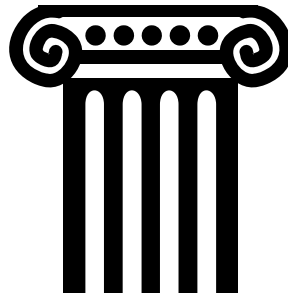


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Transnational Legal Process and State Change: Opportunities and Constraints

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Transnational Legal Process and State Change: Opportunities and Constraints

by Gregory Shaffer¹

Abstract: *Although the terms transnational law and state transformations are increasingly used, we need clearer conceptual work and more empirical study. This Article sets forth and applies a socio-legal approach to the study of transnational legal processes and their effects within countries. First, the Article clarifies the concepts of transnational law, transnational legal process, transnational legal order, state change and transformation, and recursivity. Second, it provides a typology of five dimensions of state change that we can assess empirically — changes in substantive law and practice; broader shifts in the boundary between the state, the market and other forms of social ordering; changes in the architecture and allocations of authority among state institutions; the shaping of markets for professional expertise and expertise's role in governance; and shifts in normative frameworks and the accountability mechanisms and associational patterns that convey them. Third, it explains the factors that determine the variable effects of transnational legal processes and organizes these factors into three clusters, which are: the character of the transnational legal norm and order; the relation of the transnational legal order to the receiving state in terms of power and the place of intermediaries; and the affinity of the transnational legal norm with demands of domestic elites and other constituencies in light of domestic political struggles and the extent of change at stake. Fourth, it introduces five empirical studies of transnational legal processes' differential effects in six regulatory areas in Asia, Africa and South America that illustrate these points. Together they provide a guide of how to study the interaction of transnational and national legal processes, and the extent and limits of transnational legal processes' effects.*

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Introduction

We live in an age of transnationalism. We always have but its intensity has increased. The origins of United States (U.S.) law, for example, come in large part from empire. Most remotely, they come from Rome. More close in time, they come from England and its common law heritage. Most recently, they come from the intensification of transnational economic and cultural interaction, catalyzing a proliferation of international, regional and bilateral agreements, regulatory networks and institutions which 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 reflected in the U.S. 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 don't travel by themselves. They are conveyed by actors, whether instrumentally or reflexively. They are sometimes codified in international treaties, whether of a binding or non-binding 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, non-governmental 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.

Although the terms transnational law, transnational legal process and state transformations are increasingly used, we need clarifying conceptual work and empirical study.² This introductory Article provides a socio-legal analytic framework for empirically assessing transnational legal processes and their deeper implications and variable impacts within states. First, the Article clarifies the concepts of transnational law, transnational legal process, transnational legal order, state change and transformation, and recursivity. Second, it provides a typology of five dimensions of state change at stake that we can assess empirically to address the deeper implications of transnational legal processes. Third, it explains the factors that determine the extent, location, timing, and limits of transnational legal processes, and organizes these factors into three clusters. Fourth, it introduces five empirical studies of transnational legal

² There have, for example, been intensive debates over the concept and operation of “legal transplants” among comparative law and socio-legal scholars, calling for empirical work. See e.g. Nelken and Feest 2001. Yet there is a distinct lack of, and thus need and call for, empirical work. See e.g. Twining 2005: 237 (“Perhaps the most striking aspect of the literature is that it very rarely tells us in any detail about actual impact on the ground”).

processes' differential effects in six regulatory areas that illustrate its points. The overall aim is to provide an overarching framework for empirical investigation regarding transnational legal processes from which middle range theory can be built.

The Article builds from the five comparative empirical studies that follow it, each of which are grounded in close attention to regulatory struggles and changes in countries. Each illustrates socio-legal approaches to how transnational legal processes work and interact with national law and institutions. Through the comparative framework, the studies examine variation in the reception and appropriation of transnational legal norms. They cover the following countries and regulatory domains:

- * Corporate bankruptcy law in China, Korea, and Indonesia, by Terence Halliday;
- * Patent law and competition law in South Africa, by Heinz Klug;
- * Anti-money laundering law in Brazil and Argentina, by Maira Rocha Machado;
- * Municipal water services regulation in Chile, Bolivia and Argentina, by Bronwen Morgan; and
- * Primary education law and policy in over seventy low- and middle-income countries, by Minzee Kim and Elizabeth Boyle.

The studies were chosen based both on their coverage of a range of legal domains in a range of countries in Asia, Africa and South America, and the fact that they build from sustained empirical research projects in particular fields conducted over years. Moreover, many studies of law and globalization have focused exclusively on OECD nations, and these studies thus help fill a gap.³ The countries studied in this volume vary in terms of their institutional legacies, their political and cultural contexts, and their relations to sites of transnational lawmaking. The regulatory areas likewise vary from financial and business regulation to social and economic rights. Most importantly, each of the studies builds from long-term empirical research projects that engage with the interaction of transnational law and particular countries.

Each of the studies is conducted within a systematic research design that examines the interaction of transnational and national legal processes in particular regulatory domains in different countries over time. Each study compares different countries' responses in a single regulatory field (or in one case, that of Klug, a single country and transnational/national interaction in two regulatory areas), so that the authors can assess variation in transnational influence.⁴ Four of the studies entail field work

³ See e.g. Twining 2005: 204 ("Most of the leading studies have not deviated far from the 'Country and Western tradition' of comparative law and a naïve model of diffusion"). There is a particularly large amount of work on European states in the context of the European Union, as well as of Western social welfare states.

⁴ The studies can be viewed as combining international political economy and comparative political economy, and international and comparative legal analysis, within a single socio-legal frame. For two leading socio-legal books in a similar vein, see Halliday and Carruthers 2009 (focusing on the globalization of insolvency law and its reception in China, Korea and Indonesia); and Merry 2006, 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").

involving participant observation and extensive interviewing of relevant actors. The fifth study (by Kim and Boyle) uses quantitative methods together with an historical analysis, to assess the relative impacts across over seventy low-income and middle-income countries of conflicting human rights and neoliberal development norms over a twenty-one-year period. Overall, the methods used include systematic interviewing, participant/observation, ethnography, documentary evidence, archival research and surveys, as well as (in one case) quantitative regression analysis.

This Article conceptualizes and provides a map for what transnational legal orders and legal processes are and do. It gives specific examples from the accompanying studies to illuminate its points regarding both the commonalities and particularities of state change in light of identified explanatory factors.⁵ Although the case studies in this volume focus primarily on a range of developing countries, the analytic framework used and the dimensions of change and factors assessed should apply across countries and regions, including the United States and European Union (E.U.).⁶ The primary difference between the U.S. and E.U. and the countries studied in this volume lies in the general direction of transnational flows, with the U.S. and E.U. more likely being producers of transnational legal norms, as opposed to being appropriators of them. In a globalized world, much of law is subject to transnational influences and pressures, but more powerful states are the primary exporters of legal norms.

This introductory framework Article is in five Parts. Part I defines and explains the key concepts used, transnational law and legal norms, transnational legal process, transnational legal orders, state change and transformations, and the recursivity of these processes. Part II introduces the five studies. Part III sets forth and examines five dimensions of change within states that transnational legal processes can spur — changes in substantive law and practice; broader shifts in the boundary between the state, the market and other forms of social ordering; changes in the institutional architecture of the state; the shaping of markets for professional expertise and expertise's role in governance; and shifts in normative frames which are embedded in and expressed through new transnational accountability mechanisms and associational patterns.

Parts IV maintains that variation in the impacts of transnational legal processes should be assessed as function of three clusters of factors — the character of the transnational legal norm and legal order in terms of their legitimacy, clarity, and coherence; the relation of the transnational legal order to the receiving state in terms of power and the place of intermediaries conveying the legal norm; and the affinity of the transnational legal norm with domestic demand in light of domestic political contests,

⁵ The project builds from these studies and other work carried out over the last four years as part of a collaborative research network within the Law and Society Association. These and other papers exploring these questions were presented and discussed at the Law and Society Association (LSA) annual meetings in Baltimore, Berlin, Montreal, Denver and Chicago from 2006-2010. The LSA Collaborative Research Network on Transnational Legal Orders is described at <http://www.lawandsociety.org/CRN/crn4.htm#36>.

⁶ On the migration of foreign and international law into the United States and European Union respectively, *see, e.g.*, Resnik 2006 (examining the history of migration of law into the United States and the multiple ports of entry, from the federal to the local); Resnik 2008, at 46 (“...as an empirical matter, one finds the frequent borrowing of words and text from elsewhere,” noting constitutional borrowing of texts, rewriting of texts and reinterpreting of texts); Scott 2009, at 908-928 (describing the effect of the European Union's REACH program on chemical regulatory reform in the US); Scott 2003, 228-232 (noting constraints on E.U. regulation imposed by WTO agreements including SPS, TBT, and GATT); and Shaffer 2000 (examining the impact of European privacy law on U.S. domestic privacy policies and practices).

institutional path dependencies, legal culture, and the extent of change at stake. These factors determine the extent and limits of transnational law's impact, and thus what is normatively at stake. Part V explains how national responses to transnational legal processes, including in less powerful states, can spur reassessments of the transnational legal norm in question, resulting in dynamic, recursive processes. We then conclude, summarizing the main points and calling for further research on these questions across countries and regulatory domains.

I. The Concepts of Transnational Law, Change, Transformation and Recursivity

We first need to define and clarify the key concepts used in this Article's approach to assessing transnational legal processes and state change in order to map out an agenda for empirical study: those of transnational law, transnational legal norm, transnational legal process, transnational legal orders, change, transformation, and recursivity. In other words, this Article's aim, in the tradition of the analytic work of William Twining, is "to provide concepts for asking questions, framing hypotheses and pursuing empirical inquiries."⁷

A. Transnational law, legal norms, 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 writes, was "an essential element... of national construction."⁸ Public international law was based on and came into existence with the creation of states, governing their relations and providing for their mutual recognition.⁹ Private international law provides complementary rules and standards to govern situations where more than one state asserts jurisdiction over a transaction or event. The concepts of public and private *international law* are thus both state-centric, addressing relations between nation states and between national legal systems, as reflected in the term "inter-national."¹⁰

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, to a certain extent, being denationalized, since 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.¹¹ The concept of *transnational law* has been developed, in parallel, to

⁷ Twining 2009, 107.

⁸ Glenn 2003, 839.

⁹ Id. See also Malanczuk 1997: 3 ("International law... is primarily concerned with the the legl regulation of the international intercourse of states").

¹⁰ For an earlier distinctions between international law and transnational law, see Jessup 1956 (discussed below), 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'").

¹¹ See e.g. Boyle & Meyer 1998, 213-232 (applying a world polity model); and Braithwaite and Drahos 2000 (examining the relative role of different mechanisms in thirteen areas of business law) . In the legal academy, 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

address legal norms that do not clearly fall within traditional conceptions of national and international law, but are not necessarily global in nature. The concept of transnational law can be narrower or broader, depending on the concept's user, but it generally comprises legal norms that apply across borders to parties located in more than one jurisdiction. Two examples of the transnationalization of law that fall outside traditional conceptions of international law are the formation by private actors of substantive law that applies across borders (such as the "new *lex mercatoria*"),¹² and 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.¹³ From a broader conception, transnational legal orders can comprise both hard and soft rules, can be bilateral, regional or multilateral in nature, can be constructed by states or non-state actors, and can be directed at states, corporations or individuals.¹⁴

Although the term transnational law is increasingly used, authors are not always careful in specifying what they mean by it. The increasing use of the term can be distilled into two conceptualizations, 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).¹⁵ Most legal studies that use the term transnational law refer to law that targets transnational events and activities — that is, transnational situations which involve more than one

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. Such global law may be formulated in multilateral institutions that have a global reach, by transnational networks that aim to have a global impact, or in influential states, such as the United States, and diffused globally.

¹² See Clive Schmitthoff, *International Business Law: A New Law Merchant*, 2 Current L. & Soc. Probs. 129 (1961); and from a socio-legal perspective, Teubner 1997. For an important account of the development of transnational private law-making in consumer and corporate governance law that involve the interaction of publicly and privately-made law, see e.g. Calliess & Zumbansen 2010. See also the work on global legal pluralism, such as Berman 2007; Benda-Beckmann 2006 (excellent introduction to a special issue regarding the dynamic interactive relationship of state and non-state legal orders in a range of countries and issue areas); Teubner 2007.

¹³ Slaughter 2004 (on transjudicial and transgovernmental regulatory networks); see also Buxbaum (2006) (contending "that transnational regulatory litigation can, under proper circumstances, enable national courts to participate in implementing effective regulatory strategies for global markets"); and Craig Scott & Robert Wai, *Transnational Governance of Corporate Conduct Through the Migration of Human Rights Norms: The Potential Contribution of Transnational Private Litigation*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 287 (Christian Joerges et al. eds., 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 et al. (2006); Hepple 2005: 4 (on transnational labor regulation); Wai (2005); and Wai (2008) (seeing "transnational private law as a decentralized and intermediate form of transnational governance that recognizes and manages the multiplicity of norms generated by plural normative systems in our contemporary world society").

¹⁴ In his seminal 1956 Storrs Lecture, 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.

