
Book Reviews

Gregory Shaffer (ed.), **Transnational Legal Ordering and State Change**.
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Terence C. Halliday and Gregory Shaffer (eds.), **Transnational Legal Orders**.
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1 Introduction

Sociology and international law have had an ambivalent relationship in the past. On the one hand, it has been claimed that the validity of international law, due to its coordinative nature, may only be asserted as a matter of fact.¹ Hence, the sociological category of effectiveness was considered to be of crucial importance for international law.² On the other hand, however, socio-legal scholars have largely ignored international law as a field of study because only states were regarded as its subjects.³ The perception of what is commonly called 'globalization',⁴ or the emergence of 'world society',⁵ in the social sciences has now reinvigorated interest in socio-legal studies. Scholars from both law and other disciplines, especially from sociology and anthropology, have started to investigate the transformation of law in the global realm.

Yet many surveys have stuck to the classical domain of inter-state law, such as those on the 'fragmentation of international law'⁶ and some of those on 'global legal pluralism'.⁷ Others have remained highly theoretical, not relying on sufficient practical examples, such as those from the perspective of systems theory,⁸ while the majority of legal approaches have expressly concentrated on normative issues, especially questions of legitimacy, from the outset. This normative

¹ See M. Huber, *Die soziologischen Grundlagen des Völkerrechts* (1928), at 8–14; L. Oppenheim and H. Lauterpacht, *International Law: A Treatise*, vol. 1 (8th edn, 1955), at 15.

² See Tucker, 'The Principle of Effectiveness in International Law', in G.A. Lipsky (ed.), *Law and Politics in the World Community: Essays on Hans Kelsen's Pure Theory and Related Problems in International Law* (1953) 31; C. de Visscher, *Les effectivités du droit international public* (1967).

³ See, e.g., M. Weber, *Economy and Society: An Outline of Interpretive Sociology*, vol. 2 (1978), at 641–900; L.M. Friedman, *Law and Society: An Introduction* (1977), at 1–9.

⁴ A. Giddens, *The Consequences of Modernity* (1990), at 63–78; S. Sassen, *A Sociology of Globalization* (2007), at 11–44.

⁵ N. Luhmann, *Theory of Society*, vol. 1 (2012), at 83–99.

⁶ Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law', 25 *Michigan Journal of International Law (MJIL)* (2004) 849; Koskenniemi and Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002) 553.

⁷ E.g., N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010).

⁸ See, e.g., Teubner, 'Global Bukowina: Legal Pluralism in the World Society', in G. Teubner (ed.), *Global Law without a State* (1997) 3. But see also Fischer-Lescano and Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *MJIL* (2004) 999, including some empirical material.

orientation equally marks the theories of ‘global constitutionalism’,⁹ ‘global administrative law’¹⁰ and ‘international public authority’.¹¹ Most studies of law and globalization thus lack ample empirical grounding.

It is therefore highly commendable that two related collections recently published by Cambridge University Press attempt to cure this deficiency. The earlier volume on *Transnational Legal Ordering and State Change* was edited by Gregory Shaffer, then professor of law at the University of Minnesota Law School, now at the University of California at Irvine School of Law. Prior versions of some of the articles compiled in this volume already appeared as a symposium issue of *Law and Social Inquiry*. The latter volume on *Transnational Legal Orders* emerged from the collaborative efforts of Shaffer and Terence Halliday, a sociologist by training and currently research professor as well as co-director of the Center on Law and Globalization at the American Bar Foundation.

The two books contain several case studies in different areas of law, written by distinguished scholars from North America, Europe and Asia with expertise in several disciplines, including sociology, anthropology, political science and law. Besides their empirical groundwork, both books offer an important conceptual contribution to the debate on law and globalization. In their respective introductory and concluding chapters, the editors develop an analytic framework that guides the empirical studies while, at the same time, drawing from them. Consequently, their approach is neither inductive nor deductive. Rather, the editors regard it as ‘emergent analytics’,¹² which means ‘analytics that oscillate between empirical findings, abstract theorizing, real-world assessment, and back again’ (Shaffer, at 2).

