Transnational Law Institute convenes London Roundtable to advance private law theory and teaching

By Stephen Minas and Peer Zumbansen*

What is transnational law? What does it mean to research and teach transnational law as private lawyers? And how can engagement with the broader social theory debates over globalisation enrich this study of transnational law? These were the questions considered by the inaugural London Roundtable on Transnational Private Law Theory, which the Transnational Law Institute hosted last month at King's College London in collaboration with the Centre for Transnational Studies at the University of Bremen.

The Roundtable brought together legal and political science scholars from universities in the UK, Germany and the Netherlands to consider these questions. Over two days of presentations and discussion, participants shared their research of, and experience teaching, a broad range of private law fields. While the Roundtable produced no definitive answers, participants were able to identify an emerging research agenda and novel applications of methodology that hold much promise for advancing the study of private law in a time of flux.

Participants in the Roundtable drew on their diverse research projects to address questions ranging from human rights accountability of transnational corporations to the role that private dispute resolution can play in global commercial relations. While all participants were, by their professional affiliation and definition 'private' lawyers, the public (law) dimension of transnational private regulatory governance wound itself through the two days' discussion like a substantive red thread. The evident problems of maintaining a neat distinction between 'private' and 'public' law in relation to the transnational regulatory concepts being discussed prompted engaged debates over the proper label to be applied to norms and regulatory regimes in this transnational context. This theme ran through the discussions around transnational consumer contract law, corporate governance standards and best practices as well as investment treaty arbitration and made evident the need to place the investigations into these fields by legal scholars in a wider context of global governance studies.

Placing private law debates in this larger field, however, raises important questions concerning terminology, background assumptions, and methodology. For one, the scrutinized dynamics, which characterize the transnationalisation of regulatory regimes in a host of fields and governance areas imply enormous pressures on both public and private law insofar as these bodies of law continue to be associated with state-based actors, norms and processes of law creation. In that sense, telling examples that were discussed by Roundtable participants included the diffusion of corporate governance institutions from country to country but, increasingly, also across particular industries and markets, or the growing role of transnational arbitration not only in further elaborating procedural rules but also fomenting substantive standards and precedents. Another area of concern emerged through a study of the prominence of NGOs and 'technical' experts in setting global standards, a development that in many cases is tightly interwoven with the resort by corporations to informal processes to enforce cross-border contracts and regulatory arrangements.

In light of the diversity and the complexity of such a range of transnational regulatory governance, it comes as little surprise that valuable conceptual and analytical contributions to these investigations are increasingly coming from outside the law. Anthropologists, sociologists, economic geographers as well as economists – in particular in the areas of new institutional economics, 'social norms' as well as behavioral economics – have been offering crucial insights into the norm generation and diffusion processes we are witnessing. This broadening and multiplication of perspective prompted further scrutiny regarding the prospects of rethinking

transnational private law theory on an interdisciplinary footing. Certainly in that context as throughout the two days' of discussion, participants used the occasion to highlight the importance of embedding these investigations in a more serious engagement with questions concerning the relations between practice and theory. In other words, the discovery of the transnational interrelations between different legal fields that were traditionally conceived of (and taught) as distinct subject matter areas repeatedly prompted the Roundtable participants to raise questions about the consequences of this research for the teaching of law.

In a forceful illustration of the maxim that research ought to drive teaching and that problems prompt theorization (and not the other way around), participants lamented the fact that, for the most part, law schools risked failing to adequately prepare their students for a legal practice in which they would be prompted to understand different legal fields as against the background of changing contours of business practice, trade relations and geopolitical stakes. Participants underlined the relevance of beginning to confront students with questions of x-law 'in context' from a very early moment onwards in order to make them aware of the artificiality of the boundaries between, say, corporate and labour law, nationally-based contract law and the lex mercatoria.

For example, the Roundtable session on commercial arbitration illustrated the challenges of bringing private law theory to bear on a shifting transnational architecture of dispute settlement and resource allocation, where the clash between 'public' and 'private' interests can only properly be understood in light of the larger history and the politics of foreign direct investment, regulatory arbitrage and international economic relations. In this context, then, the denomination of such a field as one of 'private law' becomes questionable, because a functional analysis reveals a lot of overlap between 'public' and 'private'. Has commercial arbitration moved beyond 'lowest common denominator' principles to setting procedural rules and even substantive precedents? If so, concerns over the assumption by arbitral tribunals of 'governance functions' become more urgent, especially where arbitration is mandatory or contractually imposed on weaker parties. In sectors where (rarely published) arbitral awards far outnumber court cases, the 'vanishing trial' leaves in its wake the questions of how law production takes place, and on whose terms. Likewise, the constitutional itch that persists in this ambiguous zone of transnational, 'hybrid' regulatory governance, originates from both our neglect and our apparent unease with answering questions such whose interests are privileged and whose excluded?