¹⁵ The formal divide between international and national law is likewise sometimes defined by subjects (law addressing states versus persons) and sometimes by sources (treaties versus statutes). According to traditional conceptions, the subjects of international law are states, while the subjects of national law are persons and institutions, although the development of international criminal and human rights law, among other areas, radically challenged this conception.

national jurisdiction.¹⁶ Specific transnational legal rules and legal doctrine can develop to address these situations. (We dub this concept, *Transnational Law Applying to Transnational Situations*). Many socio-legal studies, however, including those in this volume, 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 which involve transnational networks and international and regional institutions that help to construct and convey the legal norm within a field of law. (We dub this concept, *Transnational Law as Transnational Construction and Flow of Legal Norms*).

In his famous 1956 Storrs Lecture, Judge Philip Jessup defined “transnational law” in the first “situational” sense as “all law which regulates actions or events that transcend national frontiers.”¹⁷ He stressed that “[b]oth public and private international law are included, as are other rules which do not wholly fit into such standard categories.”¹⁸ This concept is a functional and practical one, reflecting a professional concern that, since 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.¹⁹ The growing use of the concept of “transnational law” in this sense reflects a functional legal response to increasing economic interconnectedness, sometimes involving new international treaties and regimes, and sometimes involving the application of national law to events that occur outside a state’s borders but have effects within it. 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 examines three perspectives of transnational law which lie within this first conception, which he labels traditionalist, decisional and socio-legal.²⁰ First, he notes that the concept of transnational law, at a minimum, simply aggregates traditional concepts of public and private international law. Public international law addresses relations between states, while private international law (in its traditional meaning) addresses conflicts between national jurisdictions

¹⁶ These studies 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).

¹⁷ Jessup 1956, 2.

¹⁸ Id.

¹⁹ Jessup 1956, 7 (“The 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”). See also Steiner, Vagts, and Koh 1994, 2 (“transnational law” addresses “transnational problems”).

²⁰ Scott 2009.

asserting authority over the transnational activities of private actors.²¹ 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.²² Second, as national courts and international arbitrators issue an increasing number of decisions to address these situations, they create disaggregated clusters of principles and rules that can be extracted, used by advocates, and guide subsequent decisions.²³ Third, as a pool of legal norms in this area becomes relatively coherent and systematized over time, we may discern the emergence of a distinct body of law that is not “statist,” but “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 Construction and Flow of Legal Norms, 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, nor only substantive law applied to cross border business transactions. In other words, this conceptualization of transnational law comprehensively includes public and private international law (with their traditional state-based focus), global law (with its universalist pretensions), and non-globalized law that applies to more than one state. Users of this concept focus on the transnational construction and migration of *legal norms*, by which we refer, for heuristic purposes, to norms that lay out behavioral prescriptions issued by an authoritative source that take written form, whether or not formally binding or backed by a dispute settlement or other enforcement system.²⁴ *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.

This concept of Transnational Law as Transnational Construction and Flow of Legal Norms is used to assess how law that is produced transnationally migrates across borders, whether it is formally enacted by national legislatures, is directly applied by

²¹ In Europe, private international law continues to mean conflict of laws, and is a standard course in the law school curriculum. In the United States, academics often colloquially refer to private international law as the law addressing international business transactions. While such law is typically national, it can include non-state law, or *lex mercatoria*. A course under the name “International Business Transactions” is standard in the U.S. law school curriculum.

²² In focusing on law applying to foreign transactions, Jessup addressed issues of jurisdiction and choice of law in particular. 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].” Jessup 1956

²³ Scott 2009, 871 (“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.”).

²⁴ This conception of legal norms is captured in the dichotomous conception of hard and soft law along the dimensions of precision, obligation and delegation in Abbot and Snidal 2000. Cf. Halliday 2009, 6 (“norms in this article refer to formalized codifications of behavioral prescriptions that are accepted by subjects as legitimate and authoritative”).

national courts, shapes interpretation of existing domestic law, or otherwise affects private behavior. The concept is not a doctrinal or functional one, but a socio-legal and methodological one that is used to assess 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. It provides a framework for empirical research.²⁵ In sum, these different conceptions of transnational law and legal norms are adopted because they are useful for different purposes.

The two concepts have a clear overlap since the cross-border construction and flow of legal norms is often catalyzed by cross-border activities and policy concerns.²⁶ Yet under this second conception of transnational law, 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, studied by Kim and Boyle and Morgan, 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 and economics 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.²⁷ 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 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

²⁵ For use of the term in a similar “methodological” way, see Zumbansen 2010. See also Calliess and Zumbansen 2010: x, 11, an important contribution regarding transnational private law (understanding transnational law “primarily as a *methodological* perspective rather than as a demarcated substantive field of law”).

²⁶ Friedman 1996 (“The global economy is the engine driving convergence, and is what stimulates jurists to draft model laws and to worry about harmonization. In fact, harmonization and model laws are, in an important sense, merely responses to processes that have already taken place.”).

²⁷ Cf. Friedman 1996, 69-72; and Simmons, Dobbin, and Garrett 2008.

hands” doctrine, which migrated from the British law of equity to many other legal systems.²⁸

Koh’s metaphors, while helpful in conveying the idea of transnational legal processes, risk reducing their complexity since 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 broadens the analysis too far to include all migrations of legal norms. In practice, however, there likely will be both horizontal and vertical flows which constitute a transnational legal order so that this concern should be limited. 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. We thus define the concept of Transnational Law as Transnational Construction and Flow of Legal Norms, for heuristic purposes, as *law in which transnational actors, be they transnational institutions or transnational networks of public or private actors, play a role in constructing and diffusing legal norms*, even if the legal norm is taken in large part from a national legal model, such as a powerful state like the United States.²⁹

This Article builds from Koh’s important conception of transnational legal processes, while aiming to improve the tools for empirically assessing their implications for state change and the factors that explain its timing and extent. Critically for our purposes, Koh did not provide a framework for assessing 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 Article and the studies in this volume “beam the searchlight of social science” on the transnational sources of legal norms, their reception in countries, and the broader dimensions of state change that are implicated and thus at stake.³⁰ Although this particular Article and volume focus primarily on the factors leading to the variable reception of transnational legal norms within countries and the dimensions of change at stake, the studies also highlight the importance of addressing the source, production, and recursive reconsideration and change of these legal norms over time.

A key concept for this project is that of *transnational legal process*, the process through which the transnational construction and conveyance of legal norms takes place. Transnational and international 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 (to cover only binding law between states) or broadly (to encompass soft law norms and non-state

²⁸ Koh 2006, 745-46.

²⁹ Pursuant to transnational processes, in fact, legal models developed in the United States and Europe are often circulated globally. See e.g. Braithwaite and Drahos 2000.

³⁰ The quotation is from Friedman 1996, 65.

actors) — this project’s assessment of the dimensions of state change implicated by transnational legal processes and the factors that facilitate and constrain such legal change, are central for understanding international law.

Transnational legal processes occur differentially in particular legal areas, potentially constituting distinct transnational legal orders that are semi-autonomous.³¹ The term *transnational legal order* is conceptualized as *a collection of more or less codified transnational legal norms and associated institutions within a given functional domain*. Where the transnational legal norms are relatively clear, coherent and accepted in practice, the transnational legal order is more salient and may be viewed in systematic terms. Where they are less so, the transnational legal order is more contingent and fragile and thus less likely to be effective in producing domestic legal and institutional change. In other words, transnational legal processes can, over time, constitute transnational legal orders through processes of ongoing articulation and re-articulation of legal norms and their application. Transnational legal orders arise in many areas of law, including human rights, criminal, regulatory, and business law, involving different degrees of consensus and coherence. They may include global, multilateral, regional and bilateral norms and institutions. They may encompass traditional international and supranational organizations, transgovernmental regulatory networks, and the activities of transnational corporate and civil society actors, whether or not working through formal institutions.³² The existence of transnational legal orders may be reflected in treaties, non-binding standards, model codes, and different forms of monitoring and dispute settlement. These instruments include amalgams of hard law and soft law varying in their obligatory nature, precision, and institutionalization of monitoring, peer-review and dispute settlement mechanisms.³³

The concept of transnational legal orders is similar to that of global administrative orders used in the global administrative law project out of New York University School of Law, although this project is broader in ambition and scope. Both projects depict legal orders arising beyond the nation-state that comprise not only international organizations, but also bureaucratic networks of public officials, hybrid public-private networks, and networks of purely private parties creating hard and soft law rules and norms.³⁴ The concept of transnational legal orders, however, comprises more than administrative law principles and procedural rules, and it includes substantive areas of law not traditionally touched by them, such as human rights trials³⁵ and letters of credit used in the private sale

³¹ These orders can be viewed as semi-autonomous functionally differentiated fields. Cf. Teubner 1997.

³² *Transnational institutions* (concomitantly) refers to institutions whose members come from more than one jurisdiction, but are not necessarily states. For a related conception, see Fischer-Lescano & Teubner 2004: 1009 (viewing transnational legal regimes in terms of the “external reach of their jurisdiction along issue-specific rather than territorial lines, and which claim a validity for themselves”).

³³ Abbott and Snidal 2000; Shaffer & Pollack 2012 (forthcoming).

³⁴ Kingsbury, Krisch, and Stewart 2005: 25. 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.”

³⁵ See e.g. Sikkink forthcoming 2011 (studying the emergence of norms of criminal liability for violations of human rights that has certain systematic elements and that have emerged in a decentralized way) .

of goods.³⁶ The concept of transnational legal order also does not (by its name) imply that it has a “global” reach.”³⁷ Rather, the concept of discrete transnational legal orders facilitates the analysis of both their heterogeneous nature (including whether they are complementary or conflictual)³⁸ and their variable effects, which may sometimes be global in nature, but which are more likely to exhibit considerable variation.

B. State Change and Transformation. We need to specify what we mean by state change and transformation. First, in terms of the state, for heuristic purposes, we refer to the Weberian conception of a state which wields formal authority, exercises compulsory jurisdiction, and monopolizes the legitimate use of force within a territory.³⁹ Yet at the same time, we recognize that such a conception is an ideal type since state institutions exercise varying amounts of actual authority, and one must disaggregate the concept of the state in order to assess empirically how the state changes over time. Moreover, the very concept of transnational legal processes problematizes the idea of a state/global or state/transnational dichotomy. As Saskia Sassen writes, while the state remains central as a political unit, and thus central for purposes of socio-legal study, the state contributes to its own change through its active collaboration with and enabling of transnational forces.⁴⁰

As regards, change and transformation, we need to clarify what they consist of and what to look for in terms of the location and timing of change. Transnationally-induced change can affect the state generally or only discrete parts of the state (the *location* of change), and is thus a “differentiated process.”⁴¹ Change occurs along different dimensions, such as legal, institutional, professional, and normative, which we typologize and examine in Part III. Change can occur evolutionarily or revolutionarily, episodically, incrementally, or dramatically as in Eastern Europe in the 1990s (the *timing* of change). The concept of *transformation* refers to significant or fundamental change, change which can vary in terms of time and space.⁴² The threat of transformation of the state can lead to a protracted politics both locally and transnationally to forestall change. Diachronic empirical studies are thus important since we may not know the extent of change until after some struggle, possibly a protracted one.

³⁶ Levit 2008.

³⁷ In this respect, the distinct aim of the global administrative law project is to assess the relevance of traditional national administrative law tools to evaluate and improve the accountability of global governance mechanisms. Kingsbury, Krisch, and Stewart 2005, 29 (focus on “principles, procedural rules, review mechanisms, and other mechanisms relating to transparency, participation, reasoned decisionmaking, and assurance of legality in global governance”).

³⁸ Shaffer & Pollack 2008.

³⁹ By “state” we mean “national state” as used by Charles Tilly in his classic work *Coercion, Capital and European States: AD 990-1992*. Tilly (1992, 2-4) defines “national states” as “states governing multiple contiguous regions and their cities by means of centralized, differentiated, and autonomous structures,” and “states” as “coercion-wielding organizations that are distinct from households and kinship groups and exercise clear priority in some respects over all other organizations within substantial territories.”

⁴⁰ Sassen 2006: 3 (“The national is still the realm where formalization and institutionalization have all reached their highest level of development,” but “the national is also often one of the key enablers and enactors of the emergent global scale”); Sassen 2007: 46, 56.

⁴¹ Sassen 2007: 34.

⁴² For important studies on this question, see Campbell 2004 (chapter 2 on the problem of change); Grossman and Grossman 1971: 4-6 (on law and magnitude and scope of social change); Held et al. 1999; Leibfried and Zürn 2005; Sorensen 2004.

The extent of change is always contingent, so that at times studies will speak of transnational influence, at times of transnational failure, at times of appropriation of transnational law, and at times of significant transnationally-induced change. The resulting legal change may occur *symbolically* (on the books in terms of constitutional, statutory and administrative law revisions, or the creation or modification of agencies and courts) or *practically* (in terms of established patterns of institutional and individual behavior). While much of traditional law scholarship focuses on the symbolic,⁴³ the studies in this volume address changes in not only formal law and institutional structures, but also institutional and social practice.

