

Does Brexit Spell the Death of Transnational Law?

Ralf Michaels
Duke University School of Law
[\[michaels@law.duke.edu\]](mailto:michaels@law.duke.edu)

Introduction

Philip Jessup would not be pleased. Exactly sixty years after he published his groundbreaking book on *Transnational Law*,¹ a majority of voters in the United Kingdom decided they wanted none of that. By voting for the UK to leave the European Union, they rejected what may well be called the biggest and most promising project of transnational law. Indeed, the European Union (including its predecessor, the European Economic Community), is nearly as old as Jessup's book. Both are products of the same time. That invites speculation that goes beyond the immediate effects of Brexit: Is the time of transnational law over? Or can transnational law be renewed and revived?

It is worth remembering that Brexit is not an isolated event of anti-transnationalism. The most successful transnational movement today is, ironically, nationalism. Nationalists and populists in other EU Member States hope to ride the Brexit wave and inaugurate their own exits in the name of national sovereignty: Italexit, Nexit and Frexit are more than just idle word games. The EU might well collapse. And such nationalism, often with clear racist tendencies, goes beyond Europe, and beyond states within organizations. In India, Modi has instituted a new Hindu nationalism. In Russia, Putin is deploying a cynical form of nationalism. And in the United States, Donald Trump has already suggested that his campaign is about "the exact same thing" as Brexit, namely taking the country back from cosmocrats and elites. This transnational nationalism is thus about more than just membership in the EU. It is a movement for national strength, for closed borders, for controlled or restricted trade. It wants to reestablish a traditional idea of a sovereign nation state.

Leave voters have been called stupid, selfish, and xenophobic, among other things. Even if this were true (it clearly is for some, but not necessarily for all), this would not prove much. In a democracy everyone has the right to be stupid and also, up to a point, selfish and

¹ PHILIP JESSUP, *TRANSNATIONAL LAW* (1956).

xenophobic. This is not petty: we leave to democratic votes precisely those questions of politics that we do not feel we can decide objectively on a scientific basis, and we trust people to determine for themselves what is best for them. Whether membership in the EU should be open to a referendum is quite contestable. But once a referendum is called, it is not easy to reject the result and simultaneously celebrate democracy. The arguments must be taken seriously, even if we refuse to accept them. And they must inform our thinking about transnational law, even if we refuse to adopt them.

Brexit as Rejection of Transnational Law

Brexit must be understood as a rejection of transnational law because, in many ways, the European Union is the epitome of transnationalism. Jessup himself, although primarily interested in Asia, acknowledged as much. When *Transnational Law* was first published, Jessup could only mention the European Coal and Steel Community, but he already rejoiced that it had “blazed a trail for supranational authorities.”² In *Transnational Law*, Jessup famously defined 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.”³ This fit the new European Union quite well, as Jessup himself explained:

The basic treaties are pure international law, as is the rule which makes these treaties binding—*pacta sunt servanda*. But the jurisprudence of the Court of Justice of the European Communities shows that to a great extent the law of the Communities is something different—something which I would call “transnational,” which may be in part international law in the sense in which that term is used in Article 38 of the Statute of the International Court of Justice, and partly law which has certain other characteristics.⁴

The core for our understanding of both Transnational Law and European Law (and, incidentally, also Brexit) is to understand their relation to the state and to national

² *Id.* at 113.