As the central paradigm animating their enterprise, the editors have distilled the category of the ‘transnational’. They prefer it to the ‘global’ because, as they correctly notice, only few phenomena are universal in reach. Moreover, to their minds, it best expresses that the nation-state remains relevant, if not dominant, in legal ordering today. The term is not novel to legal scholarship, although it has not yet acquired any fixed meaning. While it had already been used earlier in different contexts, Philip Jessup famously revived and popularized it in 1956 to substitute and expand the traditional notion of international law. According to his definition, it denotes ‘all law which regulates actions or events that transcend national frontiers’, thus including not only public and private international law but also ‘other rules which do not wholly fit into such standard categories’.¹³

The editors of the two volumes presented here, by contrast, aim to shift the analytic focus from a subject-based conception of ‘transnational law’ as a particular body of law addressing cross-border situations to a sources- and process-oriented conception of ‘transnational legal ordering’ that takes into account ‘the transnational production of legal norms and institutional forms in particular fields and their migration across borders, regardless of whether they address

⁹ Peters, ‘The Merits of Global Constitutionalism’, 16 *Indiana Journal of Global Legal Studies* (2009) 397; Wiener *et al.*, ‘Global Constitutionalism: Human Rights, Democracy and the Rule of Law’, 1 *Global Constitutionalism* (2012) 1.

¹⁰ Kingsbury, Krisch and Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law and Contemporary Problems* (2005) 15; Cassese, ‘Administrative Law without the State? The Challenge of Global Regulation’, 37 *New York University Journal of International Law and Politics* (2005) 663.

¹¹ Von Bogdandy, Dann and Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’, in A. von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010) 3. But see also the case studies in the same volume.

¹² The approach was developed by Nourse and Shaffer, ‘Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?’, 95 *Cornell Law Review* (2009) 61; Shaffer and Ginsburg, ‘The Empirical Turn in International Legal Scholarship’, 106 *American Journal of International Law* (2012) 1.

¹³ P.C. Jessup, *Transnational Law* (1956), at 2.

transnational activities or purely national ones' (Shaffer, at 6). For Shaffer, such a conception opens up a 'methodological' (Shaffer, at 7),¹⁴ instead of a doctrinal or functional, perspective that differs from the internal view of legal actors in that it allows for an external description of how law is constructed and the ways in which it operates. However, this self-appraisal seems to be somewhat inaccurate. As Shaffer himself later points out, the perspective taken provides more of an 'analytic' lens through which to view and understand the law than any kind of methodology to deal with the law (Shaffer, at 7).

Moreover, Shaffer's perspective would perhaps be more precisely characterized as what Niklas Luhmann calls an external description of the internal self-description of the legal system, which is an observation of the law 'in a way in which lawyers will understand it'.¹⁵ A legal sociology of this kind has rarely been tried before but seems very promising. On the one hand, it does not leave the description of the law to other disciplines, thus running the risk of missing its target. On the other hand, it is not bound to respect the established norms, conventions and premises of the legal system.

2 Transnational Legal Ordering and State Change

The first volume on *Transnational Legal Ordering and State Change* intends to show that 'one cannot understand domestic legal change and legal practice without understanding transnational legal ordering' (Shaffer, at 2). Shaffer starts out to define transnational legal ordering in the sense indicated above, more precisely as a process bringing about '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' (Shaffer, at 5). The conception resembles Harold Koh's well-known notion of 'transnational legal process',¹⁶ but it also transcends it because it does not only allude to the vertical and horizontal migration of legal norms between the international and national legal orders. Rather, it embraces the idea of 'recursivity',¹⁷ denoting a multi-directional and dynamic process of interaction and interpenetration between the international or transnational, the national and the regional levels.

In a second preliminary chapter, Shaffer sets the scene for assessing the dimensions and determinants of state change. He mentions, in particular, changes in substantive law and legal practice; changes in the boundaries between the state, the market and other forms of social ordering; changes in the institutional architecture of the state; changes in professional expertise and the role of expertise in governance and changes in associational patterns, which are institutionalized through transnational mechanisms of accountability with their accompanying normative frame. He further names several factors explaining variation in the impact of transnational legal ordering on state change, especially the character of a transnational legal norm in terms of its legitimacy, clarity and coherence; the relation of the transnational legal process to the receiving state in terms of power and the role of intermediaries conveying the legal norm and the affinity of the transnational legal norm with domestic demand in light of domestic political contests, institutional path dependencies, legal culture and the extent of change at stake.