The effective importation of transnational legal norms and institutional forms often confronts a dilemma. While importation is facilitated if the legal norm can be translated and appropriated to fit the local context, the more that the norm is adapted, the less transformative it may be. As Sally Merry writes regarding human rights law and gender violence, legal norms “are more easily adapted if they are packaged in familiar terms and do not disturb established hierarchies, but they are more transformative if they challenge existing assumptions about power relationships.”⁴⁴ Because transnational law interacts with domestic institutional, political and cultural contexts, changes are often evolutionary and incremental over time.

C. Transnational Legal Process and Non-Legal Factors in State Change. There are of course many transnational impacts besides law on nation states, reflecting processes of economic and cultural globalization and global structures of political and economic power. Many earlier studies have examined these transnational impacts, and in particular, the phenomena of economic and cultural globalization.⁴⁵ Transnational law of course is affected by these larger political, economic and social forces.⁴⁶ It reflects and conveys them, embodying and institutionalizing values, norms and prescriptions for social organization and behavior. It is thus difficult if not impossible to separate the impacts of law from other forces, and the accompanying studies do not attempt to do so.⁴⁷ Yet at the same time, counterfactually remove the technology of transnational law from the story of state change and the story would surely be different.

However one views the relation of transnational law to larger processes of globalization and the exercise of power, the focus on transnational legal norms and legal

⁴³ See e.g. Watson 1974, 20 (“It cannot be doubted either that a rule transplanted from one country to another, from Germany to Japan, may equally operate to different effect in the two societies, even though it is expressed in apparently similar terms in the two countries. But our first concern will be with the existence of the rule, not with how it operates within the society as a result of academic or judicial interpretation”).

⁴⁴ Merry 2006, 222. See also Campbell 2004, 87.

⁴⁵ Held 1999; Leibfried and Zürn 2005; Sorensen 2004; Campbell 2004; Sassen 2006, 2007.

⁴⁶ As Lawrence Friedman writes, “Commerce, after all, is the most promiscuous crosser of national borders,” and thus gave rise to the law merchant (*lex mercatoria*), an ongoing form of transnational law. Friedman 1996, 65. Transnational law is driven in part by the mismatch between global markets and national law.

⁴⁷ The purpose here is not to evaluate broader theories of the relation of law and social change in terms of whether law is primarily (or solely) a *product* of social forces and thus has little (or no) autonomy, or whether law is an independent *producer* of change. On the vigorous debates about legal autonomy and its limits, see Cotterrell 1992, 44-65. By assessing transnational legal processes, in other words, one need not privilege law and legal explanations for political and social change.

process provides us with a vehicle for assessing transnational influences on state change. Transnational legal norms embody prescriptions for the regulation of activities in particular functional domains. They can shape the perception and definition of problems and appropriate responses to them. They provide a framework for actors to weigh particular regulatory alternatives to address particular situations. They make available tools and models for reshaping institutional arrangements for the development, application, and enforcement of law to address these situations.

To understand change in regulatory fields requires an assessment of “the various processes by which institutions are continually reproduced and modified through ... actors’ practices.”⁴⁸ Transnational legal processes engage relevant actors in an iterative process of interaction which can affect their practices, leading to incremental or more dramatic change. The study of transnational legal processes thus provides a window for assessing changes in legal norms, institutional organization, and practices within states.

D. Recursivity. The socio-legal approach represented in this volume combines the examination of transnational and national processes within a single frame by focusing inquiry on particular regulatory fields, as opposed to general global and transnational law principles. In this way, the studies can assess how the transnational and national are interpenetrated within a field. This dual focus is captured in the concept of *recursivity*, developed by Terence Halliday and Bruce Carruthers.⁴⁹ Recursivity connotes a multidirectional, diachronic process of legal change. From this perspective, transnational legal process is viewed not as unidirectional, but a process in which the transnational and local are held in tension, in which actors engaged in transnational legal processes seek to influence local lawmaking and practice, and in which national legal norms, adaptations, and resistances provide models for and feed back into transnational lawmaking.⁵⁰

This conception of transnational legal process as recursive does not reify it as singular and absolute in content, but rather accounts for its historical specificity and provisional and changing nature. Some sort of legal settlement may occur which persists over time until that settlement is destabilized. Transnational legal process is thus not reduced to a process of filling in “gaps” in law’s implementation, but rather seen in dynamic terms in which national, international, and transnational political, social, and legal processes interact. The recursivity approach posits that changes and transformations of states will be a function of three processes operating concurrently and cyclically — a politics within international and transnational processes; a politics within domestic

⁴⁸ Koslowski and Kratochwil 1994, 227. In a related vein, see Moore 1973: 722 (looking at distinct semi-autonomous social fields in terms of their processual characteristics).

⁴⁹ Halliday and Carruthers 2007; Halliday 2009. The concept of “recursivity” of legal ordering is quite distinct from the concepts of “reflexivity” and “autopoiesis” used in the work of Niklas Luhmann and Gunther Teubner. See e.g. Luhmann and Teubner 1982, 122 (viewing the legal system as consisting of all social communication that contains some reference to law); and Teubner 1993, 37 (viewing legal communication as circular and reflexive so that it is relatively autonomous from the social order).

⁵⁰ For similar conceptions focusing on the development of international law, see Rajagopal 2003, 3 (“concerned with the role of international law in shaping the ideas and practices in the field of development and with the role of ideas and practices in the field of development in shaping international law”); and Waters 2005, 490 (“I argue that the relationship between domestic and international law is co-constitutive in nature—that is, a mutually constraining and mutually reinforcing relationship in which international norms not only shape domestic law and culture, but are in turn shaped by domestic law and culture.”). See also Ahdieh 2006. .

processes; and a politics between them involving intermediaries, as we examine in Part IV.⁵¹

II. The Five Case Studies

Before we lay out a typology for the study of the dimensions of state change and the conditions and factors determining the location, extent and limits of state change, we introduce the five case studies in greater detail so that we may refer to them as illustrations for conceptual points throughout this Article.

Terence Halliday's study, *Architects of the State: International Organizations and the Reconstruction of States in East Asia*, examines the role of international organizations in restructuring corporate bankruptcy law in East Asia, focusing on China, Korea and Indonesia. He starts by noting how "doggedly nationalistic" were the United States and England in initially developing and reforming their national models for bankruptcy in the 1970s and 1980s. These models provided templates for the creation of global bankruptcy law norms promoted by international institutions. He examines how international and regional financial institutions and, eventually, the United Nations Commission on International Trade Law (UNCITRAL) drew from these national models in light of three sets of pivotal events: the fall of the Berlin Wall, a series of debt crises affecting pivotal developing and transitional economies, and the Asian financial crisis at the end of the 1990s. Clubs of nations, in particular the G-7 and G-22, with the U.S. playing a particularly influential role, first instructed the international financial institutions to develop norms and create regulatory frameworks to address national credit crises more systematically and protect the global financial system. In the post-Washington consensus, the international financial institutions stressed the role of law and institutions, such as courts and regulatory agencies, as critical for effective policy, together with trained professionals who service them. International institutions worked with international professional associations of insolvency practitioners, including the International Bar Association, to draw from their expertise in consolidating a model set of insolvency norms and practices adopted through UNCITRAL.

Halliday assesses the broader implications that these globalized legal norms raise within states, and, in particular, the institutional architecture of states, including the relative roles of executive departments, independent agencies, legislatures, and courts. In Indonesia, in the midst of the financial crisis, the international financial institutions used their leverage to spur not only substantive and procedural legal reforms, but also the creation of entirely new state institutions, including a new Commercial Court that would be responsible for corporate bankruptcies, and an out-of-court agency for negotiations between debtors and creditors. In Korea, the state shifted power over corporate insolvency from executive departments to courts, which included functional equivalents of a U.S. model of a specialized bankruptcy court. In China, the government adopted a law which outsources significant functions for the restructuring of companies to courts and private professionals, adopting global insolvency norms enunciated by the World Bank and UNCITRAL, albeit along China's timeline. Halliday nonetheless shows how the transnational promotion of legal and institutional reform, although seemingly technical, raise fundamental issues of state restructuring that implicate power

⁵¹ Halliday and Carruthers 2009 (examining the iteration of these processes until some kind of settlement is reached).

configurations within states and spur resistance to change. This resistance gives rise to recursive cycles of transnational and domestic lawmaking until some sort of settlement is reached.

Heinz Klug's study, *Access to Medicines and the Transformation of the South Africa State*, addresses the constraints and opportunities provided by international and transnational intellectual property and competition law in post-Apartheid South Africa. He notes how the transformation of South Africa was made in the context of opportunities and constraints created by international and transnational law and institutions, affecting competing political and economic factions within the post-Apartheid state, with some policy options gaining salience while others were foregone. He examines the interaction of the relative power of global and transnational institutions and models, on the one hand, and the confluence of local conditions and tensions among domestic policy sectors in light of domestic social problems, on the other. This interaction results in nonlinear and uneven processes of state change.

Klug assesses how the new post-Apartheid government came into power at the time of the creation of the World Trade Organization (WTO) and inherited the commitments made by the previous regime. The bureaucracy within the government emphasized that South African law had long protected patents and contended that the new WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) raised no significant issues for the country. The new health department, composed of activists of the African National Congress, felt otherwise and found a transnational ally in the World Health Organization. While competition law initially did not receive significant attention in South Africa, South Africa joined the International Competition Network in 2001 and strengthened its competition law institutions. It used these institutions and legal tools to address high levels of business concentration in South Africa, including in the pharmaceutical sector. Klug shows how the government and activists were able to use competition law norms to advance the government's "black economic empowerment" goals and challenge the drug pricing practices of pharmaceutical companies. In other words, transnational legal norms were appropriated to advance domestic aims.

Maira Rocha Machado's study, *Similar in its Differences: Transnational Legal Processes Addressing Money Laundering in Brazil and Argentina*, assesses the development of transnational legal norms regarding money laundering and the reasons for their variable impacts within Brazil and Argentina. The transnational process started with U.S. promotion of anti-money laundering norms within the Basel Committee on Banking Supervision, an institution created by the central bank governors of ten nations, moved to the Financial Action Task Force (FATF) created by the G-7, and then encompassed the United Nations (UN). The Basel Committee first adopted a relatively general statement of ethical principles for banks in 1998. In 1990, the Financial Action Task Force prepared more precise guidelines in the form of 40 Recommendations on Money Laundering which are not formally binding, although many states consider them to be de facto binding if they are to remain in good standing before the FATF. The FATF Recommendations and its reporting, monitoring, and peer-review processes create new forms of accountability not only for government bureaucrats but also for private financial institutions that must oversee and report on their customers' transactions. In 2002 and 2003, the FATF Recommendations became incorporated in two UN conventions that are

formally binding, one against transnational organized crime and one against the financing of terrorism.

Rocha Machado's study assesses the variable impacts of the FATF's Recommendations on anti-money laundering in Brazil and Argentina. While Brazil was certainly subject to transnational pressure, it also implemented the FATF Recommendations for domestic policy reasons. In contrast, the changes in Argentina have been largely reactions to transnational pressure and have had, as a result, less impact in practice. Rocha Machado shows how the Brazilian government found the FATF's policies useful for addressing the national problems of organized crime and corruption and their threat to the state, while there was little domestic demand in Argentina to implement them. The Brazilian state criminalized money laundering, and it created a new financial intelligence unit within the administration and a new inter-agency coordination and monitoring mechanism (named ENCCLA) pursuant to which authorities interact over money laundering initiatives for the first time. It also obligated financial institutions to identify customers, maintain records, and report on suspicious transactions, enlisting them as policing agents, and it created a new Internet-based process (named *BacenJud*) which facilitates the exchange of financial information between financial institutions and judicial authorities. The result has been the creation of new hybrid public-private financial policing mechanisms and an overall shift in allocation of institutional authority from the judicial branch to the administration.

Bronwen Morgan's study, *The Limits of Transnational Transformations of the State: Comparative Regulatory Regimes in Water Service Delivery*, addresses both the influence and (in particular) the limits of transnational norms in shaping state change in the field of municipal water services in South America. Powerful players developed a transnational epistemic community to address the issue of access to drinking water, which consisted of international and regional financial institutions (the World Bank and the Inter-American Development Bank), multinational private water companies (particularly from the UK and France),⁵² and a transnational business-supported think tank, the World Water Council.⁵³ This epistemic community promoted a shift in regulation to a "neoliberal" transactional model in which water services are provided by private companies, but overseen by independent regulatory authorities. The outsourcing of water service delivery from the public to the private sector, in other words, was accompanied by the development of new regulatory institutions. Conflicts that arose between the multinational investor and government authorities gave rise to international arbitration pursuant to a web of bilateral investment treaties, as well as bargaining in the shadow of potential international arbitration.

Morgan compares the national responses and implementation of this transactional model in Argentina, Bolivia and Chile, and finds that, while each of the countries contracted out water service provision in a number of municipalities and formed new independent regulatory institutions, they did so in radically different ways. In Bolivia, the regulatory authority was politically marginalized; in Argentina its politicized role shifted erratically in light of economic crises and political tensions within a fragmented federal

⁵² The United States is not central to transnational developments in this field because of the local and fragmented nature of U.S. water delivery.

