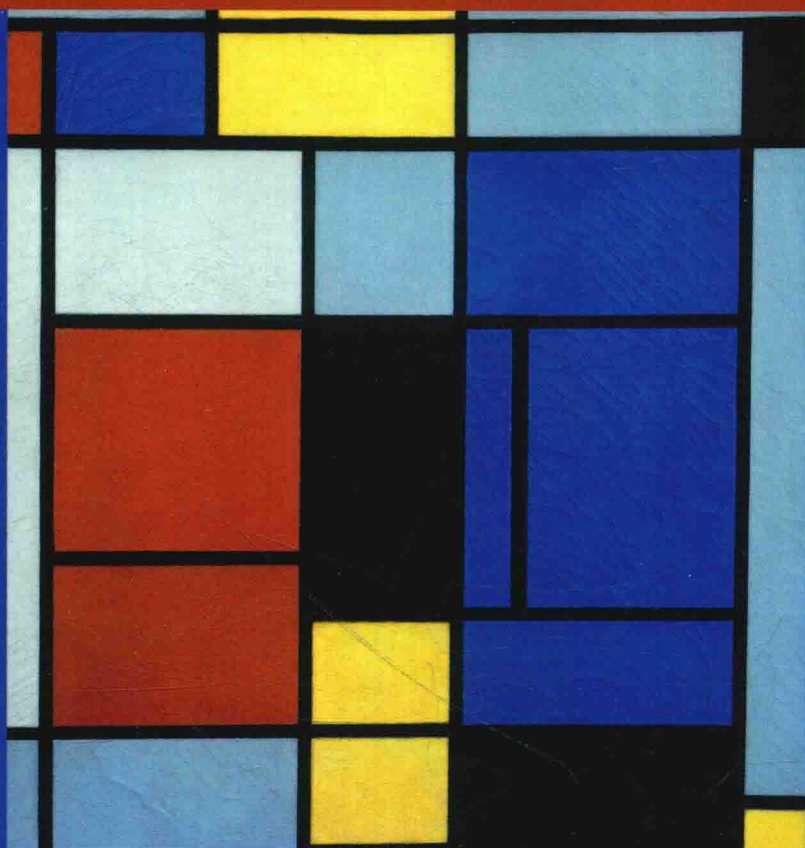


Cambridge Studies in Law and Society



TRANSNATIONAL LEGAL ORDERS

Edited by

Terence C. Halliday and Gregory Shaffer

CAMBRIDGE

Transnational Legal Orders

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TRANSNATIONAL LEGAL ORDERS

This book offers a pathbreaking, empirically grounded theory that reframes the study of law and society. It shifts research from a predominantly national context to one that places transnational, national, and local lawmaking and practice within a single, coherent, analytic frame.

By presenting and elaborating a new concept, *transnational legal orders*, Halliday and Shaffer present an original approach to legal orders that affect fundamental economic and social behaviors. The contributors generate arrays of hypotheses about how transnational legal orders rise and fall, where they compete and cooperate, and how they settle and unsettle.

This original theory is applied and developed by distinguished scholars from North America, Europe, and Asia in business law (taxation, corporate bankruptcy, secured transactions, transport of goods by sea), regulatory law (monetary and trade, finance, food safety, climate change), and human rights law (civil and political rights, rule of law, right to health/access to medicines, human trafficking, criminal accountability of political leaders).

Terence C. Halliday is a codirector of the Center on Law and Globalization and a research professor at the American Bar Foundation; Adjunct Professor of Sociology at Northwestern University; and Adjunct Professor, Regulatory Institutions Network at the School of Asia and the Pacific, Australian National University. He is the author or editor of numerous books and articles on professions, globalization, law, markets, and politics. He is the winner of multiple prizes from the American Sociological Association for his 2009 book *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (with Bruce Carruthers). Halliday is the 2013 recipient of the Podgorecki Prize for distinguished scholarship from the International Sociological Association's Research Committee on the Sociology of Law.

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Advance praise for *Transnational Legal Orders*

“This thoughtful volume helps explode the traditional matrix that has too long artificially divided law and lawmaking into rigid domestic and international, public and private cells. Having previously explored how transnational legal ordering changes states, two innovative social scientists have enlisted an impressive stable of interdisciplinary investigators to track how transnational legal orders evolve dynamically to constrain and facilitate social conduct in the business, regulatory, and human rights spheres. Their rich selection of case studies illuminates the growing array of techniques that transnational actors now deploy to develop legal norms and foster their percolation and penetration into the architecture of complex transnational legal orders.”

– Harold Hongju Koh, Sterling Professor of International Law,
Yale Law School, and former Legal Adviser, U.S. Department of State

“This book provides an integrative frame to the study of the rise, the change, and the practice of transnational legal orders. It is theoretically innovative, interdisciplinary, and enlightening. In addition, a set of rich and rigorous case studies uses this frame in a most productive way. The outcome of this effort written from a legal perspective is something that the IR study of global governance has been missing: a major step toward an integrated theory.”

