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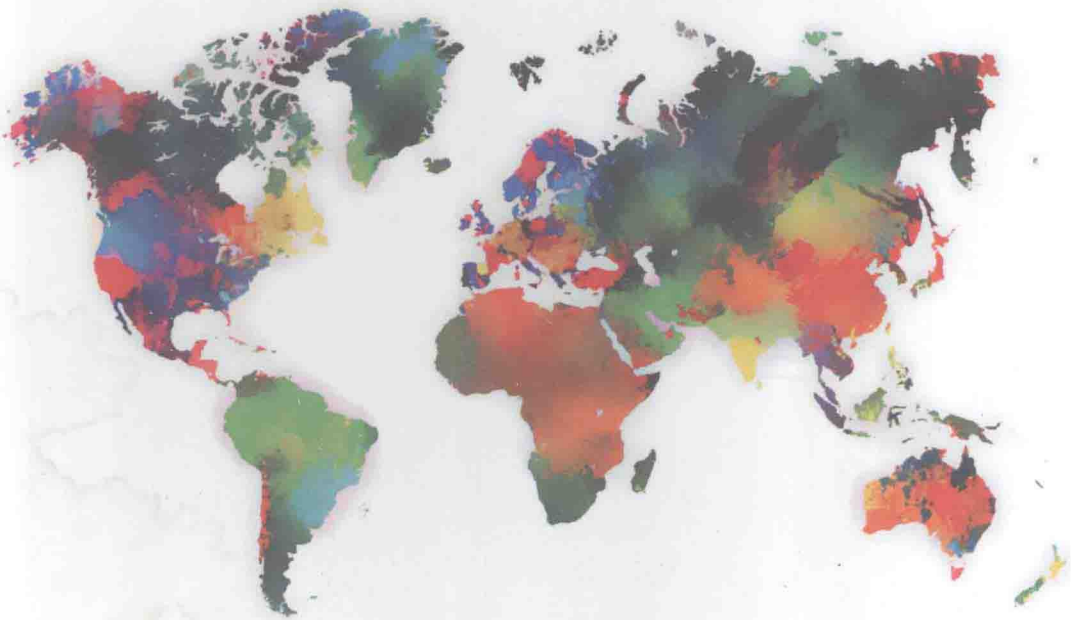
Transnational Legal Ordering and State Change



Edited by Gregory Shaffer

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Transnational Legal Ordering and State Change

Edited by
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TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE

Law can no longer be viewed through a purely national lens. Transnational legal ordering affects the boundary of the state and the market, the allocation of power among national institutions, the role of professions and their expertise, and associational patterns that provide new normative frames. This book breaks new ground for understanding the impacts of transnational legal ordering within nation-states in today's globalized world. The book addresses the different dimensions of state change at stake and the factors that determine these impacts. It brings together leading scholars from sociology and law who study the effects of transnational legal ordering within different countries. Their case studies illustrate how transnational legal ordering interacts with national law and institutions in different regulatory areas, and cover anti–money laundering, bankruptcy, competition, education, intellectual property, health, and municipal water law and policy in different countries. The book explains the extent and limits of transnational legal ordering in today's world.

Gregory Shaffer is the Melvin C. Steen Professor of Law at the University of Minnesota Law School and Affiliated Professor in the Department of Political Science. His other publications include *Dispute Settlement at the WTO: The Developing Country Experience* (with Ricardo Meléndez-Ortiz, 2010); *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (with Mark Pollack, 2009); *Defending Interests: Public-Private Partnerships in WTO Litigation* (2003); *Transatlantic Governance in the Global Economy* (with Mark Pollack, 2001); and more than seventy articles and book chapters.

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I dedicate this book to my wife Michele Goodwin, and our children Brooks and Sage, whose love and sustenance ease life and make it joyful and rewarding.

Notes on the Contributors

Elizabeth Heger Boyle, Professor of Sociology and Law at the University of Minnesota, studies the role of international laws and policies in children's survival and development around the world. She has written extensively on the impetus for, and impact of, laws related to female genital cutting. Her current research is a cross-national study of abortion policies and teen birth rates. Professor Boyle's research has been supported by the National Science Foundation and the National Institutes of Health and appears in many outlets, including *Law & Society Review*, *Law & Social Inquiry*, and *Social Problems*. Professor Boyle received a J.D. from the University of Iowa in 1987, practiced law for several years, and then received her Ph.D. in sociology from Stanford University in 1996.

