory questions, another aspect that deserves to be highlighted mentions is the symbiosis that exists between public spheres and private spaces, internally and/or externally to the geographic territories of the national States. Now, the sources come from national public domains with projection and effectiveness in the extranational private realm and, in other cases, they derive from the private initiative destined to the behavior of public institutions, governmental or not.

The circulation of normative sources to replace Transnational Law prevails in the most varied senses, multidirectional, with points of convergence or divergence practically impossible to be evaluated in the abstract. Therefore, the study of the normative sources of Transnational Law is not structured vertically only and primarily in the place of production of the norm, but significantly considers its dynamism and its extension, according to its effectiveness.

However, such diagnoses require greater care with the positivity of Law, including Transnational Law, as it should pay attention to the formal aspect of the normative text, which is not understood only by its dynamics or its genesis; by the objective aspect, which manifests itself in the organized structure of the social order. Therefore, Mauro Orlandi (2020, p. 303) asserts that the Law should not be reduced in the opacity of its matter.

For these reasons, from the formula synthesized, in the context of Comparative Public Law, by Armin von Bogdandy (2014, p. 980), the possible study methodology for Transnational Law is, first, the understanding of the phenomena in an analytical way, then, extracting the relevant principles of each phenomenon examined to, at the end, discuss the interrelationships of these actions in their multiple situations. In turn, when any new phenomenon appears, this scheme must be started again, to be represented by an incessant spiral.

In this context, it becomes possible to set the standard of normative sources of Transnational Law much more as communication channels and presentation of precepts endowed with greater effectiveness

for each phenomenon, given its specialty. Even if at times juxtapositions and/or overlaps are observed, the means of communication contribute to the development of Law, if faced in a substantial way. As a result, the notion that normative prescriptions do not originate in formal, vertical, descending, up-down-style flows gains strength.

Although Transnational Law may incorporate national norms arising from a fundamental hypothetical norm, matured in the hegemonic state sphere, upon its insertion in the field of Transnational Law, there will be no stratification with regard to its formal aspect (Staffen, 2018, p. 69). In large part, the lack of rigid formal stratification can be explained on the following aspects. First, from the institutional point of view, due to the absence and dysfunctionality of the existence of a totalitarian and sovereign global authority, invested in the power to "legislate". Afterwards, establishing a universal legislator for all matters to project valid consequences to society would be an invitation to naivety.

However, the mention of the absence of a rigid formal stratification should not be interpreted as a lack of form for Transnational Law. The form of Transnational Law is not confined only to the legal dynamics matured in the flows of globalization. Transnational Law demands a way to ensure objectivity, which although influenced by social reality, is not reduced to it.

The form of Transnational Law permeates the link with an organic, objective body, structured under the attributes of an order. Therefore, as defined in general terms by Santi Romano (1946, p. 22), the objectivity of the juridical is produced in its own intrinsic unity, thus demonstrating the indispensability of form for Transnational Law.

Even if the theoretical option for the idea of legal pluralism is considered as an argument for understanding and consolidating Transnational Law, as suggested by Paulo Márcio Cruz and Carla Piffer (2020, p. 259-275), the form allows for unifying plurality, ordering it, and enabling the entirety of Law, including Transnational Law, which does not resolve itself only in a substantial situation or in dependence on hypothetical and hierarchical structures.

The thesis defending the imperative consolidation of Transnational Law via the transcendence of the monism-dualism Manichaeism that guides the performance of domestic Law in the face of foreign pretensions, norms and actors is correct (Cruz; Piffer, 2020, p. 272). However, the theoretical models that follow the line of legal pluralism or fragmentation (Teubner, 1997, p. 16-17), end up standing on pillars destined to the production process and/or specification of the standard, without, however, to deal with the way that defines, unites, and gives identity to Transnational Law.

In communion with the content of the arguments already produced, it must be stressed that the form does not only manifest itself as a philosophical occurrence. On the contrary, in Transnational Law, as well as Law, recognizing the need for form is a hypothesis for the preservation of Law, shielding it from being converted only into a social fact or into an exclusively empirical manifestation.