– Michael Zürn, Director at the WZB (Berlin Social Science Center)
and Professor of International Relations at the Free University Berlin

“This is a theoretical landmark of socio-legal scholarship. The empirical chapters make a persuasive case that transnational legal orders can be a more serviceable framework today than national law or global law. In a book that is a delight to read, great scholars present a clear exposition of how transnational legal orders are recursively created as they transform other local, national, and transnational orders.”

– John Braithwaite, Distinguished Professor and Founder of RegNet
(the Regulatory Institutions Network), Australian National University

“This is a milestone contribution. Shaffer and Halliday and their authors develop a powerful new framework of inquiry that brings out the best in theoretical and empirical global governance research: problem-driven with cutting-edge scholarly analysis regarding law in a global context; the changing and evolving roles of norm-creating actors, institutions, and processes; and the political implications of this emerging sphere.”

– Peer Zumbansen, Professor of Transnational Law and Director,
Dickson Poon Transnational Law Institute, King's College London

CAMBRIDGE STUDIES IN LAW AND SOCIETY

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Acknowledgments

It is a rare and therefore all the more rewarding experience to develop a bold idea in thoughtful engagement with specialists in sharply different issues of international consequence, but who may never talk to each other, or talk across disciplinary barriers of theory and method. Such was the pleasure of our collaboration with international lawyers, political scientists, sociologists, anthropologists, and law and language experts in this project on a hitherto invisible phenomenon – transnational legal orders (TLOs).

A test of the verisimilitude of a new concept is to ask experts to examine, through the lens of this theoretical tool, global problems of great policy consequence, yet problems that are seldom held in juxtaposition. If the concept has the power to open new vistas, raise fresh questions, explain old problems, identify overlooked actors, reveal hidden dynamics, and open up research agendas for specialists who are already authorities on international crime or financial law or business regulation, then the concept has a musculature that inspires confidence in its wider application.

By the same token, if the nuanced understanding of specialists tests the concept and theory of TLOs, forcing its progenitors to adapt and refine it, to qualify its application or recognize its potential distortions, then the collaboration becomes a theory-building moment that is truly emergent – more than any of its contributors might have imagined alone.

For these reasons, we are most grateful to the superb contributions in writing and other exchanges of Susan Block-Lieb, Dan Bodansky, Tim Büthe, Philipp Genschel, Larry Helfer, Eric Helleiner, Paulette Lloyd, Rod Macdonald, Sally Merry, Leigh Payne, Jothie Rajah, Thomas Rixen, Beth Simmons, and Michael Waibel. We have repeatedly gone back to them, and they have repeatedly responded with insight, grace, and patience.

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conference at UCLA; the Midwest Colloquium on International Law/International Organizations of the Center on Law and Globalization; and workshop presentations at Australia National University, Berkeley, Kings College London, Irvine, the Max Planck Institute for Studies in Society, Minnesota, Stanford, Utah, and Wisconsin.

For generous funding for the original 2012 conference, we thank particularly the University of Minnesota Law School, and for additional support, we thank the American Bar Foundation. Terry Halliday expresses thanks to RegNet, School of Regulation, Justice and Diplomacy, the Australian National University, for hosting and support during the course of this collaboration.

Two anonymous readers of the manuscript provided insightful responses to Chapter 1 and the volume as a whole. Cambridge University Press editor John Berger and series editor Sally Merry were extremely helpful, as always.

It is with deep admiration that we acknowledge the remarkable life and scholarship of Rod Macdonald, a distinguished Canadian scholar and legal statesman, who died as this volume went to press. Rod told us that his chapter in our book would be the last of what we know has been a distinguished line of publications reaching back decades and exerting influence across law and interdisciplinary studies throughout the world. We are glad and humbled to memorialize his remarkable life and work in this small way.

If this volume spurs an imaginative way to understand meaningfully a form of social order hitherto barely recognized, then the complementary contributions of all those named here will have generated a new scholarly path with hitherto scarcely imagined theoretical, empirical, and policy consequences.

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Introduction

Transnational Legal Orders

Terence C. Halliday and Gregory Shaffer

Social orders increasingly are legalized transnationally. Whether the social order concerns observance of civil rights or financial stability, the facilitation of trade or the protection of public health, the regulation of noxious chemicals or the movement of peoples, protections for women or formation of new businesses, the ordering of responses to these issues inside the state and across national frontiers seems progressively to reach beyond domestic to transnational legal norms. This book aims to build theory and empirical understanding of transnational legal orders. It does so by reframing the study of law and society in today's world from a predominantly national context – or one that dichotomizes the study of international law and national law, or international regimes and national politics – to a perspective that places processes of local, national, international, and transnational public and private lawmaking and practice in dynamic tension within a single analytic frame. The book shifts attention from a dualist orientation toward international law and national law to a focus on how legal norms are developed, conveyed, and settled transnationally, integrating both bottom-up and top-down analyses. Our interest is on social ordering and how it is produced in discrete domains through human rights, business, and regulatory legal norms that are transnational in scope.