⁵³ The World Water Council is a "curious amalgam of business-based NGOs and large corporations." Morgan, this volume.

state; and in Chile it gained technocratic authority in stages that fit with priorities determined within the Chilean political context. Importantly in Chile, the “Chicago boys” – high level government officials under the Pinochet government who had obtained their PhDs in economics at the University of Chicago – facilitated the transactional model’s reception by acting as conduits and entry points for neoliberal policy norms. Morgan shows how the transnationally-promoted transactional regulatory model reciprocally helped to catalyze new politics in Bolivia and Argentina that promoted an alternative regulatory model of participatory governance. This development, in parallel with others, affected transnational politics, such that international and regional financial institutions and foreign aid agencies reoriented their programs.

The study by Minzee Kim and Elizabeth Boyle, *Neoliberalism, Transnational Education Norms and Education Spending in the Developing World, 1983-2004*, examines the relative impact on primary education policy of competing transnational regimes. One regime is composed of international human rights treaties that recognize a human right to free primary education, and relatively weak international institutions that promote its compulsory, universal provision. The authors trace the development of this legal regime, starting with the 1948 Universal Declaration of Human Rights, followed by the 1966 International Covenant on Economic, Social and Cultural Rights, and the 1989 Convention on the Rights of the Child. These treaties are monitored and promoted by international organizations, such as UNESCO, and transnational non-governmental organizations. The other regime is composed of international financial institutions which, in the 1980s and early 1990s, called for the adoption of market-oriented “user fees” for the funding of education. The international financial institutions emphasized free market principles, reductions in state spending, and balanced budgets as part of a neoliberal approach to development. When developing countries faced debt crises, the international financial institutions exercised considerable leverage, and in particular the International Monetary Fund (IMF) and World Bank through structural adjustment agreements and adjacent instruments which imposed de jure and de facto loan conditionalities. These agreements were signed by the IMF and World Bank and numerous states, building from a common template of prescriptions. The agreements fall within traditional conceptions of neither national nor international law, but are clearly transnational in character and implicate large numbers of countries. By 2000, according to a World Bank report, 77 of 79 countries studied had adopted some type of user fee for primary education.

The authors show that despite the relatively weak position of the human rights regime compared to the coercive power of international financial institutions, the international human rights regime’s approach to universal primary education has won out. The World Bank backed down and then denied that it had actually advocated user fees to fund children’s education. The authors contend that it was the power of the greater legitimacy of the human rights regime, coupled with the activity of transnational non-governmental organizations, which led to its success. Using data at yearly intervals for over seventy poor- and middle-income countries between 1983 and 2004, they show that the key factor in determining countries’ per capita expenditure on education for children under fourteen and their percentage of state expenditure devoted to education was neither the ratification of human rights treaties nor the implementation of structural adjustment agreements. Rather, countries embedded in the transnational human rights regime through stronger linkages with transnational non-governmental organizations were

significantly more likely to increase their per capita educational spending on children, and increase their relative spending on education. These transnational non-governmental organizations operate as crucial intermediaries for the conveyance of international human rights norms regarding state expenditure on children’s education. In sum, the authors find that transnational nongovernmental organizations were central to the resolution of the contest among competing transnational norms for primary education, as well as for national acceptance of the ideas promoted by the international human rights regime.

III. The Dimensions of State Change

To assess empirically the impact of transnational legal processes on state change, we need to distinguish between different dimensions of change. Besides shaping the substance of national law, transnational legal processes can have broader effects on the institutions and actors that apply law, and the normative frames in which they do so. Reflecting conceptually on the dimensions of state change which are at stake helps us to understand both the potential significance of transnational legal processes and their constraints, both the opportunities they provide and their limits.

This section provides a typology of five dimensions of state change affected by transnational legal processes that can be assessed empirically. These dimensions are summarized in Table 1, together with the academic disciplines often associated with their study.⁵⁴ The listing of the associated disciplines highlights both the stakes implicated by transnational legal processes, and the need for cross-disciplinary socio-legal study of these implications.

Table 1: The Dimensions of State Change

Dimensions of State Change	Associated Discipline
(1) Changes in national law and practice	Focus of Legal Studies
(2) Changes in the boundary of the state, the market and other forms of social ordering	Focus of Institutional Economics
(3) Changes in the allocation of authority among state institutions	Focus of Comparative Institutional Analysis in Comparative Politics
(4) Changes in markets for expertise and the role of expertise in governance	Focus of Sociology of the Professions
(5) Shifts in normative frames embedded in new mechanisms of accountability and associational patterns	Focus of Organizational Sociology

The first dimension — changes in national law and practice — the focus of most legal studies — implicates the other four, which raise deeper structural and normative

⁵⁴ This Article breaks down the dimensions of state change into patterns of legal, institutional, professional and normative change that can be identified across regulatory fields. Other analysts have assessed the dimensions of the state and state change arising from globalization generally in terms of the normative goods that states provide, such as security, rule of law, democratic self-determination, and social welfare. See e.g. Leibfried and Zürn 2005.

issues and thus bring to the foreground the stakes of transnationally-induced legal change. The second and third dimensions involve shifts in the authority and architecture of state institutions, while the fourth and fifth involve shifts in professional expertise and normative frames. These dimensions are interlinked, since changes in one dimension can catalyze changes in others. For example, transnational legal processes can create new demands on the state by enhancing the authority of certain forms of expertise, which, in turn, actuates pressures for shifts in the boundary of the state and private ordering, or in the allocation of authority among state institutions. It is nonetheless useful to disaggregate these dimensions for purposes of empirical study of the impacts and implications of transnational legal processes.

A. Changing national law: enactment and practice. To start with the traditional focus of legal scholarship, transnational legal processes can trigger changes across the spectrum of national law. They trigger changes in constitutional law, with new and amended constitutions incorporating new human rights.⁵⁵ They induce changes in criminal law, broadening its scope to address, for example, money laundering, cartels, and copyright and trademark violations.⁵⁶ They spur changes in regulation across regulatory fields.⁵⁷ National laws, from South Africa to China, incorporate by reference standards as they are developed by international standard-setting bodies.⁵⁸ These processes can potentially lead to a “race to the top,” a “race to the bottom,” or ongoing divergence in regulatory stringency.⁵⁹ Actors, of course, are behind these processes, and determine their relative success, as we assess in Part IV.

Implementation of transnational law in a national legal system can be viewed as a two-stage process. Formal domestic enactment of law (the focus of positivist legal scholars) is followed by actual practical implementation, the law-in-action (the bread and butter of socio-legal theorists). Formal legal change can provide tools for actors to effect change in regulatory outcomes over time, but they do not necessarily do so. Binding national law could be formally enacted, but could have little to no practical impact, while changes in soft law norms potentially could have significant practical effects. The studies in this volume address both the formal enactment and practical implementation of law, but focus their attention on how transnationally-spurred legal changes are applied (or thwarted) in practice.

⁵⁵ See e.g., Elkins and Ginsburg forthcoming 2010; Klug 2000.

⁵⁶ See Rocha Machado, this volume (on money laundering); Harding 2006 and Shaffer 2011 (on cartels); Braithwaite and Drahos 2000, 85 (“One of the striking features of the evolution of intellectual property law is the increased involvement of criminal law. There has been no serious discussion of why the state should mete out criminal penalties in an area that has traditionally been a civil matter. In the evolving global regime states are increasingly using criminal enforcement resources on behalf of intellectual property owners.”). U.S. pressure for intellectual property enforcement possibly led to capital punishment in China in a number of cases when China was negotiating to accede to the WTO. See suggestion in Alford 1995, 91 (“[S]uch undertakings [to enhance IP protection] have led to the imposition of the death penalty on at least four individuals”).

⁵⁷ Braithwaite and Drahos 2000.

⁵⁸ Büthe and Mattli on file 2010 (giving examples to China’s Product Quality Law and South Africa’s Occupational Health and Safety Act)

⁵⁹ See Vogel and Kagan 2004, 31-32 (“the evidence... weighs heavily against the notion that globalization induces a general regulatory race to the bottom”).

B. Changing the boundary of the state, the market and other forms of social ordering. Transnationally-induced legal change can have broader systemic effects within states. Transnational legal processes provide legal rules and models that reconfigure the respective roles of the state, the market and other forms of social ordering.⁶⁰ They can affect the allocation of authority between public law and other forms of private and social ordering, such as the public law of the administrative state, the private law of contract, and social practice, as well as the interaction between them.⁶¹ They can signal and call for the state to do more, or to do less. In some cases the state devolves or outsources previous state functions; in others it takes on new responsibilities; in yet others it creates new public-private hybrid models of governance. These shifts involve both the state's direct engagement in economic production (reflected in privatization initiatives) and the state's regulation of production (reflected in regulatory and deregulatory policies).

Transnational legal processes induce states to assume responsibilities traditionally left to other forms of social ordering in some policy areas. The study of Kim and Boyle examines how transnational hard and soft law policies have pressed developing countries to assume responsibility for providing free, universal primary education, increasing state expenditures in this domain. Klug highlights the transnational human rights pressures on the state to fund greater access to essential medicines. Rocha Machado's study documents the growth of state financial regulation, and, in particular, the spurring of greater intervention of the criminal justice system over financial transactions so that financial privacy is reduced.

In other areas, however, transnational legal models have promoted shifts away from state administration toward privatization, deregulation, and greater regulatory flexibility, reflecting "neoliberal" policies following the collapse of the socialist model after the Cold War. Binding rules of the World Trade Organization have significantly constrained state regulatory choices over trade, intellectual property, and industrial policy.⁶² Transnational legal processes also operate in diffuse ways, leading to the outsourcing of functions traditionally performed by state institutions. Morgan's study, for example, assesses the impact of new "transactional" models for the provision of municipal water services in South America, and Halliday's study explains the shift toward courts and private professionals for corporate reorganizations in Korea and China. These changes were respectively promoted by transnational epistemic communities of consultants and practitioners comprised of public and private actors working out of or in coordination with international and regional financial institutions. They are backed by an array of international treaties governing investment disputes, which have served both to deregulate foreign direct investment controls and denationalize dispute settlement through mandatory reference of disputes to international arbitration.

⁶⁰ In practice, there is a blurred line between market and state and non-state mechanisms of social control. The state/market dichotomy simply informs the assessment of governance choices along a continuum of government involvement.

⁶¹ See e.g. Shaffer 2009 (regarding institutional interactions between public law and private ordering).

⁶² Klug, for example, notes the constraints on the African National Congress's initial plans for industrial policy in South Africa when it took power in light of WTO rules and the "prescriptions proffered by the IMF and World Bank." He also notes that the ANC in South Africa was constrained in the development model it could pursue because of the reaction of international markets to its initial policy announcements, especially as it hoped to attract foreign investment. Klug 2000.

Where the state outsources traditional government responsibilities, state institutions do not leave the scene. Rather, the state often shifts toward steering mechanisms, working through public-private hybrid and other governance mechanisms.⁶³ Outsourcing the provision of services to private entities simultaneously gives rise to new public agencies, new regulation, and new forms of dispute settlement in areas traditionally monopolized by the state.⁶⁴ David Levi-Faur has traced the proliferation of functional regulatory agencies around the world in areas where none existed before, documenting the growth of material competencies of the state involving increased specialization and diversification of state administrations.⁶⁵ Policymakers often introduce new governance concepts of benchmarking, soft law, information exchange, and best practices. Transnational-created indicators report on state practices and their effects, informing countries' regulatory strategies.⁶⁶

While the concept of transnational law could suggest a conceptual link to the literature on the "retreat of the state,"⁶⁷ the state is arguably not retreating so much as being reshaped.⁶⁸ Transnational legal processes have promoted particular structures for a market economy, shifting the boundary between the market, the state and other forms of social ordering, affecting what the state does. These shifts can potentially have deep social repercussions over time.

C. Changing the institutional architecture of the state. Transnational legal processes affect not only what the state does. They shift allocations of authority among the state institutions that make, apply, and enforce law, whether they involve different branches of government, or different levels of government.⁶⁹ These shifts can incite struggles between state institutions reluctant to cede or eager to gain power.

It is frequently argued that the expansion of international and transnational governance has empowered executives, leaving legislatures to rubber stamp the results of international negotiations.⁷⁰ Such shifts of institutional authority within states have indeed occurred in many domains, spurring analysis regarding how to re-empower

⁶³ Levi-Faur 2005, 15 ("in regulatory capitalism, the state retains responsibility for steering, while business increasingly takes over the functions of service provision and technological innovation. This new division of labor goes hand in hand with the restructuring of the state (through delegation and the creation of regulatory agencies) and the restructuring of business (and other societal organizations) through the creation of internal controls and mechanisms of self-regulation in the shadow of the state"). See also Rhodes 1996; and Ayres and Braithwaite 1992. Cf. Loya and Boli 1999 (applying a world polity perspective regarding the proliferation of global standards through standard-setting bodies such as ISO).

⁶⁴ See e.g. Morgan this volume.

⁶⁵ Levi-Faur 2005, 18.

⁶⁶ See e.g. Davis, Kingsbury, and Merry 2010. Rocha Machado shows how information sharing, monitoring and peer review lie at the core of the work of the FATF on money laundering.