¹⁴ The term 'methodological' is employed in a similar sense by Zumbansen, 'Transnational Legal Pluralism', 1 *Transnational Legal Theory* (2010) 141.

¹⁵ N. Luhmann, *Law as a Social System* (2004), at 60.

¹⁶ Koh, 'Transnational Legal Process', 75 *Nebraska Law Review* (1996) 181.

¹⁷ The idea was developed by Halliday and Carruthers, 'The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes', 112 *American Journal of Sociology* (2007) 1135; Halliday, 'Recursivity of Global Normmaking: A Sociolegal Agenda', 5 *Annual Review of Law and Social Science* (2009) 263.

The following chapters then present five comparative case studies in different areas of law. The topics covered range from anti-money laundering law in Brazil and Argentina (Maira Machado) and corporate bankruptcy law in China, Korea and Indonesia (Terence Halliday), through primary education law in more than seventy low- and middle-income countries (Minzee Kim and Elizabeth Boyle), to the right of access to medicines in South Africa (Heinz Klug) and the regulation of municipal water services in Chile, Bolivia and Argentina (Bronwen Morgan). The richness and variety of the individual contributions cannot be fully appreciated here, but it should be highlighted that the results of the case studies taken together are most valuable for two reasons.

First, each of the studies is dedicated to the situation in developing countries, part of them is even written by scholars from the respective countries. This focus rectifies a long neglect in current research on law and globalization, which often suffers from a Western bias. Nonetheless, Shaffer underlines that the analytic framework may also apply to Western countries, conceding that these countries would more likely be producers than appropriators of transnational legal norms. Second, each of the case studies builds on long-term empirical research projects. Four of the authors conducted fieldwork involving participant observation and interviews, while Kim and Boyle employ quantitative methods combined with historical analysis. Such material is rare to find both in quality and quantity.

3 Transnational Legal Orders

The second volume on *Transnational Legal Orders* raises what the editors consider to be the ensuing and fundamental question of how transnational legal orders actually emerge and decline. To this purpose, Halliday and Shaffer complement their prior research with a full-blown definition of a transnational legal order (TLO) as the product resulting from the process of transnational legal ordering. A TLO, in their view, is ‘a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions’ (Halliday and Shaffer, at 5; similarly at 11, 475). Subsequently, the editors specify the three key elements of a TLO: ‘(1) A TLO seeks to produce *order* in a domain of social activity or an issue area that relevant actors have construed as a ‘problem’ of some sort or another; (2) A TLO is *legal* insofar as it has legal form, is produced by or in connection with a transnational body or network, and is directed toward or indirectly engages national legal bodies; (3) A TLO is *transnational* insofar as it orders social relationships that transcend the nation-state in one way or another’ (Halliday and Shaffer, at 20; similarly at 476).

The conception of law that the editors thereby advance remains to some degree ambiguous. On the one hand, Halliday and Shaffer emphasize that it includes soft law instruments as well as private ordering. On the other hand, however, they purport to adhere to a ‘positivist’ (Halliday and Shaffer, at 13) conception of law that does not only require formalized texts but also crucially depends on ‘the adoption, recognition, and enforcement of binding, authoritative legal norms in nation-states’ (Halliday and Shaffer, at 14). The editors thus explicitly reject ideas of a transnational legal order that could be wholly autonomous from national law and legal institutions.

As the editors distinctly expose, their approach overlaps with, but also differs from, certain other theories of law and politics under conditions of globalization, which were earlier developed in various disciplines. First, it differs from regime theory in political science because it is not only restricted to interactions between nation-states but also includes non-state and local actors. Second, it departs from world polity theory in sociology since it does not assume the emergence of universal norms but, rather, depicts the recursive flow of norms across multiple levels of order. Third and finally, it deviates from theories of global or transnational legal pluralism since it does not accentuate normative conflicts but, instead, stresses normative settlement and alignment.