³ JESSUP, *supra* note 1, at 2. Later in the book, in a less-often quoted passage, he clarified: “Transnational law then includes both civil and criminal aspects, it includes what we know as public and private international law, and it includes national law, both public and private.” *Id.* at 106

⁴ Philip Jessup, *Diversity and Uniformity in the Law of Nations*, 58 AM. J. INT’L L. 341, 347-8 (1964).

sovereignty. For Jessup, states were, only one of many sets of actors, besides individuals, organizations and corporations, and also supranational organizations. Sovereignty, for him, did not disappear or become irrelevant, but it had become relative. Already, in a speech from 1942, Jessup said as much: “If we can remove the snobbery and the selfishness from our international thinking, really admitting that the principle of sovereignty is not a sacred and unlimited thing, we shall be well on our way toward true international democracy.”⁵ In *Transnational Law*, he argued that “in fact the sovereign’s power is neither exclusive nor absolute within its own territory, and that this is true whether one is talking in terms of legal or extralegal power.”⁶ He could have been speaking of the EU. Member States still play a role, but they are one set of actors between individuals and regions, on the one hand, and the supranational organization of the EU, on the other hand. Sovereignty does not disappear but it is shared, as in Neil MacCormick’s insightful analysis of constitutional pluralism that generated a whole field.⁷

The Brexit movement, in rejecting the EU, rejected quite precisely the transnational law character of the EU. Of course, this is not overt in every aspect. Sure, there was likely little desire among the Leavers to reestablish legal categories such as public and private law. It also seems unlikely that the Leave campaign was animated by the desire to reject the problem-based regulatory style of the EU. What the campaign rejected, however, was the transnational character of EU law. Leavers want laws to be national. At its heart, Brexit represented a fundamentally legal concern: rules for Great Britain should be made by Great Britain and its institutions. This links lawmaking and sovereignty with the idealized sovereign state of 19th century international law: a British population without foreigners, a firmly controlled territory controlled by closed borders, and a sovereign British government that need not share authority with Brussels. And, remarkably, they also emphasize the fourth element named as a requirement for a state in international law: the ability to enter into relations with other states on its own terms. In other words, what the Leave-voters wanted was sovereignty, both in its internal and its external aspects: a Westphalian model of the world, in which states are internally sovereign, and in which international relations are exclusively dealt with as matters between states.

⁵ *Jessup Calls International Democracy Post-War Ideal*, 65 COLUMBIA DAILY SPECTATOR No 131 (2 (June 1942), p. 1, available at <http://spectatorarchive.library.columbia.edu/cgi-bin/columbia?a=d&d=cs19420602-01.2.7&e=-----en-20--4934--txt-txIN-columbia---50-->.

⁶ JESSUP, *supra* note 1, at 41.

⁷ Neil MacCormick, *Beyond the Sovereign State*, 56 MODERN LAW REVIEW 1 (1993); Neil Walker, *Constitutional Pluralism Revisited*, 22 EUR. L.J. 333 (2016).

The Nostalgia of the Nation State

Much of this desire is driven by nostalgia for a past that never was. There is the right-wing nostalgia for a Britain that was not only powerful and prosperous but also, by and large, white. Some of this is nostalgia for Empire, a nostalgia both unrealistic and abhorrent. More plausible is the nostalgia for the nation state. There is the left-wing nostalgia for a functioning welfare state, for a strong left that can actually improve workers conditions and can fight understandable fights with understandable enemies (workers against capitalists). This hope for a return to the nation state is misguided. There is no way back. The nation state in its 19th century idealized form is a mirage, and self-regulation in isolation can no longer work.

Start with the idea of sovereignty. We know it to be a construct and a highly problematic one. Krasner has called it, with some justification, organized hypocrisy. Jessup made the point earlier, from a realist perspective:

The very existence of a government of a state is a fiction, for a state is an intangible, and our international law picture of a sovereign state never had life. Sovereignty is essentially a concept of completeness. It is also a legal creation, and as such, is a paradox, if not an absolute impossibility, for if a state is a sovereign in the complete sense, it knows no law and therefore abolishes, at the moment of its creation, the jural creator which gave it being. All juristic persons, indeed, as Charles De Visscher has pointed out, are fictions created by a superannuated doctrine which should be discarded.⁸

But the idea of the state as the fundamental entity is problematic in other ways. Insofar as the dream of the Leavers is to go back to the nation state with a shared identity, the futility of the dream is showing, not least from the voting results. A country cannot be said to have a clear national identity if, in a referendum, it splits almost evenly on what that identity is. Indeed, the split is not random but tracks various societal differentiations: young versus old, urban versus rural, educated versus uneducated. The idea of one country with one identity and one national interest is refuted by the results of the very referendum that sought to reclaim the notion.