⁶⁷ See, e.g., Glenn 2003. See also Ohmae 1995; Strange 1996. Cf. Sassen 1996: xii ("globalization under these conditions has entailed a partial denationalizing of national territory and a partial shift of some components of state sovereignty to other institutions, from supranational entities to the global capital market").

⁶⁸ See also Leibfried and Zürn 2005; Sorensen 2004; Campbell 2004.

⁶⁹ See e.g. Kelemen 2004, 269, 270 (contending that international legal integration encourages centralization of regulatory power, but finding that the impact has been modest).

⁷⁰ See e.g. Richardson 2001, 94-95 (arguing that globalization decreases the power of legislatures); Brewster 2003; Scheppele 2011 (on 9/11 and the ensuing rise of global security anti-terror law has empowered executives in relation to legislatures and courts).

legislatures.⁷¹ Yet legislatures can also be strengthened and executives weakened by transnational legal processes. In many countries, the executive branch's discretion has been reduced, and the parliament's power enhanced, compared to allocations of power under state-development models of economic growth in which power was concentrated in executive branch bureaucracies.⁷² Halliday discusses these shifts in his study of transformations of bankruptcy law in Asia. The executive's authority is similarly curtailed when regulatory power is delegated to independent agencies operating at greater remove from political institutions, processes captured in Morgan's study.⁷³

Transnational legal processes can also affect the role of courts within national systems, sometimes providing courts with new leverage to increase their authority in relation to executives. Courts have been traditionally weak in many developing countries, but transnational legal processes provide them with new tools to assert themselves. Klug shows how judges have been empowered to force the hand of state bureaucrats regarding state-provided medical treatment. Morgan shows the increased role of courts in disputes over municipal water services in Argentina. Halliday notes the enhancement of judicial power over corporate bankruptcy in South Korea, as well as its potential in China and Indonesia. Yet transnational legal processes can also shift authority away from courts, and allocate power to executive branches in deference to international agreements, or to independent agencies because of perceived failures of courts. National administrations, for example, have asserted new authority over criminal justice policy vis-à-vis judicial authorities in the area of money laundering, as shown in Rocha Machado's study.

Transnational legal processes, in other words, promote new architectures of the state. They provide rules and models for the creation of entirely new state institutions and the reconfiguration of relations among existing ones. These institutional changes can exhibit isomorphism across states, although the actual practices of these institutions may vary considerably.⁷⁴ The law of the World Trade Organization, for example, requires the creation of new specialized state institutions for handling patent applications, resulting in the formation and expansion of patent offices in developing countries. Yet how these offices operate in practice varies.⁷⁵ The direction of changes in institutional authority within states, and what drives these changes, calls for ongoing empirical work.

D. Shaping markets for professional expertise and expertise's role in governance.
In spurring the enactment of new law and the reconfiguration of state institutions, transnational legal processes give rise to new professional specializations and shifts in

⁷¹ See e.g., Slaughter 2003, 1056.

⁷² See e.g. Pistor & Wellons, 1999, 6-7 (noting the increase in legislative activity and the reduction of discretion of state bureaucrats in Asia during this period).

⁷³ Morgan's study documents a shift toward independent agencies for the regulation of water services in Latin America spurred by transnational legal processes.

⁷⁴ On isomorphic changes across states, see Meyer, Boli, Thomas, and Ramirez 1997; and Boyle and Meyer 1998. However, the actual practice of these institutions may diverge. See e.g. Halliday, Rocha Machado, and Morgan, this volume, regarding the regulation of bankruptcy, money laundering, and municipal water services.

⁷⁵ Drahos forthcoming 2010; Drahos 2008; Drahos 2009. Article 8(a) of the TRIPS agreement states that WTO members must "provide as from the date of entry into force of the WTO Agreement a means by which applications for patents for such inventions can be filed." Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 70.8(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; 33 I.L.M. 1197 (1994).

professional authority, creating incentives for individuals and institutions to adjust to them. These developments can trigger changes toward more technocratic forms of governance, away from other forms of authority,⁷⁶ such as representative government.⁷⁷ They enhance the prospect of experts exercising authority, and create incentives for individuals and institutions to invest in expertise in specialized areas. New professions develop; professional markets are shaped; existing career paths adapt to new opportunities. Individuals, and in particular elites in societies,⁷⁸ invest in them to gain or retain material welfare, social capital, and authority.

These domestic shifts in governance occur both within state institutions and in private ordering and public-private hybrid forms of governance. State restructurings unleash competition for new expertise when the state regulates new activities, creating new positions within the state. They also do so when the state outsources traditional governmental tasks. New private governance regimes have law-like features and demand the services of professionals.⁷⁹ These professionals monitor business behavior and state institutional practice in light of transnational law and state adaptations to it.⁸⁰ In turn, when these individuals invest in professional expertise, they have stakes in supporting particular national legal and institutional changes. Different expertises are often in competition with each other, such as law, economics, and accounting, so that professional stakeholders may advocate divergent institutional changes that will enhance and protect their relative positions.⁸¹ In other words, this dimension of state change interacts with other dimensions, both responding to state institutional changes and spurring them.

The accompanying studies depict the development of new specializations in the fields of bankruptcy law, anti-money laundering law, intellectual property law, competition law, and the regulation of the provision of municipal water services. New professional expertise has developed for bankruptcy services in Asia (embracing lawyers, accountants, and insolvency specialists), and for urban water services in South America (involving economists, management consultants, and lawyers), as shown respectively by Halliday and Morgan. Rocha Machado shows how private actors perform new functions in policing financial transactions for money laundering under new obligations to report suspicious behavior to authorities, resulting in new hybrid public-private governance models for financial regulation. Intellectual property and competition law are growing fields of specialization in South Africa, India, and Brazil, creating new vested interests, and shifting industry orientations.⁸²

⁷⁶ These shifts can be viewed in terms of Max Weber's ideal type of rational-legal forms of authority. Weber 1978, 212-301 (re ideal types of traditional, charismatic and rational/legal forms of authority).

⁷⁷ Kennedy 2005; Picciotto 1996. See also Aman 2004.

⁷⁸ Dezalay & Garth 2002b.

⁷⁹ See e.g. Nonet & Selznick 1978 (writing in the U.S. context). See more recently, Meidinger 2009 (on private food safety regulation); and Calliess & Zumbansen 2010 (on corporate governance and *lex informatica*).

⁸⁰ Rocha Machado, this volume.

⁸¹ Dezalay & Garth 2002b.

⁸² Shaffer interviews with professionals in each of these countries pursuant to ongoing field work (2005-present). See also Klug, this volume; and Shaffer, Rattón-Sánchez, and Rosenberg 2008 ("Changes at the international level have helped unleash competition for new expertise to take advantage of the opportunities offered by international trade law, involving law schools, policy institutes, law firms, consultancies, think tanks, business associations, and different government ministries.... The participants in these networks

Individuals who invest in such expertise play important roles in national governance in specialized domains, whether they are employed in the public or private sector, or revolve between them.⁸³ These individuals serve as conduits for the conveyance, adaptation, and potential embedding of transnational legal norms, as we explore further in Part IV. They form part of specialized circuits of knowledge diffused through hybrid networks of public and private actors.

E. Shifting normative frames. Transnational legal processes generate shifts in patterns of association and mechanisms of accountability which convey particular normative frames. Individuals and groups inside and outside of government account to institutions outside of national borders.⁸⁴ They form new patterns of association through ongoing interaction. New relations of authority develop. The normative frames that are reflected in these accountability mechanisms and associational patterns can affect loyalties, influence legal understanding and practice, and reshape the legal culture and legal consciousness of elites and (potentially) broader publics, the way (to quote Merry) they “conceive of the ‘natural’ and normal way of doing things, their habitual patterns of talk and action, and their commonsense understanding of the world.”⁸⁵

A primary transnational accountability mechanism consists of monitoring, surveillance and reporting obligations which trigger peer pressure. International organizations directly monitor national processes, governments must report to them, and these reports are formally reviewed. WTO members, for example, report to a series of WTO committees and councils on their compliance with WTO trade and intellectual property commitments. Those reports are prepared and evaluated within the normative frame of WTO rules. The FATF monitors compliance with financial disclosure requirements, creating new forms of accountability not only for government bureaucrats but also for private financial institutions that oversee and report on their customers’ transactions.⁸⁶ The Committee on the Rights of the Child monitors compliance with the Convention on the Rights of the Child, harnessing input from both government officials and non-governmental organizations (NGOs).⁸⁷ Transnational indicators increasingly define and measure what constitutes appropriate national goals and effective strategies, facilitating further monitoring.⁸⁸

National institutions are created and developed to respond to these accountability demands. Governmental agencies and civil society organizations receive resources through technical assistance and capacity building programs.⁸⁹ Sometimes new national

have formed a community of trade policy specialists within Brazil, one that is transnationally linked to a broader trade policy field”).

⁸³ For an assessment of the role of public and private individuals in the field of trade law in the United States and Brazil, see Shaffer 2003 and Shaffer et. al 2008.

⁸⁴ Keohane & Nye 2003 (on the tensions between internal accountability and external accountability mechanisms, raising the question of accountability to whom).

⁸⁵ Merry 1990: 5 (on legal consciousness); Friedman 1997 (on legal culture).

⁸⁶ See Rocha Machado, this volume

⁸⁷ See Kim and Boyle, this volume

⁸⁸ See e.g. Davis, Kingsbury, and Merry 2010.

⁸⁹ See e.g. Drahos forthcoming 2010 (noting how domestic patent offices have become part of a globally integrated network in which the offices of Europe, the US and Japan and the interests of multinational companies are central).

agencies are designed and even staffed by consultants from transnational institutions.⁹⁰ Over time, new associational communities form as “clubs” in functionally disaggregated legal areas.

These processes have implications for how state representatives and civil society organizations view themselves and their roles, as they mediate relations between transnational and national sites of governance. Transnational networks engage national policymakers within particular normative frames. They can shape elite perspectives on the appropriate role of institutions such as markets, independent agencies, and courts. Local claims are viewed in transnational context. Through transnational patterns of interaction and practice, new conceptions of meaning are conveyed and can be gradually accepted as normal and authoritative. These conceptions can affect both the definition of particular goals and the means to further them.

These shifts in patterns of association and mechanisms of accountability with their accompanying normative frames can shape the identities and subjectivities of elites and potentially (over time) of broader publics.⁹¹ They can, in the process, affect the legal consciousness and legal culture of elites and broader publics, influencing the demands that elites and publics put on the state, leading to pressure on other dimensions of state change, such as the boundary between the state, market, and other forms of social ordering, and the allocation of institutional authority within the state. Once more, we see how these different dimensions of state change interact.

Transnational legal processes operate, however, in the context of ongoing institutional path dependencies, social histories, and domestic contests over national law and policy, factors mediating the extent of state change to which we now turn.

IV. The Factors Explaining the Location, Extent and Limits of State Change

To understand the impact of transnational legal processes on state change, we need to specify the factors that explain its location, timing and extent. The results of transnational legal processes are not homogeneous across countries; and within countries they affect different dimensions of the state. This section provides a typology of three clusters of factors that determine the impact of transnational legal process, which are enumerated in Table 2. Each of these factors can be isolated for purposes of subsequent study,⁹² but the purpose here is to provide an overall framework regarding the factors that shape the timing, extent, location, and limits of state change.

Table 2: The Explanatory Factors that Determine State Change

Three Clusters of Factors	Components within each Cluster
The Nature of the Transnational Legal Order and Norm	(i) Legitimacy of the Transnational Legal Order and Norm;

⁹⁰ Morgan notes how national water agencies in developing countries frequently are designed and (in the case of Bolivia’s water regulatory agency) staffed by consultants who work for international organizations and are seconded to national state institutions. Klug notes how the WHO seconded an official to work with the South African Health Department.

⁹¹ As Mead (1934) explains, individuals’ sense of identity is shaped by social interaction.

⁹² Terence Halliday and I, for example, are commencing a new project assessing the impact of the coherence of transnational legal orders and the degree of settlement (and thus clarity) of transnational legal norms across nine subject matter areas.

	(ii) The Clarity of the Transnational Legal Norm; (iii) The Coherence of the Transnational Legal Order and Norm; (iv) Ability to Harness Historic Events
The Relation of the Transnational Legal Order and the Receiving State	(i) Power asymmetries and the receiving state; (ii) Role of intermediaries
The Context of the Receiving State	(i) Domestic demand; (ii) Domestic configurations of power; (iii) Domestic institutional capacities and path dependencies; (iv) Domestic cultural frames; (v) Extent of change at stake

The first cluster involves the transnational legal order; the second cluster the relation of the transnational legal order and the receiving state; and the third cluster the context of the receiving state. The studies in this volume illustrate how these clusters of factors operate and interact in different fields, affecting the location, extent, timing, and limits of state change.

These three clusters of factors can be broken down into different components, as summarized in the Table and explained below.⁹³ To start with transnational law and legal orders, the ways in which they vary can be broken down into three aspects: (1) the legitimacy of the transnational legal order which contributes to its power; (2) the clarity of the transnational legal norm; and (3) the coherence of the transnational legal norm in reflection of whether different transnational legal orders complement or are in tension with each other. Collectively, the legitimacy, clarity and coherence of the transnational legal norm affect its impact, often in reflection of the possibilities provided by historic events.