The link between Transnational Law and form makes it possible to assign it means of constitution that correspond to the internal-external relationship (contained/non-contained). By form, the Transnational Law manages to guide its adherence to the Law or, deal with dimensions parallel to the legal. Also due to its form, Transnational Law embodies consistency capable of enabling individuals to achieve unity and belonging.

The current stage of development of Transnational Law demands the overcoming of analyzes that are based on the investigation of its weak verticality and/or on arguments typically understood as "the law of the strongest". The reports that Transnational Law establishes with National Law, with International Law or with Supranational Law, due to the attention given to its form, allows for the construction, refutation, and improvement of relations of greater objectivity, homogeneity, coexistence and unity.

Unlike National Law, International Law and Supranational Law, Transnational Law is not restricted to the watertight principle of territoriality or conventionality and, therefore, it can remain intact

in the scenarios of norm-territory-transnational actor (autonomy), as also establish relationships and interconnections with national, international or supranational structures and institutions (heteronymy), corresponding to the statement by Maurizio Oliviero and Paulo Márcio Cruz (2012, p. 12) that "this new legal paradigm permeates the state normative tissue".

Therefore, theorizing Transnational Law in an unscathed manner is not viable, making the Law lacking attributes that give it security and quality. Giving shape to Transnational Law imposes respect and conforms what is out of order. For the consolidation of Transnational Law, it is no longer adequate to place it in the context of globalization and the crises of the national state. Equally relevant is the confrontation of Transnational Law with predominance in its substance or contents and in the opaque disregard for the form of Transnational Law.

As pointed out by Aleida Hernández Cervantes (2014, p. 193), transnational legal production in the State and in Law is marked by the loss of unity and coherence of the order, the disregard of the principles of abstraction and generality, the lack of political control and illegitimacy of plural and opaque legal production.

This makes the notion of form for Transnational Law emerge at presuppositional levels. Whether from the point of view of Philosophy, or from the point of view of Legal Science, sustaining Transnational Law only through matter, that is, its substance, means the denial of Transnational Law itself. Furthermore, it collapses with elementary conditions for the function, meaning and structure of Law in a broad sense, from which National Law does not escape. Without form, Transnational Law becomes "something", without internal articulation, without constitutive command and without principle of unity.

Although the material characteristics that constitute Transnational Law are relevant, provide important substrates for the analysis and understanding of the phenomenon and guide the discussion on the existence of a transnational legal system, the limitation of Transnational Law to casuistry and circumscribed appreciation to facticity

impoverishes the Law *lato sensu*, not just Transnational Law. In apology to the exercise performed by Sabino Cassese (2009, p. 131-135) it is possible to infer that systematizing the characteristics pedagogically helps in demonstrating their occurrences, however, it cannot overcome the demands for identity, coexistence, and unity[3].

While reservations are raised against Günther Teubner's postulate, it is necessary to agree that the current stage of the normative sources that guide the Law are partially based on regulations pertaining to States and their institutions. According to his analysis, the normative sources can be described in two moments. The first, contemporary, operates cumulatively on flows of communication and exchange with typical sources of State Law. Later, it projects for the future the construction of independent normative sources for Transnational Law (Teubner, 1997, p. 08). As a result, Transnational Law is consolidated through pluralisms, specializations and fragmentations that do not exempt the need for form.

