

Cambridge University Press

978-1-107-02611-7 - Transnational Legal Ordering and State Change

Edited by Gregory Shaffer

Excerpt

[More information](#)

1

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,

Cambridge University Press

978-1-107-02611-7 - Transnational Legal Ordering and State Change

Edited by Gregory Shaffer

Excerpt

[More information](#)

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”).

Cambridge University Press

978-1-107-02611-7 - Transnational Legal Ordering and State Change

Edited by Gregory Shaffer

Excerpt

[More information](#)

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).

Cambridge University Press

978-1-107-02611-7 - Transnational Legal Ordering and State Change

Edited by Gregory Shaffer

Excerpt

[More information](#)

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).

Cambridge University Press

978-1-107-02611-7 - Transnational Legal Ordering and State Change

Edited by Gregory Shaffer

Excerpt

[More information](#)

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); Dibatj 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.

Cambridge University Press

978-1-107-02611-7 - Transnational Legal Ordering and State Change

Edited by Gregory Shaffer

Excerpt

[More information](#)

law as the law addressing “transnational problems.” The growing use of the concept of transnational law in this sense reflects a practical legal response to increasing economic interconnectedness, sometimes involving new international treaties, sometimes involving the application of national law to events that occur outside a state’s borders but have effects within it, and sometimes involving private legal ordering. The concept permits legal academics to assess and advocate (or contest) particular transnational legal rules and legal doctrine applied by courts and other bodies to transnational situations.

In an excellent conceptual analysis, Craig Scott (2009) examines three perspectives of transnational law that lie within this first conception, which he labels traditionalist, decisional, and sociolegal. First, he notes that the concept of transnational law, at a minimum, simply aggregates the *traditionalist* concepts of public and private international law. Public international law addresses relations between states, whereas private international law (in its traditional meaning) addresses conflicts between national jurisdictions asserting authority over the transnational activities of private actors. These private law situations give rise to the development of doctrinal principles and rules regarding choice of law, jurisdiction, and enforcement and recognition of judgments.⁸ Second, as national courts and international arbitrators issue an increasing number of decisions to address these situations, they create disaggregated clusters of *decisional* principles and rules that can be extracted, used by advocates, and guide subsequent decisions. As Scott (2009: 871) writes, “this approach to ‘law’ understands law in disaggregation, not as whole legal orders or systems but rather as discrete norms or normative clusters that are capable of reasoned extraction from the whole and then of being brought to bear on constantly changing particulars.” Third, as a pool of legal norms in this area becomes relatively coherent and systematized over time, we may discern the emergence, from a *sociolegal* perspective, of a distinct body of law that is not “statist,” but rather is “transnational,” one that is developed by the ongoing interaction of public and private actors across states, including national judges, international arbitral bodies, and international private law rule-making institutions.

The concept of *transnational law as transnational legal ordering*, in contrast, focuses on the transnational production of legal norms and institutional forms in particular fields and their migration across borders, regardless of whether they address transnational activities or purely national ones. The concept includes legal norms that are substantive and specific to discrete areas of law, and not just general principles of conflicts of law, or only substantive law applied to cross-border business transactions. This book adopts this sociolegal conception. In doing so, it

⁸ In focusing on law applying to foreign transactions, Jessup (1956) particularly addressed issues of jurisdiction and choice of law. The three chapters resulting from the lectures, respectively, were entitled the “The Universality of Human Problems,” “The Power to Deal with the Problems” (i.e., jurisdiction), and “The Choice of Law Governing the Problems” (i.e., conflicts of law).

Cambridge University Press

978-1-107-02611-7 - Transnational Legal Ordering and State Change

Edited by Gregory Shaffer

Excerpt

[More information](#)

shifts the focus from transnational law as a body of law or legal doctrine to processes of transnational legal ordering. It does so by turning its attention to the transnational construction and migration of *legal norms*, by which we refer, for heuristic purposes, to *formalized norms that lay out behavioral prescriptions issued by an authoritative source, whether or not formally binding or backed by a dispute settlement or other enforcement system*.⁹ Transnational legal norms include those purported to be global and those that are more limited in their reach. The source of the transnational legal norm may be an international treaty, international soft law, privately created codes or standards, a foreign legal model promoted by transnational actors, or a combination of them. In other words, they can involve both hard and soft law; can be bilateral, regional, or multilateral in nature; can be constructed by states or nonstate actors; and can be directed at states, corporations, or individuals.