A. The character of the transnational legal order and legal norm: legitimacy, clarity and coherence

1. The relation of a transnational legal order's power to its legitimacy.

Scholars from various disciplines increasingly have engaged with the concept of legitimacy in evaluating the impacts of international law and institutions.⁹⁴ Legitimacy, as used in a sociological sense, refers to the subjective belief of actors that a rule or institution should be obeyed.⁹⁵ The concept of transnational law's legitimacy is thus a relational one, since it depends on whether actors regard the institutions and processes which promulgate and convey it as "rightful," and thus authoritative.⁹⁶ Where there are

⁹³ Halliday's study in this volume conceptualizes these factors slightly differently, breaking some of them down into distinct factors. For heuristic purposes, this Article places them into three clusters.

⁹⁴ See Halliday 2009, 23 (noting that the issue of the legitimacy of international processes has been an important subject in international law (Bodansky; Franck), international relations (Barnett; Hurd), and sociology of law and globalization (Halliday and Carruthers)), as well as Block-Lieb and Halliday 2006.

⁹⁵ Mark Suchman defines legitimacy in sociological terms as "a generalized perception of assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions." Suchman 1991, 574.

⁹⁶ For Ian Hurd, an institution acquires authority when it is perceived to be legitimate. Hurd 2008.

political and social struggles over regulatory norms, actors attempt to use law strategically to advance their aims through harnessing law's potential legitimating power. The more that the transnational legal order and its norms are perceived to be legitimate, the more likely they will exercise normative pull.

A transnational legal order's legitimacy can be assessed along three dimensions in terms of inputs (who participates in a process), throughputs (the quality of procedural fairness and deliberation characterizing such process), and outputs (how a process substantively responds to a problem).⁹⁷ Overall, national actors are more likely to perceive transnational law to be legitimate where the law is formulated by actors who share their interests, where the process is procedurally fair and characterized by non-coercive reasoned argument, and where the results are functionally efficacious. The perception of the legitimacy of a transnational legal process should vary along these three dimensions of representativeness, procedural fairness, and effectiveness.

Legitimation is an aspect of power, and neither legality nor legitimacy should be viewed in contradistinction to power as in some conceptions in the legal literature. Transnational legal orders exercise power and authority through mechanisms of coercion, reciprocity, persuasion, and acculturation.⁹⁸ Stated in other terms, states and non-state actors may adopt or otherwise adapt to transnational law because they are coerced to do so, they find it to be in their self-interest through a reciprocal exchange or through being persuaded, or they are normatively induced to comply with it in light of its perceived legitimacy.⁹⁹ Those scholars who focus on the role of sanctions highlight law's coercive aspects. Yet law also exercises considerable power (if not its greatest power) through normative processes in which law is accepted as legitimate because it reflects norms of proper social behavior.¹⁰⁰ These mechanisms are of course ideal types, and in practice they interrelate, affect, and build upon each other.¹⁰¹

These mechanisms all depend in different ways on legitimacy. Sanctions are more likely to be effective if the relevant transnational legal order is accepted as legitimate and thus authoritative because the sanctions will be more difficult to resist, avoid, and counter through third party assistance. Where transnational legal orders are perceived to be legitimate, they are also more conducive to facilitating dialogue that leads to persuasion, as well as to reciprocal exchange and modeling. Mechanisms of acculturation most directly depend on a transnational legal order's perceived legitimacy.

⁹⁷ Cf. Bodansky 1999 (legitimacy in terms of sources, procedures and outcomes); Halliday and Carruthers 2009, 11; and Scharpf 1999, 2 (distinguishing input and output legitimacy).

⁹⁸ See Ginsburg and Shaffer forthcoming (discussing the links between these mechanisms with those discussed in Braithwaite and Drahos 2000 (7 mechanisms); Halliday and Osinsky, 2006 (8 mechanisms); and Goodman and Jinks 2004 (3 mechanisms). There are, as noted in I.C above, of course other mechanisms that induce legal and institutional changes in states that are not linked to transnational legal processes, such as market competition among states. See e.g. Simmons, Dobbin, and Garrett 2008 (4 mechanisms of diffusion).

⁹⁹ Hurd 1999.

¹⁰⁰ See Tyler, 1990. As Merry writes, "law's power to shape society depends not on punishment alone but on becoming embedded in everyday social practices." Merry 2006, 4. See also Halliday and Carruthers 2009, 11.

¹⁰¹ As Hurd writes, "the relationship between coercion, self-interest, and legitimacy is complex, and each is rarely found in anything like its pure, isolated form. Further, they are probably sometimes related in a patterned, systematic fashion, in that many social structures that are eventually legitimized emerged first from relations of coercion or from individual self-interest." Hurd 2007, 40.

Michael Barnett and Raymond Duvall have provided a useful framework of four conceptions of power in international governance which they label as agency, institutional, structural, and productive power.¹⁰² Each of these conceptions applies to the assessment of transnational legal processes and their effects, and each has implications for understanding the way legitimation operates in these processes. First, from an *agency perspective* of power, actors have variable resources that affect their ability to shape and mobilize transnational law.¹⁰³ They likewise have variable resources to deploy offers of rewards and threats of sanctions to induce third parties to comply with it. Since actors have stakes in the perception of transnational law's legitimacy, they have incentives to mobilize resources to legitimize or delegitimize transnational law and legal processes.¹⁰⁴ Powerful players, such as the United States, are typically best positioned to use transnational institutions and legal processes to legitimize policies that they want, as well as to delegitimize the emergence of transnational legal norms that go against their interests.¹⁰⁵

Second, from an *institutional perspective*, transnational institutions shape the type of issues and arguments that parties may effectively raise.¹⁰⁶ International institutions and transnational policy networks structure choices, and they do so especially for less powerful states.¹⁰⁷ They provide frames that organize deliberation over the conceptions of problems, their diagnoses, and strategies to address them. Institutional power is more likely to be effective where institutional processes are accepted as legitimate, whether from the perspective of input (participation), throughput (deliberation), or output (material results). Actors invest in (and forum shop for) international institutions, in part, because of the legitimation they can provide.¹⁰⁸

Third, from a *structural perspective*, transnational legal orders create structures that can materially advantage some over others, and, in the process, affect actor's understandings of their interests.¹⁰⁹ Transnational legal orders can materially affect how actors calculate the costs and benefits of alternative policies, and ideationally affect such actors' perceptions of the worth of pursuing or even conceiving of such alternatives.

¹⁰² Barnett and Duvall 2005. Peter Digeser nicely summarizes these four conceptions of power as follows: "Under the first face of power the central question is, 'Who, if anyone, is exercising power?' Under the second face, 'What issues have been mobilized off the agenda and by whom?' Under the radical conception, 'Whose objective interests are being harmed?' Under the fourth face of power the critical issue is, 'What kind of subject is being produced?'" Digeser 1992, 980.

¹⁰³ This behavioral (or agency) conception of power is used by Robert Dahl. See Dahl 1957; Dahl 1968, 405.

¹⁰⁴ Within the academy, critical legal studies can be viewed as an attempt to delegitimize accepted law on account of perceived structural biases.

¹⁰⁵ Cf. Büthe and Mattli manuscript on file 2010 (maintaining that domestic institutional arrangements, and particular whether they are centralized or decentralized, also matter because they affect the mobilization of domestic interests).

¹⁰⁶ This institutional conception of power is used by Bachrach and Baratz. As they contend, "power is also exercised when A devotes his energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to public consideration of only those issues which are comparatively innocuous to A." Bachrach and Baratz 1962, 948.

¹⁰⁷ Gruber 2000.

¹⁰⁸ See e.g., Esty 2006, 1496 ("In the realm of supranational governance, where the democratic underpinnings for rulemaking are particularly weak, the legitimacy-enhancing potential of procedural safeguards takes on special significance"); Franck 1990, 21.

¹⁰⁹ Lukes 1974, 24.

Fourth, from a *productive (or constitutive) perspective*, social discourse and knowledge systems can shape actors' subjective understandings of their identities and their capacities.¹¹⁰ Transnational legal orders propagate certain conceptions of identity and choice with the result that state and non-state actors are more likely to accept a given order as normal and inevitable. Although these latter conceptions of power do not focus on actors, those able to benefit from these forms of power, through the legitimation that transnational legal norms can provide, are in privileged positions.

These latter conceptions of power find their reflections in the transnational legal process theories within the legal academy of Harold Koh and Ryan Goodman and Derek Jinks, who are generally positive in their assessments of these processes. Koh contends that “[r]epeated participation in the transnational legal process... helps to reconstruct the national interests of the participating nations.”¹¹¹ He sees “transnational legal process” as “seeking to shape and transform personal identity” so that political elites and broader societies “internalize” international law norms.¹¹² Similarly, Goodman and Jinks analyze acculturation processes through which states are socialized without reflecting if the norms they adopt are in their interests.¹¹³ Where transnational legal processes are accepted as legitimate, they are more likely to shape actors' interests and identities, and thus have transformative effects.

The studies in this volume commonly highlight how the power of transnational law's perceived legitimacy exercises considerable influence in affecting domestic legal change, and how coercion is less successful when an international regime's legitimacy is challenged. International financial institutions, for example, were successful in using their coercive financial leverage during the Asian financial crisis to press Indonesia to enact bankruptcy law reforms, as shown in Halliday's study. However, these formal changes were not implemented in a way that changed outcomes in the directions or degree that the IMF anticipated. In contrast, UNCITRAL has exercised much greater authority in national bankruptcy law reform efforts because the processes of representative deliberation, which gave rise to its “model rules” and “legislative guides,” are deemed more legitimate. The national actors who participate in the UNCITRAL process take home models which they had a voice in drafting and approving, models which can become part of a more indigenous national agenda to enhance financial stability and economic development. Similarly, Kim and Boyle's study shows how the World Bank's structural adjustment policies initially pressed developing countries to shift toward requiring user fees for primary education (with 77 of 79 countries studied for a World Bank report having adopted some type of user fee for primary education by 2000).

¹¹⁰ See e.g. Foucault 1984, 213 (viewing individuals as effects of power, writing “[t]he system of right, the domain of the law, are permanent agents of these relations of domination, these polymorphous techniques of subjugation”); and Guizzini 2000 (discussing Pierre Bourdieu's concept of “doxa”).

¹¹¹ See Koh 1998, 642.

¹¹² Koh 1998, 629; and Koh 1997. Cf. Hurd 2007, 388 (“the operative process of legitimation is the internalization by the actor of an external standard. Internalization takes place within the actor's sense of its own interests is partly constituted by a force outside itself, that is, by the standards, laws, rules and norms present in the community”).

¹¹³ Goodman and Jinks forthcoming 2010.

However, these efforts were rebuked following challenges to their legitimacy by non-governmental actors, pressing the Bank to revise its policies.¹¹⁴

2. *Variation in transnational law's hard and soft law nature and the coherence of transnational legal orders.* The nature of transnational law varies in terms of different features which affect its authority. Variations in the features of transnational legal norms have been conceptualized in terms of hard and soft law, which contrast across the dimensions of obligation, precision, and delegation of monitoring, rule elaboration, and interpretation to a third party decision-maker.¹¹⁵ Such variations can affect a legal norm's clarity. As Beth Simmons writes, "[n]ormative as well as rational theorists have explored the quality of law precision as an influence on compliance."¹¹⁶ Where a transnational legal norm is clearer and less ambiguous, there is less room for significant variation at the domestic level when it is formally adopted.¹¹⁷ Similarly, where a transnational legal norm is elaborated over time through delegated dispute settlement or through different forms of delegated monitoring, peer review, and reporting, these processes can enhance the legal norm's clarity.¹¹⁸ It is striking, for example, how competition law in South Africa, for which there are transnational soft law principles but no binding international law obligations, has developed in a more indigenous manner than patent law, which is subject to the relatively precise and binding rules of the WTO TRIPS Agreement. Although precise legal norms may in some cases be ignored or evaded, and vague legal norms can be applied in similar ways, in general, clearer legal norms providing unambiguous signals regarding the legal change sought, will provide better tools to local actors at the stage of domestic implementation of the legal norm.¹¹⁹ Overall, the more that a transnational legal norm is clear, binding, and its meaning is interpreted, elaborated, and applied by a third party regarding particular contexts, the more compelling its signal should be to states and other constituencies. Actors promote these features in order to enhance the impact of transnational law.

¹¹⁴ "By 2001, the World Bank quietly indicated to countries that it did not support user fees for education.... By 2006, the World Bank was considered the leading global advocate for greater public spending on education." Kim and Boyle, this volume.

¹¹⁵ See Abbott and Snidal 2000. Hard law "refers to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law." Soft law, in contrast to hard law, refers to legal arrangements that are weaker along one or more of these three dimensions. Abbott and Snidal 2000, 421-22.

¹¹⁶ Simmons 2009: 121 (citing the work of Thomas Franck from a normative perspective and of James Morrow from a rationalist one). Franck (1990, chapters 4-5) focuses on the role of international law's clarity in his study of the power of legitimacy.