In the remainder of their introductory chapter, the editors spell out the conditions and circumstances that enable and constrain the formation and institutionalization of transnational legal orders, notably normative settlement in terms of stabilization and alignment with the issue area to be regulated. They also determine the varying impact of transnational legal orders. An ideal type of a transnational legal order following their proposal supposes the concordant settlement of norms at the transnational, national and local levels.

Twelve case studies in three different areas of law illustrate the analytic framework submitted by the editors. The studies on business law in the first part of the book cover corporate bankruptcy and maritime transport (Susan Block-Lieb and Terence Halliday), secured transactions (Roderick Macdonald) as well as tax law (Philipp Genschel and Thomas Rixen). The surveys on regulatory law in the second part of the collection include trade and monetary law (Gregory Shaffer and Michael Waibel), finance (Eric Helleiner), food safety (Tim Büthe) and climate change law (Daniel Bodansky). And the articles on human rights law span the right to health (Laurence Helfer), the rule of law (Jothie Rajah), the role of indicators in civil and political rights law (Sally Merry), the emergence of norms against human trafficking (Paulette Lloyd and Beth Simmons) and the criminal accountability of government officials (Leigh Payne).

All individual contributions adopt the general framework submitted by the editors, thus generating a coherent whole. Nonetheless, many of them concentrate on one particular aspect of analysis only, which allows for in-depth treatment in line with the peculiarities of their topic. Thus, the study by Block-Lieb and Halliday, for example, focuses on normative settlement – that is, the establishment of a certain meaning of norms and its ensuing acceptance – while the chapters by Helleiner and Büthe extensively deal with institutionalization. The general framework allows, and even invites, further development as well as criticism. Hence, Rajah adds the concept of a ‘meta-TLO’ (Halliday and Shaffer, at 343) with regard to the rule of law, while Bodansky raises the concern that the editors’ conception of law may be overly inclusive (Halliday and Shaffer, at 289). Therefore, if the collection in the aggregate convincingly makes the case that transnational legal orders have emerged, it simultaneously shows how diverse and contested their occurrences are. For easy access, the editors present a synopsis of the essential hypotheses and propositions drawn from the various case studies at the end of the book.

4 Conclusion

The two collections fill a major gap in law and globalization scholarship. In rich detail, they supply empirical material on the current transformation of law that has long been sought after. The studies in the first volume stand out in particular as they employ methods of empirical social research and focus on change in non-Western countries. From this material, other researchers will greatly benefit in the years to come.

At the same time, the two volumes add a highly convincing conceptual approach to the field. Indeed, their guiding category of the transnational is very promising in contrast to many others proposed for similar purposes. As the editors properly assert, it best expresses that most patterns of order neither reach out globally nor circumvent the state. Indeed, the recursive interaction of different levels of order appears to be one of the dominating modes of law production today, which is well captured by the term.

Nevertheless, some obscurity and doubt about the conceptions of transnational legal ordering and order remain. First, it does not become quite clear what exactly the editors refer to when they speak of the transnational. One usage of the term captures a transnational level of norms next to the national and the local levels, which encompasses model codes drafted by the International Institute for the Unification of Private Law and standards developed by the International Organization for Standardization, for example. The other usage refers to the

interaction and amalgamation of the three different levels of order. This twofold usage of the term entails the Janus-faced conception of law mentioned above. While the editors include soft law and private ordering, they admit that such norms 'are not binding legal instruments in themselves' (Halliday and Shaffer, at 14) but call for adoption, recognition and enforcement in nation-states. The claim that transnational law may 'vary in the weight of its authority' can hardly resolve the inconsistency (Halliday and Shaffer, at 18). Rather, it reveals the urgent need to find adequate criteria for marking the distinction between law and non-law.

Second, contrary to what the editors contend, it may well be possible to discover transnational legal orders that are relatively autonomous from both international and national law. The regulation of Internet domain distribution by the Internet Corporation for Assigned Names and Numbers¹⁸ and the organization of global sports by institutions such as the International Federation of Association Football¹⁹ count among the most prominent examples. Arrangements of this kind gain a relative independence by institutionalizing their proper arbitration mechanisms, which allows them to operate self-referentially. Nevertheless, they may later become involved in processes of mutual contestation and recognition with the national legal orders.²⁰ Thus, a former Olympic champion in speed skating recently succeeded in challenging an award by the Court of Arbitration for Sports imposing a doping sanction before a German appellate court.²¹ It appears that such kind of transnational legal process significantly differs from what the two volumes suggest and would therefore require additional analysis.