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Karen Yeung, Cambridge 2007), and editorship of *The Intersection Between Rights and Regulation: New Directions in Socio-legal Scholarship* (Ashgate 2007).

Gregory Shaffer is Melvin C. Steen Professor of Law at the University of Minnesota Law School and Affiliated Professor of the Department of Political Science at the University of Minnesota. Professor Shaffer's work applies a socio-legal approach to international and transnational law. A recipient of two National Science Foundation awards, he is the author of more than seventy articles and book chapters, as well as the books *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (Oxford University Press 2009) and *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings Institution Press 2003); he edited the volumes *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge University Press 2010) and *Transatlantic Governance in the Global Economy* (Rowman & Littlefield 2001).

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Transnational Legal Ordering and State Change

Gregory Shaffer

We live in an age of transnationalism. We always have, but its intensity has increased. The sources of US law, for example, derive in large part from empire. Most remotely, they come from Rome. Closer in time, they come from England and its common law heritage. Most recently, they reflect the intensification of transnational economic and cultural interactions, which have catalyzed a proliferation of international, regional, and bilateral agreements, regulatory networks, and institutions that foment and promote legal and institutional change. We unconsciously experience such transnationalism in our daily lives, and we sometimes embrace it. Yet, we can also be anxious about its effects on our social order and our identities. Our laws and legal systems reflect how we see ourselves and our communities. As the migration of law across borders intensifies, we can become anxious about it, as illustrated by the US clamor over citations to foreign and international law and legal decisions in federal courts.

Legal norms in almost all domains of law circulate around the globe. The norms do not travel by themselves. Actors convey them, whether instrumentally or reflexively. The norms are sometimes codified in international treaties, whether of a binding or nonbinding nature. At other times, they are diffused through informal processes involving bureaucratic networks of public officials; transnational networks of private actors such as business representatives, nongovernmental activists, and professionals; and hybrid combinations. Over time, distinct *transnational legal orders* may emerge that impose or impart legal norms governing particular areas of law. Where the transnational legal norms are relatively clear, coherent, and accepted, the transnational legal order can be viewed in systematic terms. Where they are less so, the transnational legal order is more contingent and fragile. The effects of transnational legal norm conveyance, however, are not homogeneous across states. They vary in light of identifiable factors. *Transnational legal processes*, the processes through which these norms are constructed, carried,

and conveyed, always confront national and local processes, which may block, adapt, translate, or appropriate a transnational legal norm, and spur its reassessment – in other words, feeding back into the modification of transnational legal norms.

This book contends that, in vast areas of law today, one cannot understand domestic legal change and legal practice without understanding transnational legal ordering. Counterfactually, take out the transnational story and what one would see across jurisdictions would be quite different. The centrality of transnational legal processes can best be understood through empirical work involving discrete domains of law that address the *interaction* of transnational lawmaking and national legal practice, holding them in tension. To understand transnational legal ordering, one needs to not only assess the development of international and transnational legal norms (the focus of much international law scholarship), but also evaluate their impact on practice in national legal systems. Such studies can be viewed as combining international and comparative legal analysis, and international and comparative political economy, within a single sociolegal frame.[1]

Although the terms transnational law, transnational legal process, and state transformations are increasingly used, we need both clarifying conceptual work and detailed case studies applying it. There have been intensive debates over the concept and operation of "legal transplants" among comparative law and sociolegal scholars (Nelken & Feest 2001). However, as William Twining (2005: 237) writes, "[p]erhaps the most striking aspect of the literature is that it very rarely tells us in any detail about actual impact on the ground." This book aims to provide both clarifying conceptual analysis and empirical grounding. It first sets forth a sociolegal analytic framework for empirically assessing transnational legal processes and their deeper implications and variable impacts within states. It then follows through with five case studies of transnational legal processes' differential effects in six regulatory areas. This introductory chapter clarifies the concepts of transnational law, legal process, and legal ordering in relation to alternative approaches that have been used to study international and transnational law. The case studies then apply the framework, and, at the same time, the framework draws from them. In this way, the book provides an example of what I have elsewhere called "emergent analytics," analytics that oscillate between empirical findings, abstract theorizing, real-world assessment, and back again (Nourse & Shaffer 2009; Shaffer & Ginsburg 2012).