This concept of *transnational legal ordering* is used to assess the construction, flow, and impact of transnational legal norms. The term *transnational legal order* is conceptualized as *a collection of legal norms and associated institutions within a given domain that order behavior across national jurisdictions*.¹⁰ Such ordering, as we will see, is typically discrete and fragmented, involving particular legal subject areas, because the world lacks an overarching global legal system. Where the transnational legal norms in a subject area are relatively clear, coherent, and accepted in practice, the transnational legal ordering is more salient. Where they are less so, the transnational legal ordering is more contingent, and thus less likely to be effective in producing domestic legal and institutional change.

This second, sociolegal concept of transnational legal ordering is methodologically used to evaluate how law is produced transnationally and migrates across borders, whether it is formally enacted by national legislatures, is directly applied by national courts, shapes interpretation of existing domestic law, or otherwise affects private behavior. This concept is not a doctrinal or functional one, but a *methodological* one that is used to assess empirically how transnational-induced legal change occurs and what type of effects it has. The concept, in other words, does not aim to delineate a particular body or field of law or legal doctrine, but cuts across fields of law and provides an analytic means for assessing transnationally induced change in a globalized world.¹¹ In sum, the two different conceptions of transnational law and legal ordering are adopted because they are useful for different purposes, one for *internal* functional use by legal actors and the other for *external* sociolegal analysis of how law is constructed and operates.

⁹ This conception of legal norms is captured in the conception of hard and soft law along the dimensions of precision, obligation, and delegation in Abbot & Snidal 2000.

¹⁰ See also Halliday & Shaffer 2012 (further developing the study of this concept).

¹¹ For use of the term in a similar “methodological” way, see Zumbansen 2010. See also Calliess & Zumbansen 2010: x, 11 (understanding transnational law “primarily as a *methodological* perspective rather than as a demarcated substantive field of law”).

Cambridge University Press

978-1-107-02611-7 - Transnational Legal Ordering and State Change

Edited by Gregory Shaffer

Excerpt

[More information](#)

A related concept central to this book is that of *transnational legal process*, conceptualized as *the process through which the transnational construction and conveyance of legal norms take place*. Transnational legal norms do not travel by themselves. They are constructed and conveyed by actors, including by government officials, members of international secretariats, professionals, business representatives, and civil society activists. Actors with agendas often drive these processes. At other times, the legal norms may be carried less consciously as a reflection of intensified cross-border interaction characterizing economic and cultural globalization. For those focused solely on international law – whether they define international law narrowly or broadly – this book’s assessment of transnational legal processes, the dimensions of state change implicated by them, and the factors that facilitate and constrain such change are central for understanding international law as well.

Over time, transnational legal processes can constitute transnational legal orders through processes of ongoing articulation and rearticulation of legal norms and their application. The resulting transnational legal orders can be viewed as semi-autonomous, functionally differentiated fields, because transnational legal processes occur differentially in discrete legal areas. Andreas Fischer-Lescano and Gunther Teubner (2004: 1009) thus view transnational legal regimes in terms of the “external reach of their jurisdiction along issue-specific rather than territorial lines.”

Transnational legal ordering arises in many areas of law, including human rights, criminal, regulatory, and business law, involving different degrees of consensus and coherence. It may include global, multilateral, regional, and bilateral legal norms. It may encompass associated international and supranational organizations, transgovernmental regulatory networks, and the activities of transnational corporate and civil society actors, whether or not working through formal organizations. Transnational legal ordering may be reflected in treaties, nonbinding standards, model codes, and different forms of monitoring and dispute settlement. These instruments may include amalgams of hard law and soft law varying in their obligatory nature, precision, and institutionalization of monitoring, peer review, and dispute settlement mechanisms (Abbott & Snidal 2000; Shaffer & Pollack 2010).

The two concepts of transnational law have a clear overlap because the cross-border construction and flow of legal norms is often catalyzed by cross-border activities and policy concerns. As Lawrence Friedman (1996: 77) writes, “[t]he global economy is the engine driving convergence, and is what stimulates jurists to draft model laws and to worry about harmonization.” Yet, under this book’s conception of transnational legal ordering, the legal norms in question address not only transnational activities, but also purely national ones. For example, primary education law and municipal water services regulation, respectively assessed by Bronwen Morgan (in Chapter 6) and by Minzee Kim and Elizabeth Boyle (in Chapter 7), are exclusively national activities, but they can be significantly shaped by the transnational construction and flow of legal norms, whether human rights norms or neoliberal law

Cambridge University Press

978-1-107-02611-7 - Transnational Legal Ordering and State Change

Edited by Gregory Shaffer

Excerpt

[More information](#)

and development norms. The transnational legal norms in question may be adopted voluntarily in a planned fashion pursuant to harmonization efforts, or adopted without a plan as part of a process of diffusion conveyed through transnational actors and interactions (Simmons, Dobbin, & Garrett 2008). Regardless of the transnational source and nature of the legal norm, it is given particular force and effect when it becomes embedded in a national legal system.

