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Introduction

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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

actors and to individuals whose activities and careers cross national boundaries. By authoritative we refer to the acceptance of the legal norms as reflected in law's understanding and practice. Nation-states remain central to TLOs (we do not live in a post-national world), but they do not alone define the territorial boundaries of legal ordering.

Our theory-building enterprise addresses a series of questions that this introductory chapter elaborates and the book's contributors address in their substantive chapters. They include:

- What is the *value-added* of the concept of TLOs compared to alternative frameworks?
- What are the *boundaries* of a TLO in terms of its geographic and legal scope?
- For *what reasons and under what conditions* are TLOs created?
- What processes drive the *settling and unsettling* of transnational legal norms?
- *How do TLOs interact and align?* Under what conditions are TLOs competitive or complementary?
- How do TLOs become *institutionalized*?
- What are the *impacts* of variously institutionalized TLOs on nation-states, markets, and other forms of social order?

This chapter sets out an analytic framework for building theory and studying TLOs, and it consists of six sections. Section I defines the concept of TLOs and its three composite terms – transnational, legal, and order. Section II compares and contrasts the theory and analytic framework of TLOs with three others developed in the disciplines of political science, sociology, and law – regime theory, world polity theory, and legal pluralism. In this way, it highlights the value of developing TLO theory and using the TLO analytic framework. Section III examines the differentiated scope of TLOs along two dimensions – their legal scope and geographical scope. Section IV formulates theoretical foundations for understanding the formation, development, and change of TLOs in terms of facilitating circumstances, precipitating conditions, and the recursivity of lawmaking and implementation across levels of social organization. Section V assesses the institutionalization of TLOs along our two dimensions – normative settlement and issue alignment among one or more TLOs. Section VI examines five classes of potential impacts of variously institutionalized TLOs. This chapter creates a conceptual framework for studying both the institutionalization of legal orders across national boundaries and the ensuing implications for law and social ordering more generally. The book's concluding chapter then builds a series of hypotheses from the case studies for future research, addressing the framing, rising, contestation, nesting, mapping, resisting, structuring, decline and fall, moralities, and recursivity of TLOs.

I. WHAT IS A TRANSNATIONAL LEGAL ORDER?

A. *What Is a Transnational Legal Order?*

Law provides structure that enables humans to order the complexity of their environment. It does so, according to Niklas Luhmann (1985: 77), by creating “generalized normative behavioral expectations” through which humans communicate and interact.⁴ This project broadly conceives of social *order* in terms of shared social norms and institutions that orient social expectations, communication, and behavior. In complex societies, social ordering is substantially done through law. This ordering becomes *authoritative* when the legal norms become accepted and institutionalized across national jurisdictions (Hurd 2008), in contrast to those legal norms that are simply formal or symbolic.

Yet before addressing the issue of law, one must ask: What is being ordered? What behaviors are entailed in the notion of order? A TLO is oriented to the regulation of behavior. More precisely, it endeavors to produce some order out of chaos, anarchy, unpredictability, or irregularity. The effort to produce order conventionally arises from a problem or issue whose occurrence or consequences are thought by one or another actor to be deleterious, or amenable to improvement.⁵ Such problems include the ones studied in this book, including human trafficking, lack of access to life-saving medicines, the unaccountability of perpetrators of atrocities, the risks of climate change, double taxation across borders, harmful tax competition, insufficient domestic credit, monetary stability, and financial contagion.

Sociologically speaking, there is nothing “natural” about the diagnosis and rhetorical construction of a social behavior as a problem (Schneider 1985; Benford & Snow 2000). Behaviors may exist for a very long time before they are thought to be problematic by one or another actor, thereby setting in motion efforts to solve the problem. Agenda setting in general requires that “conditions become defined as problems when we come to believe that we should do something about them,” which often reflects changes in values (Kingdon 2002: 109). For example, for years economic cartels were considered less as a problem and more as a solution to provide price stability and social stability between management and labor; today, in contrast, cartels are commonly viewed as a “supreme evil” (Shaffer et al. in press). Not only are problems socially and politically constructed; frequently there are diagnostic struggles by competing actors over the nature of a problem, whether there should be some social ordering to solve it, and what form that social order might take (Halliday 2009).

⁴ “Law is essential as structure, because people cannot orient themselves towards others or expect their expectations without the congruent generalization of behavioral expectations.” Luhmann 1985: 105.

⁵ A TLO may be oriented to further something advantageous such that the current situation is deleterious only in the sense of being less desirable than an alternative.

The construction of a “problem” is closely related to the purposes or goals of salient actors in creating a TLO. If an actor’s generic purposes are to produce order, the particular purposes derive from imagined alternatives to existing problems. Put another way, a struggle over definition or specification of a problem lays the foundation for a struggle over a set of prescriptions to produce a particular outcome. Each of our case studies, therefore, aims to identify both the problem that some actors intend a TLO to solve and the kind of order or outcomes that proponents of a TLO aspire to accomplish. In an institutionalized TLO, the link between problems and outcomes is shaped through *legal* means, as we elaborate in the following discussion.