[1] For two leading sociolegal books in a related vein, see Halliday & Carruthers 2009 (focusing on the globalization of insolvency law and its reception in China, Korea, and Indonesia); and Merry 2006a: 29 ("My approach is to focus on a single issue, the movement against gender violence, in five local places in the Asia-Pacific region and in the deterritorialized world of UN conferences, transnational NGO activism, and academic, legal and social service exchanges of ideas and practices").

1. THE CONCEPTS OF TRANSNATIONAL LAW, LEGAL PROCESS, LEGAL ORDERING, AND STATE CHANGE

The term "transnational law" is increasingly used in scholarship, but often without adequate conceptual work regarding what the term covers. This section clarifies how the term transnational law has been used to date, and then shifts orientation from a focus on transnational law (which suggests the existence of a particular body of law), to that of transnational legal ordering and the transnational processes that implicate it. This shift in analytic focus enables us to show that the nation-state and national law remain central to understanding transnational law and legal ordering.

A. *Transnational Law, Legal Process, and Legal Orders*

Since the rise of sovereign states in the seventeenth century associated conventionally with the Treaty of Westphalia, law has been associated with state law and national legal systems. Law, as John Glenn (2003: 839) writes, was "an essential element . . . of national construction." Law helped to provide legitimacy to governing institutions, including by constructing a sense of national identity. Constitution building, following war and civil conflict, helped to consolidate legal order within defined boundaries for a given populace, constituting new imagined communities (Arnold 1983; Bobbitt 2002). Public international law was based on and came into existence with the creation of states, governing their relations and providing for their mutual recognition. The central aim, in the words of Peter Malanczuk (1997: 3) was to provide "the legal regulation of the international intercourse of states." Private international law concurrently provides rules and standards to govern situations in which more than one state asserts jurisdiction over a transaction or event involving nonstate actors. Thus, the concepts of public and private *international law* are both state-centric, addressing relations between nation-states and between national legal systems, as reflected in the term "international."

With the fall of the Berlin Wall and the spread of economic globalization, scholarly work has increasingly applied new concepts of "global" and "transnational law," but often without clear conceptualizations of either. Under each of these two overlapping concepts, law is being denationalized, to varying degrees, because the legal norms may not be formally part of international or national law as conventionally construed. *Global law* posits, by its name, that universal legal norms are being created and diffused globally in different legal domains that may or may not involve agreements between states.[2] For example, in the legal academy, the *global administrative law* project chose the title of "global" administrative law under the intuition

[2] See, e.g., Boyle & Meyer 1998: 213–32 (applying a world polity model); and Braithwaite & Drahos 2000 (examining the relative role of different mechanisms in thirteen areas of global business law).

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" (Kingsbury 2009: 3).

The concept of *transnational law* has been developed to address legal norms that do not clearly fall within traditional conceptions of national and international law, but are not necessarily global in nature. In his influential 1956 Storrs Lecture, Judge Philip Jessup turned to the concept of transnational law because he found "the term 'international' misleading since it suggests that one is concerned only with the relations of one nation (or state) to other nations (or states)" (Jessup 1956: 1).[3] The concept of transnational law used in scholarship can be narrow or broad, depending on the user, but it generally is composed of legal norms that apply across borders to parties located in more than one jurisdiction. From a broad conception, transnational law encompasses public and private international law, as well as law governing transnational activities not traditionally included within them (Jessup 1956). From a narrow perspective, transnational law is composed only of rules, "which regulate actions or events that transcend national frontiers . . . which do not wholly fit into such standard categories" of public and private international law.[4]