Harold Koh (2006: 745–6) captures this latter conception of transnational law, in part, when he combines the vertical and horizontal dimensions of the transnational flow of legal norms:

Perhaps the best operational definition of transnational law, using computer-age imagery, is (1) law that is “downloaded” from international to domestic law: for example, an international law concept that is domesticated or internalized into municipal law, such as the international human rights norm against disappearance, now recognized as domestic law in most municipal systems; (2) law that is “uploaded, then downloaded”: for example, a rule that originates in a domestic legal system, such as the guarantee of a free trial under the concept of due process of law in Western legal systems, which then becomes part of international law, as in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and from there becomes internalized into nearly every legal system in the world; and (3) law that is borrowed or “horizontally transplanted” from one national system to another: for example, the “unclean hands” doctrine, which migrated from the British law of equity to many other legal systems.

Koh’s metaphors, although helpful in conveying the idea of transnational legal processes, risk reducing their complexity because the processes, in practice, are multifold, simultaneous, and iterative, involving disparate actors, applications, and flows in multiple directions. For some, the third example used by Koh may broaden the analysis too far by including all migrations of legal norms. In practice, however, there likely will be both horizontal and vertical flows that comprise a transnational legal order. Transnational legal orders will build from national models, and national actors will deploy transnational networks and institutions as means to export and diffuse national legal norms. Transnational legal ordering, in other words, involves international and transnational organizations and networks of public and private actors that play a role in constructing and diffusing legal norms. The legal norm is often taken from a national legal model, such as from a powerful state like the United States (Braithwaite & Drahos 2000), but the construction of transnational legal norms also varies, as shown by the empirical chapters in this book.

This book builds from Koh’s important conception of transnational legal process, while aiming to improve the tools for empirically assessing its implications for state change. Critically for our purposes, Koh did not provide a framework for assessing

Cambridge University Press

978-1-107-02611-7 - Transnational Legal Ordering and State Change

Edited by Gregory Shaffer

Excerpt

[More information](#)

the conditions and factors determining the extent, location, and limits of transnationally induced legal change. He likewise did not engage in extensive empirical study of them. Moreover, he did not assess the source of transnational legal norms, and whether transnational legal norms reflect a structural tilt in favor of some interests over others. In contrast, this book aims to assess the transnational sources of legal norms, their reception in countries, and the broader dimensions of state change that are implicated and thus at stake. Although this book focuses primarily on the factors leading to the variable reception of transnational legal norms within countries and the dimensions of state change at stake, the studies also highlight the importance of addressing the source, production, and change of these legal norms over time.

Finally, the concept of transnational legal orders has parallels with that of “global administrative orders” used in the global administrative law project out of New York University School of Law. Both projects depict legal orders arising beyond the nation-state that comprise multiple actors, and involve hard and soft law rules and norms. For example, the Global Administrative Law project defines “global administrative orders” to include:

- (1) administration by formal international organizations; (2) administration based on collective action by transnational networks of cooperative arrangements between national regulatory officials; (3) distributed administration conducted by national regulators under treaty, network, or other cooperative regimes; (4) administration by hybrid intergovernmental – private arrangements; and (5) administration by private institutions with regulatory functions (Kingsbury, Krisch, & Stewart 2005: 25).

This project, however, is both broader and narrower in ambition and scope than the global administrative law project. The concept of transnational legal orders is broader because it is composed of more than administrative law principles and procedural rules, and includes substantive areas of law not traditionally touched by them, such as human rights trials (Sikkink 2011) and letters of credit used in the private sale of goods (Levit 2008). The concept of transnational legal ordering also does not (by its name) imply that it has a “global” reach. The project on transnational legal ordering is nonetheless narrower in that it does not mix positive and normative analysis. A distinct aim of the Global Administrative Law Project, in contrast, is to assess the relevance of traditional national administrative law tools to evaluate and improve the accountability of global governance mechanisms.¹² This book’s assessment of transnational legal ordering is nonetheless complementary because of the normative implications raised by its empirical analysis.

¹² Kingsbury, Krisch, & Stewart 2005: 29 (focusing on “principles, procedural rules, review mechanisms, and other mechanisms relating to transparency, participation, reasoned decision making, and assurance of legality in global governance”).