¹¹⁷ For an experimental study of the impact of legal imprecision on compliance, see Feldman & Teichman 2009 (finding that people are less likely to comply in situations where uncertainty stems from imprecision than from imperfect enforcement). The link between rule precision and legal certainty, however, is a debated one in a world of complexity, rapid change, and high economic stakes where legal entrepreneurs can manipulate bright line rules to evade broader policy goals captured in principles. See Braithwaite 2002. Franck also notes that bright line rules may sometimes be less important than principles that accommodate diverse situational contexts. Franck 1990.

¹¹⁸ See Sandholtz and Sweet 2004 (on dynamic processes of elaboration of international law over time).

¹¹⁹ For an example of the problems for implementation of vague transnational environmental law rules, see e.g. Talitman et al. 2003.

Transnational legal orders, however, can also complement or conflict with each other, affecting transnational law's coherence.¹²⁰ Different transnational legal orders can address a single regulatory question. Where they complement each other, their leverage can increase. Where they conflict, transnational legal norms may be in tension, or even contradictory, affecting their overall coherence. In this latter case, states and constituencies within them should have greater policy discretion, everything else being equal, enhancing their ability to resist a particular transnational legal norm's importation.¹²¹ In other words, even where a transnational legal norm is precise and obligatory by its terms, if it is in significant tension with another transnational legal norm, domestic actors can more easily find means to evade it.

The studies illustrate the processes of complementarity, conflict, and consolidation of transnational legal norms over time, affecting their clarity and coherence. The legal norms promoted by the Financial Action Task Force became increasingly precise over time, and eventually became reflected in binding UN conventions, as Rocha Machado illustrates. UNCITRAL built on the recommendations and guidelines of the international financial institutions for national bankruptcy law when it created a Legislative Guide and Model Law that were adopted by its members, as Halliday shows. In contrast, the study of Kim and Boyle illustrates how two transnational regimes advocated different approaches toward user fees in primary education, but one of those (the UN human rights regime) prevailed over the other (the international financial institutions). In Klug's work, different transnational legal orders again provided conflicting frames regarding the interaction of intellectual property and public health protection. This time, however, the tensions between these transnational legal orders remain. Even though the WTO TRIPS Agreement's provisions are binding, relatively precise, and subject to third party dispute settlement, activists in South Africa were able to harness international human rights and transnational competition law norms against demands for pharmaceutical patent protection. They were thus able to counter somewhat the pressure for higher pharmaceutical prices through monopoly patent rights in the context of struggles over access to medicines.

3. *Harnessing historic events.* Particular historic events create opportunities on which actors can capitalize to convey transnational legal norms to change domestic law and institutions. Events such as the fall of the Berlin Wall and the major debt and financial crises striking Latin America and Asia provide such openings. Crises create uncertainty that destabilizes background assumptions and perceptions of interest regarding legal and institutional change. As John Campbell writes, historic events can

¹²⁰ See e.g. International Law Commission 2006; Raustiala and Victor 2004, 279; Shaffer and Pollack 2010. Franck (1990, chapter 6) also discusses coherence in his study of the power of international law's legitimacy, but he largely focuses on coherence in the application of a single rule. The rise of the WTO and the literature on the challenges posed by the fragmentation of international law have developed since his study.

¹²¹ Conflicts in transnational legal orders typically reflect political struggles both among and within states. See Shaffer and Pollack 2010. Transnational and domestic struggles can become intermeshed, as different local actors see competing international organizations and transnational networks as their allies. As Dezalay and Garth write in their book *The Internationalization of Palace Wars*, the "success of import is inevitably tied to domestic palace wars and to the international competition to export state expertises." Dezalay and Garth 2002b, 5.

lead to processes of change involving “punctuated equilibria,” where “a crisis upset[s] the institutional equilibrium and precipitate[s] a search for a new ... order that, once institutionalized, usher[s] in a new period of institutional equilibrium.”¹²²

Each of the studies grapples with transnational legal processes within their historic contexts. The development and export of a “transactional model” for the provision of municipal water services reflected a shift in the 1990s toward neoliberal policies and the reappraisal of economic development models, as noted by Morgan. The Asian financial crisis created openings for transnational actors to press Asian states to restructure their bankruptcy laws and institutions, as demonstrated by Halliday. As Rocha Machado shows, the terrorist attacks of September 11, 2001 on the World Trade Center catalyzed new developments before the Financial Action Task Force and the United Nations through pressure from the United States. These studies each illustrate how transnational legal processes harness and are constrained by historic contexts.

B. The relation of the transnational legal order to the receiving state. The second cluster of factors affecting transnational law’s impact involves the relation of the transnational legal order to the receiving state. We can look at this position from a top down perspective in terms of structure, on the one hand, and a bottom up one in terms of agents and intermediaries, on the other. Macro-sociological theories, such as world systems theory and world polity theory, take a top-down approach, focusing respectively on material and ideological power.¹²³ Micro-socio-legal studies address the patterns of interaction between local and global actors, focusing on the role of intermediaries. They help us to “map the middle,” in Sally Merry’s phrase, to understand the mechanisms and dynamics of state change.¹²⁴

1. Power asymmetries and the receiving state. Structural power asymmetries have long driven transnational flows of legal norms, from Roman to Napoleonic to colonial conquests.¹²⁵ The United States and Europe are the major producers of transnational legal norms today and they have the means at their disposal to circulate them and induce their adoption globally. They diffuse regulatory approaches through the strength of their know-how and experience, coupled with technical assistance, capacity building programs, and other inducements. They control the budgets of the IMF and World Bank, affecting their policy prescriptions. Their national regulations and the private standards adopted by their

¹²² Campbell 2004, 21 (citing the work of Neil Fligstein). See also Hall 1993.

¹²³ World polity theory “stresses the embeddedness of nation-states in a wider world cultural context of meaning and models.” Kim and Boyle, this volume. World systems theory, in contrast, has a neo-Marxist materialist orientation in which structural power, whether exercised by dominant states or transnational capital, is the primary mediator of international relations, and such power is determined by a division of production between “core” and “peripheral” states. See Wallerstein 2005; and Robinson 2001, 157-200. Christopher Chase-Dunn and Thomas Hall “define world-systems as intersocietal networks in which the interactions... are important for the reproduction of the internal structure of the composite units and importantly affect changes that occur in these local structures”). Chase-Dunn and Hall 1997, 28. This literature is usefully summarized and discussed in Halliday and Osinsky 2006, 454.

¹²⁴ Merry 2006.

¹²⁵ Cf Whitman 2009 (stressing the missionary influence in Christianity); and Mattei and Nader 2008 (stressing material interests).

private sectors set requirements for products around the world simply because of the economic importance of their markets.¹²⁶

Structural power asymmetries create opportunities for transnational actors to use leverage, such as economic coercion, in reshaping institutions and legal norms in target states. Particular events, such as financial crises, enhance their ability to do so. Powerful states are often behind these transnational processes, and they work through and in conjunction with international and transnational institutions. Only states in structurally weaker positions are subjected to mechanisms of economic coercion. The international financial organizations exercised much more leverage over Indonesia during the Asian financial crisis than they did over Korea, and they exercised no leverage over China, as shown in Halliday's study. They have often exercised leverage over developing countries in shaping social policies, such as educational policy as depicted in the study by Kim and Boyle. Economic coercion is most tempting to use when regulation has asymmetric financial implications, benefitting some countries at the expense of others.¹²⁷ Such is the case with intellectual property regulation, as Klug's study shows regarding the U.S. government's attempt to threaten South Africa with trade sanctions, including the withdrawal of tariff preferences and the cutting off of foreign aid, which it hoped to legitimize in part by the claim that South Africa was in violation of WTO legal requirements.

The studies in this volume, nonetheless, address the limits of the use of coercion, calling into question how much real transformation occurs at the implementation stage where only coercive mechanisms are used. Coercive measures can de-legitimize a transnational legal process because they generate resentment. Coercive measures may initially be successful in inducing symbolic legal change (in terms of legal enactments), but ultimately be thwarted at the stage of actual implementation — the law-in-action. The studies highlight both the use of coercive measures and their limits. Indonesia made significant changes to its bankruptcy law in response to IMF conditions during the Asian financial crisis, but implementation was often foiled in practice, as Halliday shows. Kim and Boyle similarly show the limits of structural adjustment conditionalities on education policy in developing countries, and Klug explains the eventual withdrawal of US legal challenges against South Africa regarding its patent law.¹²⁸

2. *The role of intermediaries.* Second, for transnational legal processes to be effective, they require intermediaries who are cognizant of both the processes of transnational law-making and national settings. Intermediaries are the carriers, conduits, and points of entry for the circulation of transnational legal norms.¹²⁹ They can operate at the national or sub-national levels, and consist of public or private actors, thus offering (to borrow from Judith Resnik) multiple “ports of entry” for transnational legal norms.¹³⁰ They help to diagnose national situations, monitor national developments and responses, and translate, adapt and appropriate global norms for local contexts. Through their links

¹²⁶ See e.g. Snyder 2002 (using the example of the global toy industry).

¹²⁷ Braithwaite and Drahos 2000, 80 (comparing global processes for property and contract lawmaking) .

¹²⁸ Klug, this volume; and Klug 2008.

¹²⁹ Transnational legal norms depend on “the international circulation of experts and knowledge between the North and the South.” Garth and Dezalay 2009, 113, 123.

¹³⁰ Resnik 2006 (on ports of entry in federalist systems); Resnik et al. 2008 (discussing the role of Transnational Organizations of Government Actors, or TOGAs); Sassen 2007, 190-212.

with international institutions and transnational networks, they form part of transnational epistemic communities. They play central roles across areas of law, from human rights law to business regulation.¹³¹ Intermediaries, in the words of Bryant Garth and Yves Dezalay, are “essential to produce the credibility and legitimacy of these transnational norms.”¹³²

The impacts of transnational legal processes are, in part, a function of the positions of intermediaries. Carruthers and Halliday have typologized intermediaries in terms of their competencies, power, and loyalty.¹³³ Intermediaries may, for example, have greater competence in legal or economic expertise, have variable power to translate international legal scripts into national contexts, and have variable loyalties to actors at the national and international levels. These intermediaries include cosmopolitan government representatives, professional service providers, academics, think tank policy analysts, nongovernmental organizations, and social movement leaders.

Local intermediaries can be empowered by transnational legal processes so that they have a professional stake in them. Through their national and international connections, they are able to inform themselves of developments both at home and abroad, which provides them with informational advantages. International organizations depend on them to convey transnational legal norms to work in local settings, bridging cultural divides and, where necessary, indigenizing transnational norms. National governments and organizations rely on them to present national positions in international fora and within transnational networks. When these intermediaries have a stake in the national adoption of transnational legal norms, they become important allies in attempts to embed them, whether the norms are human rights or business ones.

The studies in this volume depict the key roles played by intermediaries. National intermediaries respectively played key roles in the adoption, adaptation, and application of transnational bankruptcy, financial transparency, and competition law norms, as shown in the work of Halliday, Rocha Machado and Klug. Kim and Boyle show statistically the correlation between the number of transnational non-governmental organizations operating in countries and their adoption of international human rights obligations to provide universal primary education, controlling for other factors. Yet although intermediaries are necessary, they are not sufficient. To understand transnational legal process and state change, domestic factors remain central.

C. The domestic context: Domestic demands, domestic struggles, and the extent of change at stake. Arguably the most important determinant of state change is the affinity

¹³¹ On human rights, see e.g. Merry 2006, 1-2 (noting the “transnational circulation of people and ideas transforming the world we live in”, and “highlighting the role of activists who serve as intermediaries between different sets of cultural understandings of gender, violence, and justice.”) . On business law, see e.g. Braithwaite and Drahos 2000. To give one example, in the four largest Korean law firms, three-quarters of the lawyers who passed the bar between 1980 and 1990 had studied abroad, primarily in the United States. Lee 2007, 245.

¹³² Garth and Dezalay 2009, 113, 114. Garth and Dezalay 2002a, 1,5. Dezalay and Garth refer to them as brokers and double agents. They note how elites “use international credentials, expertise and connections to build capital that they can reinvest in domestic public arenas” Garth and Dezalay 2002b, 34.

¹³³ See Carruthers and Halliday 2006, 529-32. Where a country is culturally distant from the transnational legal norm in question, local intermediaries tend to be fewer and more difficult to locate. These countries are often those who are in a weaker power position, although not necessarily, as in the case of China. Carruthers and Halliday 2006, 529-32.

of the transnational reform efforts with the demands and discursive frames of domestic constituencies and elites in light of domestic configurations of power and the extent of change at stake. This third cluster of factors involves domestic demand, domestic political struggles, domestic institutional capacities and legacies, and domestic cultural frames. Together these factors shape how transnational legal norms are received and implemented in practice, affecting the extent of state transformation. Sometimes they lead to the rejection of transnational law, sometimes to significant institutional and legal change, and sometimes to an appropriation for purposes initially not considered.¹³⁴

First, transnational legal norms need local supporters. Sometimes domestic elites will support their adoption because the elites believe that legal reforms will spur foreign direct investment and promote economic growth, possibly in relation to inter-state competition for power.¹³⁵ Sometimes professionals or commercial interests promote them because reforms enhance their career and business prospects.¹³⁶ Sometimes domestic activists support them as leverage against current government or private practices.¹³⁷

Second, transnational legal processes ultimately meet configurations of power within national political contexts. Legal and institutional change advocated by international organizations and transnational networks that seem rather technical, such as over bankruptcy law, can upset careers and power configurations in domestic orders, creating incentives for factions within governing elites and affected domestic constituencies to thwart the reform efforts. Such transnational legal reform efforts are difficult to implement because they can represent “the restructuring of the state itself.”¹³⁸ Transnational legal processes will be most successful if they are useful to national actors as tools in these political contests.