⁸ Philip C. Jessup, *International Law in the Post-War World*, 36 AM. SOC'Y INT'L L. PROC. 46, 49 (1942).

Indeed, the UK is one of the stranger models for a nation state, not least because it consists of several nations: besides England, there are Wales, Scotland, and Northern Ireland. Scotland and Northern Ireland voted with significant majorities to remain in the EU. Both are now considering an exit from the UK in order to make that happen. The Leavers run into the familiar conundrum from international law discussions on secession and self-determination: if the UK can split from the EU, why should not Scotland split from the UK? Why is it wrong for Brussels to make rules for London, but right for London to make rules for Glasgow? Who is the *self* in self-governance?

There is one answer, and it should not be dismissed out of hand.⁹ One might say that sovereignty does not require homogeneity of a shared identity. Quite the contrary: the state is that very institution that provides robust procedures to create decisions that can be accepted amongst diverse views. Nation states (especially the UK with its parliamentary supremacy) provide the relevant institutions for democratic decision-making. They have functioning parliaments, a functioning court system, a functioning government. And they have elected officials who can be held accountable.

This seems plausible in theory but it has two shortcomings. First, it is not clear that voters actually accept decisions made under the procedures provided by the state; the referendum itself may be a test case. Second, and more importantly, it is not clear that the state's institutions are particularly well-versed for transnational problems. These institutions remain national in their setup and in their functioning. As they stand, these institutions are adequate for national, not transnational issues.

This is where the second mirage becomes evident, the mirage of self-governance. When Jessup suggested that "the sovereign's power is neither exclusive nor absolute within its own territory," he expressed an important fact. There are many issues that are effectively decided outside of the sovereign. There are issues on which states are almost bound to follow the demands from other states—not by law, but by necessity. Neighbors of the EU know of the need to enact EU legislation in order to be compatible. Even seemingly robust states strive to comply with EU data privacy standards in order to serve as "safe havens." Poorer countries have even less choice. They have to enact certain product and labor standards in order to be allowed to export. They may have to grant foreign investors specific privileges. Their sovereignty is formal, but in effect they are regulated from elsewhere through economic pressures, even without the formalities of a system like the EU. Jessup knew about this interdependence. British proponents of Brexit, if they did not, will soon learn it.

⁹ See, e.g., Richard Tuck, *The Left Case for Brexit*, DISSENT (June 6, 2016), available at https://www.dissentmagazine.org/online_articles/left-case-brexit.

Jessup's focus, in positing transnational law, was especially on problems that transcend borders—which defines, at least traditionally, the limited competences of the EU. But Jessup already demonstrated that there is no clear boundary between domestic and transnational problems, and that traditional distinctions tend to be arbitrary.¹⁰ Realistically, an increasing number of problems must be characterized as transnational, and it is not surprising therefore that the EU has claimed ever broader competences. Now, these transnational problems cannot be resolved through isolated self-regulation on the level of the nation state. By necessity, citizens in or from several countries are involved—the very justification for regulation at the EU level. Immigration concerns, which seem to have been the biggest driver of the referendum's outcome, show this nicely. Immigration control can be defined as a national problem, but that is artificial. Immigration is by definition a transnational problem: it concerns the immigration country, the emigration country, the refugees in transit between the two, and also other countries that will need to bear the costs of one country's permissive or restrictive immigration policies. Much was made of the claim that Angela Merkel, in accepting the European duty under international law to accept masses of refugees, was indirectly imposing on other countries as well. But the Brexit demand for self-regulation is, in itself, the demand that the UK should be allowed to regulate refugees and thereby, indirectly, impose on other countries, without giving them a say. That may be justifiable, but not as self-regulation.