These objections notwithstanding, the visionary collections presented here deserve wide dissemination and reception. As soon as their empirical studies have reached general attention, legal theorists and philosophers will be called upon to tackle the normative problems raised by them. It will be one of the major tasks to ascertain if and how notions of legitimacy, as advanced by theories of global constitutionalism, global administrative law or international public authority, may be brought to bear on transnational legal orders.

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Individual Contributions to Transnational Legal Ordering and State Change

Gregory Shaffer, *Transnational Legal Ordering and State Change*;

Gregory Shaffer, *The Dimensions and Determinants of State Change*;

Maira Rocha Machado, *Similar in Their Differences: Transnational Legal Processes Addressing Money Laundering in Brazil and Argentina*;

¹⁸ See Froomkin, 'Wrong Turn in Cyberspace: Using ICANN to Route around the APA and the Constitution', 50 *Duke Law Journal* (2000) 17; M.L. Mueller, *Ruling the Root: Internet Governance and the Taming of Cyberspace* (2002).

¹⁹ F. Latty, *La lex sportiva: recherche sur le droit transnational* (2007); L. Casini, *Il diritto globale dello sport* (2010).

²⁰ See Viellechner, 'The Constitution of Transnational Governance Arrangements: Karl Polanyi's Double Movement in the Transformation of Law', in C. Joerges and J. Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (2011) 435.

²¹ See Oberlandesgericht München, Judgment of 15 January 2015, U 1110/14 Kart.

- Terence C. Halliday*, *Architects of the State: International Organizations and the Reconstruction of States in East Asia*;
- Minzee Kim and Elizabeth Heger Boyle*, *Neoliberalism, Transnational Education Norms, and Education Spending in the Developing World, 1983–2004*;
- Heinz Klug*, *Access to Medicines and the Transformation of the South African State*;
- Bronwen Morgan*, *The Limits of Transnational Transformations of the State: Comparative Regulatory Regimes in the Delivery of Urban Water Services*;
- Gregory Shaffer*, *Conclusion: The Study of Transnational Legal Ordering*.

Individual Contributions to Transnational Legal Orders

- Terence C. Halliday and Gregory Shaffer*, *Transnational Legal Orders*;
- Susan Block-Lieb and Terence C. Halliday*, *Settling and Concordance: Two Cases in Global Commercial Law*;
- Roderick A. Macdonald*, *When Lenders Have Too Much Cash and Borrowers Have Too Little Law: The Emergence of Secured Transactions Transnational Legal Orders*;
- Philipp Genschel and Thomas Rixen*, *Settling and Unsettling the Transnational Legal Order of International Taxation*;
- Gregory Shaffer and Michael Waibel*, *The (Mis)Alignment of the Trade and Monetary Legal Orders*;
- Eric Helleiner*, *Regulating the Regulators: The Emergence and Limits of the Transnational Financial Legal Order*;
- Tim Büthe*, *Institutionalization and Its Consequences: The TLO(s) for Food Safety*;
- Daniel Bodansky*, *Climate Change: Transnational Legal Order or Disorder?*;
- Laurence R. Helfer*, *Pharmaceutical Patents and the Human Right to Health: The Contested Evolution of the Transnational Legal Order on Access to Medicines*;
- Jothie Rajah*, *'Rule of Law' as Transnational Legal Order*;
- Sally Engle Merry*, *Firming Up Soft Law: The Impact of Indicators on Transnational Human Rights Legal Orders*;
- Paulette Lloyd and Beth A. Simmons*, *Framing for a New Transnational Legal Order: The Case of Human Trafficking*;
- Leigh A. Payne*, *The Justice Paradox? Transnational Legal Orders and Accountability for Past Human Rights Violations*;
- Terence C. Halliday and Gregory Shaffer*, *Researching Transnational Legal Orders*.