[3] As an illustration of the effects of the confusion on the form of Transnational Law, the judgment rendered by the Federal Supreme Court, in ADI n. 4.976/DF, in which Law n. 12,663/2012. The aforementioned Law dealt with domestically contemplating the commitments assumed by the Federative Republic of Brazil with the Fédération Internationale de Football Association (FIFA) through hosting agrément that, in theory, offended the Federal Constitution of 1988. The Brazilian Constitutional Court, without omitting the For political reasons, he judged Law 12663/2012 constitutional, by majority vote, as well as the charges assumed by the Brazilian government, in spite of having adduced "that the law derives from the commitments assumed by Brazil to hold the event and also that Brazil does not he was forced to receive the Cup, on the contrary, he volunteered and won a dispute to hold it". Thus, what is extracted is the embarrassment established from the confusion about the form and the consequent legal inconsistency, overcome by the condition of the State's will, which challenges the logic of unity, coherence and objectivity. BRAZIL, Federal Supreme Court. **Direct Unconstitutionality Action 4,976/DF**. Min. Rel. Ricardo Lewandowski, j. 07.05.2014. Regarding the application of civil liability of airlines in international flights, in judgments handed down by the Superior Court of Justice (REsp n. 1,842,066/RS) and by the Federal Supreme Court (RE n. 636.331/RJ and Tema 210), note There has been a deep confusion about the identification of International Law diplomas, arising from the direct and privileged action of national States to celebrate conventions (Warsaw, 1929 and Montreal, 1999) with sources of Transnational Law. In summary, in the case of civil liability of airlines in international flights, the use of transnationalization proves to be wrong.

André-Jean Arnaud (2007, p. 147-150), in turn, with a look from the social dynamics, in addition to facing the problem of the place of production of the norm, from the aspect of national/international geography, it creates bases for hybridity regarding the sources of Law in times of globalization. According to him, the sources of Transnational Law can be classified by traditional processes, that is, Constitutions, laws, treaties, principles, customs, doctrine, and jurisprudence, adding to them forms expressed in negotiated law, market needs, governance mechanisms, policies alternative regulations and, in the exceptionality of war. In fact, in addition to the discussion about the sources, André-Jean Arnaud, at the same time, contemplates instruments that shape Transnational Law, even though he has not used such nomenclature.

Transnational Law, by the way that it stands out from the notably material space, to make possible a vicarious to another substance, showing that the form is not reduced to the matter, the normativity desired by Transnational Law makes sense and, consequently, spreading to the Legal Science. In fact, form commands and coordinates matter, determining that form is declared as something. The absence of form of Transnational Law, moreover, shields it from the necessary capacity for progress, innovation, and development.

4 FINAL CONSIDERATIONS

Without prejudice to the considerations already mentioned, the emergence and consolidation of Transnational Law, with a view to Law as an object of Legal Science, challenges its continence, coherence, unity and identity with the existence of form. The dependence of Transnational Law on material aspects makes it fragile and predominantly associated with casuistry, which translates into the loss of its function.

In form, Transnational Law acquires objectivity, gains continuity beyond ad-hoc practices and assumes intrinsic unity. Such unity not

only makes it viable on a transnational level, but also contributes as a "mortar" for the means of interrelation and cooperation with National Law, International Law and Supranational Law. The absence of form brings opacity, confusion, and ineffectiveness.

According to Aristotle's teachings, form stands out from the notably material space, to make possible a vicarious to another substance, showing that form is not reduced to matter. In turn, form commands and coordinates matter, determining that form is declared as something.

The arguments of transnational legal pluralism, fragmentation and specification have analytical relevance to the problem of the social fact found. However, Transnational Law, in addition to the theses of legal pluralism, needs a way to give it coexistence in the paradigms in which the singular can be unified, constituting an aspect of identity and conformation.

Therefore, Transnational Law, due to the consigned Aristotelian and institutionalist aspects, is not capable of sustaining itself in the absence of sensitive forms, producing immediate and immediate consequences for the normative sources of Transnational Law. Furthermore, a material element cannot be taken in isolation, the core of which is in the lesson on the homonymy of the parts.

Therefore, the study of the need for a form of Transnational Law is a true presupposition for the establishment and theorization of legal sources for Transnational Law. Before exhaustively enumerating the normative sources of Transnational Law, it must be understood that it cannot be just substance/matter, after all, if so, it will be case-by-case and truly ad-hoc, as well as not complying with the prescription according to which, matter is subjugated to the demands of form, drawing the object's identity.

Without form, Transnational Law will not be Transnational Law!

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