Again, there is a more sophisticated version of this argument. It says that even when problems are transnational they need not be regulated on a supranational level. It would be better to resolve them through coordination among individual states, and such regulation requires sovereign states. The Leavers made much of the UK's enhanced ability to enter into agreements, both with third countries and with the EU. And indeed, in many ways, such decentralized regulation is often superior to supranational regulation. But it seems questionable, to say the least, that such coordination is easier from outside than from inside the EU. One can well speculate that a vote for Brexit is really largely a vote against coordination, not for better coordination.

This is not to say that the EU is the optimal mechanism for coordination. It is not a mere coordination institution, and one may well argue that its impulse for harmonization has gone too far. But the Leavers grossly overestimate the space for political freedom that Brexit creates. In view of existing networks, it will be very difficult for the UK to independently negotiate better conditions and, thus, essentially secure more regulatory space for itself than would have been possible from within the EU Switzerland and Norway are sometimes named as models. But one would think the UK's ambition goes beyond

¹⁰ *Id.* at 11.

these autonomy and authority of these countries. Leaving the EU means escaping from some outside influence, but it results in the UK losing even more influence.

The Nostalgia of Transnational Law

If the desire to return to the nation state is a sign of nostalgia, then why is it that so many people prefer it over transnational law? One answer, I suggest, is perhaps surprising: transnational law itself is marred by its own nostalgia. Nostalgia for Jessup can be viewed, perhaps, in the frequency with which his book on *Transnational Law* is invoked as a book for our, not its, time. Nostalgia for the European Union can be viewed, for example, in a curious statement from 25 June 2016, in which the foreign ministers of the six original founding Member States invoked the Community's founding in 1957 and assure themselves of that project's continued importance.¹¹ Both stem from a time that is no longer ours. Just as we cannot go back to the 19th century sovereign state, so we cannot go back to the mid-century world.

In many ways, reading Jessup's *Transnational Law*, like reading statements around the founding of the European Communities, is a journey into another time, the era of the *Pax Americana*. That era was influenced by the recent experience of the catastrophe of two World Wars, and it was characterized by an emerging Cold War. The first of these experiences suggested the risk of nationalism, the second suggested the risk of collectivism. Transnationalism and individualism, in the form of free markets, were the apt responses. But this describes only what was to be rejected—in that time and in that place. Beyond that, both *Transnational Law* and the European Community were hopeful projects. Jessup's *Transnational Law* exudes the optimism of its time: problems exist, but they can be solved. There is some utopian quality to it, but it is a very finely chiseled and detailed utopia. It is a manifesto of a generation that sees big tasks ahead but feels up to resolving them, with the right instruments and the right attitude.

It is necessary, however, to consider carefully what these instruments and this attitude were. Jessup's approach to transnational law was influenced by legal realism: He suggested that one should start with concrete problems rather than the abstract categories. What was needed was expertise: not expertise in legal doctrine, but expertise in real world

¹¹ See Common Statement by the Foreign Ministers of Belgium, France, Germany, Italy, Luxemburg and the Netherlands, 25/06/2016, *available at*

http://www.auswaertiges-amt.de/EN/Infoservice/Presse/Meldungen/2016/160625_Gemeinsam_Erklaerung_Gruenderstaatentreffen_ENG_VERSION.html.

See also <https://euobserver.com/political/132204/>.

problems and their solutions. He trusted institutions and officials to display this kind of expertise. He praised Mixed Arbitral Tribunals for their creativity in developing new and attractive rules in the lack of established ones, and suggests that national judges should be able to do something similar. At least in principle this is still the approach that the EU takes in its lawmaking. Most secondary law is formulated as a response to a concrete problem that has surfaced. One may well criticize the EU for its narrow focus on the problems confronting a free market. One may also claim that the EU sometimes sees problems that are not really there. But that does not change the methodological point.