Table 1.1 illustrates a variety of areas addressed in this book, in which problems are construed that explicitly or implicitly seek certain outcomes. TLOs are directed to economic development through business facilitation (Block-Lieb & Halliday, Chapter 2 in this volume; Macdonald, Chapter 3), trade and monetary regulation (Shaffer & Waibel, Chapter 5), climate stabilization (Bodansky, Chapter 8), protection of intellectual property rights and public health (Helfer, Chapter 9), restraint of arbitrary state power through rule of law (Rajah, Chapter 10), and human rights protection through criminal law (Lloyd & Simmons, Chapter 12; Payne, Chapter 13). For instance, if transnational lawmakers confront a wide-ranging problem of how to limit the damages that failing companies might have within and beyond their national borders, then they also imagine economic and legal orders that would save rather than destroy companies, preserve value in the assets rather than allow that value to be eroded, save jobs rather than lose them, and protect financial stability in a country rather than allow instability to occur that may have regional or global adverse effects (Block-Lieb & Halliday, Chapter 2). Similarly, if governments and private traders wish to avoid beggar-thy-neighbor problems in a financial crisis, they imagine rules and institutions that can constrain such behavior (Shaffer & Waibel, Chapter 5). Notwithstanding the desire to create order, there is often considerable contestation regarding the appropriate substantive rules and monitoring organization in light of alternative constructions of a problem and diagnoses of its causes, which can reflect the normative and distributive concerns at stake.

It is critical to insist that for socio-legal scholars, the ultimate outcomes analyzed are not simply the creation of a set of international or transnational legal norms and organizations or the construction of a legal edifice inside a country or across countries (although these may be important first steps). Rather, they are changed normative orientations of those applying and practicing the law so as to affect behavior. Formal international and national law can often be simply expressive and symbolic, in which case formal legal change does not fundamentally change normative orientations but, at best, gives a sense to a relevant audience that a problem is being addressed. Thus, for socio-legal scholars, it is changed normative orientations of

TABLE 1.1. *Presenting problems and remedial outcomes sought by proponents of transnational legal orders*

Author (Subject)	Perceived Problem	Desired Outcome
Block-Lieb & Halliday (on corporate insolvency and sea transport law)	Failing corporations, failing economies	Maximizing the value of assets Saving companies
	Uncertainty about liability of carriers by sea	Saving jobs Preserving financial stability
	Complexity and costs of carriage of goods from door to door	Encourage investment
	Industry changes (e.g., containerization)	Certainty about liability rates and actors' responsibilities Simplification and reduction of costs in transport of goods
Macdonald (on secured transactions law)	Credit surplus: too much capital to be absorbed in domestic markets	An international capital market regime that facilitates flows of capital from cash-rich to cash-poor countries
	Credit deficiency: too little capital to build domestic economy	Stimulating prosperity in poor countries
	Lack of (uniformity in) secured credit laws	Lowering barriers to cross-border lending
Genchsel & Rixen (on corporate tax law)	Double taxation across borders suppresses trade	Facilitating cross-border trade
	Tax competition leads to domestic tax evasion and avoidance	Maintaining welfare-enhancing domestic investment
Shaffer & Waibel (on trade and monetary law)	Trade protection	Trade liberalization
	Balance of payments and currency misalignment	Orderly adjustment
	Trade wars	Social protection
	Financial contagion	Financial stability
Helleiner (on financial law)	Bank failure Arbitrage leading to financial instability	Harmonized financial standards
Büthe (on food safety standards)	Conflicting national product standards constrain international trade	Create common product standards
Bodansky (on climate change law)	Risks of rapid climate change and climate engineering	Stabilize the climate

(continued)

TABLE 1.1. (continued)

Author (Subject)	Perceived Problem	Desired Outcome
Helfer (on pharmaceutical patents and right to health)	Lack of access to life-saving medicines	Access to medicines
	Lack of property rights in medicines	Right to health
	Inequitable distribution of life-saving medicines	Enforceable property rights in medicine
Rajah (on rule of law)	Protection of developing countries for health and property rights	
	Rule by law	Construction of rule of law regimes in politics and markets
	Authoritarian rule of law	
Merry (on human rights law)	Rule of lawlessness in politics and markets	
	Abuse of human rights	Greater protections for human rights
	Human trafficking	Contextualized enforcement of human rights
Lloyd & Simmons (on human trafficking)		Suppression of human trafficking
	Human trafficking	Suppress human trafficking through immigration, human rights, and/or crime policy
Payne (on accountability for human rights violations)	Occurrence of atrocities	Prevent atrocities
	Occurrence of severe human rights abuses	Make perpetrators of atrocity accountable
	Use of amnesty laws to protect perpetrators of atrocities	Fit appropriate justice to the crimes in light of political transition

those applying and practicing the law that will increase the likelihood of producing changed behaviors, whether of heads of state, high-level officials, lower-level bureaucrats, judges, firms, managers, consumers, ship captains, military personnel, or men in their relations with women. Those behaviors will be structured in a social organization of some kind.

The concept of a legal “order,” like a political order, is a broad one. Just as an illiberal political order may range from a totalitarian Stalinism to a National Socialist fascism to a Maoist Cambodia to an African kleptocracy to a Singaporean urbane authoritarianism, so, too, may a legal order not only contain much space