In this vein, participants identified a number of deeper concerns that arise from a closer inspection of commercial arbitration and other, fast-evolving regulatory fields for the development of 'private law' theory. One such concern was the need to inquire whether and if so, how to adequately conceptualise transnational regulatory governance against the background of nationally grounded private law debates, in order to identify the 'juridical touchdown' where the effects of these developments are felt. Such context includes varying levels of economic development, different legal 'families' (e.g. the civil and common law traditions) and the reality that a shift from public to private law is emphatically *not* taking place everywhere. More than one participant emphasized the importance of case studies in testing theoretical approaches, highlighting one more time the importance of thinking about the ways in which such conceptual case studies could be integrated into the predominantly case-law oriented modes of classroom instruction.

Pointing to the desideratum of making students (and, arguably, some colleagues) more effectively aware of the political nature of law and legal regulation, participants emphasized the importance of theorizing the legitimacy of transnational norms and processes, especially when these serve particular interests and affect or become binding on third parties. The contribution of political science was particularly evident on this latter point. It was suggested that where standards set by a small group gain broader adherence, as in the field of financial regulation, the standards may be understood as contributing to a 'political ordering' taking form beyond the national level.

Unsurprisingly, participants differed considerably on how to address these concerns. The question of whether and how to constitutionalise transnational regulatory orders proved contentious, given that all attempts to embed private law functionality in a larger context of public regulatory concerns prompt tedious questions regarding benchmarks, reference scales and substantive-normative orientation.

Allowing for a lively and rich conversation, participants discussed their research projects with an eye open to reflections on methodology. Several participants reported using quantitative methods in their work, further illustrating the fact that, today, much theorizing of transnational private law takes place in environments that are rich in quantitative data (e.g. concerning market activity or multiple, intersecting and overlapping codes of conduct). Quantitative methods can be used to do descriptive work that then allows a researcher to ask the 'right' questions. However, it was also acknowledged that quantitative methods will often be transporting – explicitly or implicitly - political and economic assumptions (e.g. concerning shareholder value).

Participants also cited experiences of doing fieldwork, for example to examine the country-specific effects of international standards. Interviews were used to study informal and often intransparent or even opaque negotiation or implementation processes. It was telling that many of the methods recounted were departures from the discursive approach that has traditionally been central to the study of legal doctrine (one participant recalled a journal editor who had advised that 'we don't publish articles with figures').

Towards the end of the Roundtable, participants turned their attention to the possible consequences of this research for legal education. The ensuing discussion on *teaching transnational private law* centered on the question of interdisciplinarity, particularly in the context of practice-driven and/or practice-focused case studies of private law in a global context. Several reasons were advanced for bringing interdisciplinary studies into the classroom, including to foster better understanding of legal problems and to better equip students with skills and competences for their careers in a fast-changing environment, where field labels might prove superfluous. Interdisciplinary teaching is difficult, with participants reporting pushback from students. 'Ninety minutes of blood, sweat and tears', recalled one presenter. 'As soon as I put the first equation on the slide, it ends there', claimed another. Additionally, there is resistance from the profession, with UK courts less receptive to arguments grounded in economics, political science and other 'cognate' disciplines than their American counterparts (in a recent lecture at the University of Chicago, Richard Posner claimed that 'there's too much law taught in law school'). However, many participants agreed with the view that in transnational law, 'if you only teach black letter law then you have nothing to say'. Additionally, in emerging fields where there is no casebook, simply teaching doctrine is not an option.

The first London Roundtable on Transnational Private Law Theory brought together diverse strands of scholarship to scrutinize the possibilities of formulating elements or aspects of a more comprehensive research agenda. It was clear from the presentations and discussion that this investigation of the transnational dimension of private law is not about 'writing off the state', in the words of one participant. Rather, the imperative is to get to grips with pervasive regulatory, institutional and normative developments. The challenge is not just to explain and to analyse, but to enable scholars and students to take a normative position on justice and injustice beyond the courtroom and the legislature.

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* Stephen Minas is Research Fellow at the Transnational Law Institute and PhD Candidate at The Dickson Poon School of Law. Peer Zumbansen is Director at the Institute.