What could be wrong about all this? For one, Brexit demonstrates that governance by experts is unpopular. This should not just be irrational. David Kennedy demonstrates in his latest book some of the problems of expert-based governance and how it can lead to injustice.¹² There are many reasons for this, but the simplest may be this: it is undemocratic. Expert-based governance depoliticizes decisions and turns them into observable truths. Such depoliticization may have seemed appropriate in view of the experience with Nazi Germany and the Soviet Union. Today it has become problematic. In the light of such expert opinions it appears that Brexit supporters relied on the power they had: they may be wrong, their vote may not even be to their benefit, but at least they are able to stick it to what they perceive as the elite.

This leads to a broader problem for transnational law, the problem of democratic responsibility. Jessup speaks of the wealth of rules, he speaks of jurisdiction and he speaks of choice of law, but he does not speak of accountability. Admittedly, Jessup spoke forcefully for international democracy elsewhere.¹³ But even there, this democracy often seemed more instrumental than intrinsically good. Democracy was important to fend off the Soviet Union (that did not support it, at least in the Western way). But it is not clear that it plays a role for the development of transnational law. And as for the EU, its democratic deficit has never been fully resolved, and it is not clear that there is enough political will to fix it. In many ways, the EU was set up precisely in order to overcome the narrow national interests that make their way into national legislation.

Indeed, arguably, this anti-democratic position was once a virtue. In the aftermath of the experience with Nazi Germany, the idea of populist control was deeply suspicious, at least for Europe. In the European postwar mind, the depoliticization of important questions

¹² DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW & EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* (2016).

¹³ See, e.g., Jessup, *supra* note 5; Philip C. Jessup, *Democracy Must Keep Constant Guard for Freedom*, 25 DEP'T ST. BULL. 220 (1951).

seemed a good thing: it made it possible to ensure that rational decisions would be taken. In this story, what made the postwar world prosper and what made transnational law successful was precisely that it held populist control in check. The international human rights movement spoke truth to power, even where that power rests in overwhelming popular majorities, and even where the “truth” was normative and contestable. The emerging transnational commercial law was successful because it was able to free itself from democratic state control. And the EU was able to hold national governments accountable not just *vis-à-vis* foreigners but also *vis-à-vis* their own citizens, an aspect that Christian Joerges has emphasized. The disdain for the leave voters is a successor to the disdain for Nazi populism. Discord may exist within, not about, the system. This somewhat restrained view of democracy is now seeing its limits: people revolt against decision-making process in which they do not feel represented.

This leads to a further aspect. For Jessup and for the European Union, the focus on the individual was closely linked to a preference for competition and capitalist markets. Party autonomy has been greatly expanded and private ordering has been celebrated. Not all individualism in transnational law has this focus on markets; the human rights movement is, in parts, anti-capitalist. Nonetheless, it appears that individualism itself is being rejected. In Brexit we see this with particular strength. The hope of many of the Leavers was to avoid the harsh individual competition of the common market, in favor of a national community, whether in the leftist view of solidarity and the welfare state or the rightist view of a racially homogeneous nation.

A final aspect follows from this, and it may be the most important one: Transnational law is potentially elitist. Transnational law, like increased Europe-wide competition benefits some and injures others—it benefits the British elites and the famous Polish plumber; it hurts the British worker. If, as we know, the educated were against Brexit and the uneducated were for it, then that may suggest that votes for Brexit were simply dumb. But it may also suggest that the EU benefits the educated more than it benefits the uneducated. Similarly, it is undoubtedly xenophobic and selfish to oppose human rights, including rights for refugees. But it is at least understandable in view of the fact that, of course, human rights for some individuals have spillover effects on others. This is a reason why we usually do not leave decisions on human rights to a majority vote; the fact that the Brexit referendum has such effects is one of the most unfortunate aspects.