Since the rise of sovereign nation-states in the seventeenth century, law has been conventionally associated with the law of the nation-state. National law was “an essential element... of national construction,” facilitating social integration, public order, and the resolution of conflict through the nation-state's monopolization of the legitimate use of force (Glenn 2003: 839). Accordingly, the study of law and society conventionally focused on nation-state law and practice. From this perspective, to quote the great jurist Oliver Wendell Holmes (1963: 5), “[t]he law embodies the story of a nation's development.” Or as the inscription of the classic 1815 Courthouse (Domhus) in Copenhagen states, “With Law We Shall Build the Land.”¹

¹ The Danish reads: “Med lov skal man land bygge.”

International law developed concomitantly with the creation of nation-states, pursuant to which nation-states mutually recognized each other's sovereignty, including the exclusive authority of each to make and apply law within its borders, and thus to be free from interference in its "internal affairs" (Glenn 2003). The conventional concept of *international law* is thus nation-state-centric in that it largely addresses relations between nation-states, and not legal ordering within nation-states (Malanczuk 1997:3). The Westphalian legal order was built on these two pillars of national law (within a national constitutional order) and international law (regarding inter-state relations). Because law and society scholarship focuses on the relation of law to actors and communities within particular societies, in contrast to the traditional study of international law that reifies the nation-state, there has been much less law and society scholarship assessing international law.

Modern processes of economic and cultural globalization have, in recent decades, blurred the basic coordinates of the Westphalian nation-state juridical system (Walker 2010). In response to these transformations, scholars have increasingly explored new concepts of "global" and "transnational" law to make sense of legal processes that are not adequately captured by the concept of international law (Twining 2000; Tamanaha 2008; Zumbansen 2010; Berman 2012; Shaffer 2013). The term "global" law implies that legal norms are being created and diffused globally in different legal domains that do not necessarily involve traditional international law between nation-states.² Such terminology of "global" law is misleading because much legal ordering today is not global in its geographic reach, but it nonetheless involves variation in legal ordering beyond the nation-state. Because the geographic, substantive, and organizational scope of such legal ordering varies, and because it involves both public and private actors, these processes are best captured by the concepts of *transnational legal orders* and *transnational legal ordering*.³

² See, e.g., Boyle & Meyer 1998: 213–232 (applying a world polity model); Braithwaite & Drahos 2000 (examining thirteen areas of business law); Kingsbury 2009a: 3 (the global administrative law project chose the title of "global" administrative law under the intuition that regulatory structures are being pressed to respond to common demands "that have a common normative character, specifically an administrative law character. The growing commonality of these administrative law-type principles and practices is building a unity between otherwise disparate areas of governance").

³ For recent conceptual and empirical analysis of transnational law and legal ordering, see Shaffer 2013 (including a literature review around two conceptions of transnational law) and Cotterell 2012. For earlier distinctions between international law and transnational law, see Jessup 1956, and between international and transnational society, see Friedmann 1964: 37 ("international society is represented by the traditional system of interstate diplomatic relations, the relations of 'coexistence'"). See also Steiner et al. 1994; Vagts 2010.

Existing work on the development of global and transnational law has not focused on the production of *order*, or, in our terms, on the *normative settlement* of law, within nation-states and societies. This book, in contrast, focuses on the settlement and unsettlement of legal norms at different levels of social organization, from the international and transnational to the national and local. It does so with respect to discrete, differentiated areas of law. These differentiated areas define the legal scope of a transnational legal order (TLO), which combine with its geographic scope to determine the boundaries of a TLO.

The development and normative settlement of TLOs differing in their legal and geographic scope raises the ensuing question of how distinct TLOs *align* with a particular issue and how these TLOs interact. Although there has been considerable work on the fragmentation of international law and international regimes (Raustiala & Victor 2004; Koskeniemi 2006; Alter & Meunier 2009), the existing literature has not focused on how the alignment of one or more international (or, in our terms, transnational) legal orders affects the legal order's institutionalization at different levels of social organization. In this book, we examine the relation of one or more TLOs' alignment with an issue to the institutionalization of legal norms across national jurisdictions and levels of social organization. Together these two dimensions of normative settlement and TLO alignment shape the *institutionalization* of a TLO, which occurs multi-directionally and recursively up from and down to the national and local levels.

In a recent book project, we investigated the question of how transnational legal ordering affects state change (Shaffer 2013; Halliday 2013). This new book project asks the ensuing and fundamental question – how do *transnational legal orders* rise and fall in their capacity to constrain and enable behaviors in diverse spheres of social life? Subsumed under this question are three subsidiary questions. First, what is a transnational legal order? Here the issue is: What is ordered? What behaviors are entailed in the notion of order? From a law and society perspective, these questions are fundamental for the study of law, whether law is viewed in international, transnational, national, comparative, or local terms. Second, what is a transnational *legal* order? If there are varieties of orders – social, political, economic – what is it about a *legal* order that renders it distinctive? Third, what is a *transnational* legal order? Why transnational rather than bilateral, regional, international, or global?

The answers to these questions ground our definition of a TLO as *a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions*. We construe “associated organizations and actors” broadly to include any organization or social formation, including networks. By actors we refer both to collective