Let us look at two examples of the transnationalization of law that fall outside traditional conceptions of public and private international law. The first is the formation by private actors of substantive law that applies across borders (e.g., the "new *lex mercatoria*") (Schmitthoff 1961; Teubner 1996). Gralf Peter Calliess and Peer Zumbansen (2010), for example, have assessed the development of transnational private lawmaking in consumer and corporate governance law that involves the interaction of publicly and privately made law. A second example is the rise of common approaches of national judges and regulators to cross-border legal and regulatory issues as a result of transjudicial and transgovernmental regulatory dialogues (Slaughter 2004).[5] As Hanna Buxbaum (2006: 316) contends, "transnational regulatory litigation can, under proper circumstances, enable national courts to participate in implementing effective regulatory strategies for global markets." Robert Wai (2008: 107) likewise views such lawmaking in terms of "a decentralized and

[3] See also Friedmann 1964: 37 (distinguishing international and transnational society, and maintaining that "international society is represented by the traditional system of interstate diplomatic relations, the relations of 'coexistence'"). See also the work on legal pluralism in global and transnational context by von Benda-Beckman (2006), Berman (2007), and Teubner (1996).

[4] The language is carved out from the broader definition of transnational law adopted by Jessup (1956).

[5] See also Scott & Wai 2004 (arguing for a more activist conception of the role of private law courts in a process of *transnational comity* with respect to transnational corporate liability and human rights concerns); Djelic & Andersson 2006; Hepple 2005: 4 (on transnational labor regulation); and Wai (2005).

intermediate form of transnational governance that recognizes and manages the multiplicity of norms generated by plural normative systems in our contemporary world society."

The increasing use of the term "transnational law" can be distilled into two concepts, which can be differentiated by whether they focus on subjects (law addressing transnational activities and situations) or on sources (law, whether international or foreign, that is imported and exported across borders). Most legal studies that use the term transnational law refer to law that targets transnational events and activities – that is, transnational situations that involve more than one national jurisdiction.[6] Specific transnational legal rules and legal doctrine can develop to address these situations. (We call this concept *transnational law applying to transnational situations*.) Many sociolegal studies, in contrast, conceive of transnational law and legal norms in terms of the source of legal change within a national legal system. In this latter conception, transnational law consists of legal norms that are exported and imported across borders, and that involve transnational networks and international and regional institutions that help to construct and convey the legal norm within a field of law. (We call this conception *transnational law as transnational legal ordering*.)[7]

In his famous 1956 Storrs Lecture, Jessup defined "transnational law" in the first "situational" sense as "all law which regulates actions or events that transcend national frontiers." This concept is a functional one, reflecting a professional concern that, because both international and national law are inadequate to address the flow of actions and the impact of events across borders, we need a more accurate and useful concept to govern these situations. As Jessup (1956: 7) wrote, "[t]he more wedded we become to a particular classification or definition, the more our thinking tends to become frozen and thus to have a rigidity which hampers progress toward the ever needed new solutions of problems whether old or new." In their path-breaking casebook *Transnational Legal Problems* (1994), Henry Steiner, Detlev Vagts, and Harold Koh similarly conceptualized transnational

[6] Many legal scholars build from and cite the famous lecture of Jessup 1956. See, e.g., Koh 2004: 53 (citing Jessup's definition of law addressing "events that transcend national frontiers"); Burley 1993 ("I define transnational law to include all municipal law and a subset of intergovernmental agreements that directly regulate transnational activity between individuals and between individuals and state governments," citing Jessup); Slaughter 2000: 245 ("Transnational law has many definitions. I mean to include here simply national law that is designed to reach actors beyond national borders: the assertion of extraterritorial jurisdiction. Extraterritorial jurisdictional provisions are often the first effort a national government is inclined to make to regulate activity outside its borders with substantial effects within its borders," citing Jessup); Hathaway 2005: 473 n.11 ("transnational law includes all law that has cross-border effect, whereas international law refers only to treaties or other law that governs interactions between states," citing Jessup); Dibadj 2008 (classifying the range of sources "applicable to cross-border events" together with the range of actors involved, citing Jessup).

[7] In the Law and Social Inquiry symposium, I called this conception *transnational law as transnational construction and flow of legal norms* (Shaffer 2012). The term *transnational legal ordering* is a more succinct label for this sociolegal conception.