The elitist potential of transnational law is no accident. It is a reflection of the new stratification of world society, creating a transnational upper class that travels and communicates freely across borders, and a national underclass that remains local and cannot participate in the benefits of the upper class. In this sense, the solidarity amongst nationalists worldwide is not paradoxical. Transnational law, insofar as it concerns transnational problems, threatens to be the law of that transnational elite. It may care for

the transnational underclass (especially migrants), but not the local underclass. As such, it is no surprise that the underclass opposes it.

What Is to be Done

All of this does not suggest that transnational law is dead. The simple return to the nation state is not the answer, despite the nostalgia that surrounds it. Transnational problems are not solved by national laws in isolation. There is no alternative to transnational law. But we must realize that transnational law has a dark underbelly. That underbelly was not so visible in the 1950s, and maybe it was not so important. Today it is important and should not be underestimated. Transnational law, like any other area, benefits some and hurts others. It must be developed without nostalgia. That means that some aspects that are often underappreciated must be addressed.

One of these aspects is elitism. Transnational law, by and large, is a project made by a transnational elite, a transnational network of scholars and decision-makers. It is also, widely, a network made for a transnational elite, namely those who benefit from transnationalism, whether in its market liberal form or its human rights form. Transnational law likes to take on the fate of the poor elsewhere—exploited workers in Bangladesh, environmental victims in Ecuador. It does not always sufficiently endorse the issues of the have-nots at home, especially where these have-nots display unattractive characteristics such as racism and xenophobia. This is the problem of exclusion. Market liberal transnationalists let the weak collapse. Leftist transnationalists let the xenophobes collapse. It is no wonder, then that weak xenophobes most vociferously reject transnationalism. The Brexit voters are those who felt excluded, and the disdain that we pour on them suggests that they are not wrong in feeling that way. There is something charming in the current movement for London to separate from the UK. But we cannot go back to a Hanseatic League of transnational cosmopolitan, cities and leave only the countryside to the nation states.

The lack of democratic accountability is a second, related problem. It is not enough to try to extend the benefits from transnationalism to the have-nots because they may reject this as paternalism—the fact that so many in the UK who oppose the EU are the ones who benefit from it makes this clear. This is a particularly tricky challenge. We have come to develop our ideas of democratic accountability in the nation state. This is why proponents of democracy are among the opponents of transnational law and the EU. If that is not an option, then better concepts of actual democracy, self-determination and accountability are needed. Transnational law in Jessup's conception did not provide for this; today it must be found.

A third problem concerns, ironically, Jessup's favored approach to problem-solving. The realist idea of law as a solution for a problem seemed attractive in many ways. Today we realize that it underestimates the symbolic value of law. The Brexit nostalgia for the British state is also a nostalgia for the symbolism of nationally made law, which has more attraction than Brussels. There is no other explanation for the paradox that the leave campaign voted in favor of the supremacy of a Parliament which itself, by a large majority, is opposed to the Brexit. The European Union has always hoped to establish an identity and a positive image; but its image remains that of a cold regulator of bananas. As concerns marketing, transnational law may be able to learn from human rights law with its widely shared positive image. But the problem is not merely one of marketing. Transnational law must also take seriously that law itself has symbolic power. Law goes beyond regulation—it aspires and inspires and expresses a vision of our better selves.

Jessup was aware of the power the have-nots could yield if their problems remained unaddressed:

When such issues as we have been describing attain certain proportions or degrees of intensity, something is done about it. If it is not done by the haves, the have-nots may resort to domestic violence, or to international war, or to the General Assembly of the United Nations.¹⁴

Or to Brexit, one might add. For Jessup, transnational law was the answer to such issues. For today's have-nots today, transnational law is part of the problem. Transnational law will need to regroup in order to respond to their plea.

[The author offers thanks for valuable comments to Jed Purdy]

¹⁴ JESSUP, *supra* note 1, at 32.