Third, institutional path dependencies and capacities place constraints on national change.¹³⁹ In many cases, countries, especially poorer countries, lack the institutional capacities to carry out transnational legal prescriptions. In other cases, the reception of transnational legal processes is mediated through domestic institutional structures which have their own interests and their own long-standing ways. Institutionalized practices do not change without sustained pressure. As Dezalay and Garth write, “the results of particular exports of state expertises depend on the extent to which there are structural homologies in the respective fields of the importers and exporters.”¹⁴⁰

Fourth, if transnational legal norms are to have an impact, they should resonate with local norms. Discursive frames that are consonant with prevailing cultural and institutional norms and practices are most likely to be accepted as legitimate within a domestic setting, whether the norms comprise human rights, business or regulatory

¹³⁴ As Moore (1974: 723) writes, “the social arrangements are often effectively stronger than the new laws.”

¹³⁵ See e.g. Berkowitz Pistor, and Richard 2003; and Halliday and Carruthers 2009, 339.

¹³⁶ Dezalay and Garth 2010.

¹³⁷ See e.g. Klug, this volume regarding access to medicines in South Africa.

¹³⁸ Halliday, this volume.

¹³⁹ See Campbell 2004, 28-29, 118 (stressing the role of institutional path dependencies); Peerenboom 2006: 833 (“Even when there is no ideological barrier to transplantation, local institutions may lack the institutional capacity to implement reforms”); Fourcade-Gourinchas & Babb 2002 (providing a historical institutionalist account of variation in the reception of neoliberalism in four countries).

¹⁴⁰ Dezalay and Garth 2002b, 14.

norms.¹⁴¹ Activists thus construct frames that will appeal in national contexts, such as the use of human rights frames as opposed to feminist frames in challenging discrimination against women.¹⁴² Where discursive frames and policy prescriptions resonate in the domestic setting, local actors can more effectively harness the transnational legal norm to further their goals. Where the distance between the transnational legal order and the local cultural and institutional context is considerable and the extent of change at stake great, then transnational legal processes are less likely to have a transformative impact.

Local populations have their own interests and ideas and don't simply accept and reject transnational legal norms. They also exercise agency in translating, reshaping, and appropriating transnational legal norms for their own uses in their own contexts, shaping their own histories.¹⁴³ The norms may often be transformed for purposes that were not contemplated by their transnational promoters. Klug's study nicely illustrates this point regarding the use of competition law in South Africa.

“While the new competition law in South Africa is modeled on European Union, United Kingdom and Canadian statutes, and draws on legal concepts developed in the United States, it also represents a hybridization of global norms and rules designed both to accommodate international restraints as well as take advantage of the opportunities these norms and rules provide to pursue particular national goals that are peculiar to the history and social context of South Africa.”¹⁴⁴

In Klug's case, local authorities use competition law norms developed in the United States to rein in pharmaceutical prices charged by US-owned pharmaceutical companies, as well as to empower new black ownership of capital.¹⁴⁵ Transnational legal processes do not simply convey legal requirements that are internalized without reflection of domestic interests and domestic stakes. They rather provide tools that national actors use to advance particular policies. In this way, transnational legal norms cross-pollinate and hybridize.

¹⁴¹ See Berkowitz, Pistor and Richard 2003, 174 (“legal intermediaries... can be more effective when they are working with a formal law which is broadly compatible with the preexisting order, or which has been adapted to match demand”). Cf. Watson 1974; and (“[l]egal irritants cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change”).

¹⁴² See Keck and Sikkink 1998, 196, 183-84; and Merry 2006, 135-38.

¹⁴³ Campbell uses the concepts of “bricolage” and “translation.” Campbell 2004, 71, 80 (“the concept of bricolage focuses our attention on a creative process in which actors make decisions about how to combine the institutional elements at their disposal”). As Merry writes regarding the issue of women's rights, local actors “appropriate, translate, and remake transnational discourses into the vernacular,” that is, into terms that resonate in local settings. Merry 2006, 3 (stressing “a process of appropriation rather than imposition.” See also Dezalay and Garth 2002b, 6 (“[i]nternationally generated imports success only where the local situation allows them to be nationalized—made part of indigenous structures and practices. Local histories determine what can be assimilated into local settings and how what is assimilated will affect long-standing local practices”).

¹⁴⁴ Klug, this volume. See also Klug 2002, 276 (illustrating how “South African actors drew on foreign sources of legitimacy to try to support their own points of view in the process”).

¹⁴⁵ See also Hirsch 2005, 158-59, 193-201 (on competition law and the black economic empowerment program).

The studies in this volume each focus on the role of domestic factors in explaining the location, extent, timing, and limits of domestic change. On the one hand, they address the power of local actors to thwart and foil transnationally-promoted legal change at the stage of implementation. Weak actors at the level of international negotiations and domestic ratification can become quite strong in foiling actual implementation of transnational prescriptions. Indonesia may have been more easily subject to economic coercion to carry out bankruptcy reforms advocated by international financial institutions than Korea and China, but these changes were often thwarted at the implementation stage, as illustrated in Halliday’s work. Similarly, Latin American social movements have successfully resisted municipal water service reforms in weak states such as Bolivia, as Morgan documents. Klug does the same regarding the work of NGOs in the fight over patent protection and access to medicines in South Africa.

Yet the studies also address where transnational legal processes help precipitate significant institutional and legal developments within countries. In Brazil, a government concerned over organized crime used the transnational recommendations of the Financial Action Task Force to tighten banking regulations in order to accomplish domestic goals to combat organized crime and corruption, as Rocha Machado shows. The government was less interested in U.S. and European concerns over terrorist networks which had spurred an intensification of FATF activity. In contrast, financial reform efforts were less successful in Argentina because no domestic demand was mobilized. Similarly, the three Latin American countries studied by Morgan each “partially ceded [regulatory control] to semi-independent regulatory institutions that strongly resemble the institutional recommendations of the transnational consensus” for water services regulation. However, analysis of “the implementation dynamics of these institutions... reveals significant national differences.”¹⁴⁶ Chile, for example, implemented a transactional model promoted by transnational actors, but it staged its urban water reforms in reflection of Chilean government perceptions of national priorities. Transnational models likewise provided templates for China in its bankruptcy reform efforts studied by Halliday, but China adopted them at its own pace following extensive internal debate.

The interaction of the relative coherence of a transnational legal order (TLO) and the degree of synchronicity of domestic demand for the legal changes envisaged can be mapped as shown in Table 3, which notes where the different subject areas and countries covered in this volume lie.

Table 3: TLOs and the Synchronicity of the Domestic Context

	HIGH (TLO coherence)	LOW (TLO coherence)
HIGH (Synchronic domestic)	Corporate bankruptcy (Korea, China); Money laundering (Brazil); Competition law (South Africa)	Municipal water services regulation (Chile)
LOW	Corporate bankruptcy	Municipal water services

¹⁴⁶ She finds that, “[i]n Bolivia, the role played by the regulator in each case is coherent with the transactional model but is politically marginalised; in Chile, a strongly transactional regulator maintains political salience, and in Argentina, a more political model of regulation is erratically salient.”

(Synchronic domestic)	(Indonesia); Money laundering (Argentina); TRIPS and patents (South Africa)	regulation (Bolivia; Argentina)
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V. Transnational Legal Process and Recursive Change

Transnational legal process is a dynamic, recursive one, involving the interaction between national and transnational law and policymaking. National law often provides the models that are then exported to other nations through transnational legal processes. Even when these models become accepted within international and transnational institutions, their adoption is often resisted within countries at the stage of implementation, which can trigger reassessments of the transnational legal norm. This resistance can spur a new counter-politics of transnational coordination, organization, and law-making, leading to competitive transnational legal processes. Table 4 provides a summary of a simplified dynamic cycle of recursivity between national and transnational lawmaking processes.

Table 4: Dynamic Cycles of Recursive Change

<i>Flow a:</i> National regulatory models are conveyed to and appropriated by an international and transnational institutions and networks giving rise to transnational legal norms
<i>Flow b:</i> The transnational legal norms are conveyed to receiving states, but often encounter resistance at the stage of enactment or practical implementation
<i>Flow c:</i> National resistance spurs a new transnational politics that triggers a reevaluation and modification of the transnational legal norm
<i>Flow d:</i> A modified transnational legal norm is conveyed to national institutions and processes

This depiction is a stylized one, as the processes are multifold and multidirectional, both top down and bottom up, comprising competition and conflict as frequently as coordination and cooperation, and involving ongoing interaction between national and transnational legal norms. The intensity of this interaction varies in light of the degree of settlement (if any) which is reached. A range of actors are involved, including key intermediaries serving as conduits and conveyors of transnational and national legal norms, who use a range of mechanisms, such as coercion, persuasion, reciprocal bargaining, modeling, and acculturation, which we discussed in Part IV.¹⁴⁷

To break down the processes' complexity, we can think of it, for heuristic purposes, in terms of stages. First, a domestic policy export often provides a model for a transnational legal order so that transnational legal norms are often globalized (or transnationalized) localisms.¹⁴⁸ The United States and the European Union most frequently provide the models.¹⁴⁹ When their models are not promoted through

¹⁴⁷ For an expanded figure summarizing the exogeneous and endogeneous factors that driver recursive processes, see Halliday & Carruthers 2009: 364.

¹⁴⁸ Santos 2003, 275.

¹⁴⁹ See e.g. Braithwaite and Drahos 2000, 27; Sassen, 2006.

transnational legal orders, U.S. and European resistance to transnational legal prescriptions is often quite transparent. Yet their prominent role in providing models tends to be overlooked in much of traditional international law scholarship which focuses on the texts of international law as agreed by consensus. For example, U.S. and European intellectual property law became the basis for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, their competition law norms the basis for the International Competition Network's principles and recommended practices, their anti-money laundering legal prescriptions the basis for the FATF's recommendations, and their bankruptcy law the basis for the UNCITRAL Model Law and Legislative Guide. These national models are disseminated through transnational legal processes, including through technical assistance, capacity building, benchmarking, monitoring, and enforcement measures. Transnational legal processes help to legitimize these legal exports.

Second, however, these transnational legal norms and institutional prescriptions often encounter resistance when the models are implemented in receiving states. Powerful actors may prevail in international negotiations as well as in the domestic enactment of transnational law. Yet actors who are quite weak (or unrepresented) in international negotiating fora and before executives and legislatures can be powerful at the stage of actual implementation.¹⁵⁰ Such resistance to transnational legal norms can trigger reassessments of transnational strategies, as well as of the norms themselves. Domestic implementation challenges send signals to international organizations over what legal norms will be accepted and what rejected. Both positive and negative signals flowing from the national to the transnational can compel the latter to reassess the appropriateness of the transnational legal norm, triggering further iterations of transnational lawmaking.

Third, national resistance to the implementation of transnational legal norms can spur a new politics that catalyzes new transnational organizing and lawmaking. Transnational pressures for neoliberal regulatory models, for example, can incite the creation of new political coalitions to advance social welfare and human rights concerns, as Morgan illustrates regarding municipal water services, Kim and Boyle regarding primary education, and Klug regarding access to medicines. Although international and transnational institutions tend to reflect the interests of the dominant powers, developing countries and activist groups also can influence transnational law through their choice among international and transnational institutions in a fragmented international system.¹⁵¹ They often do so to create policy space for themselves.

As a result, many cycles of lawmaking may occur as international and transnational institutions find that carefully crafted transnational legal norms are unacceptable or unworkable in national regulatory settings. International and transnational institutions are thus pressed to reassess the norms and institutional models that they promote, as well as the mechanisms that they use to diffuse them. Many iterations of transnational legal norms may be produced until some settlement is reached, including tacit agreement to live and let live. Nonetheless, as states are transformed along the dimensions discussed in Part III, and as intermediaries are empowered as discussed in Part IV, these state changes and intermediaries can facilitate the conveyance

¹⁵⁰ Halliday and Carruthers 2009, ch. 10.

¹⁵¹ Helfer 2004; Shaffer & Pollack 2008,

and appropriation of the transnational legal norm over time, potentially leading to a greater embeddedness of the transnational legal order. That settlement, depending on one's politics, may be progressive or regressive.

While each of the studies captures these processes, let us turn to Halliday's and Bruce Carruthers' work to provide a brief example. Halliday and Carruthers theorize the following four mechanisms that drive recursivity: the indeterminacy of law; contradictions introduced into the law; diagnostic struggles over how the problems are construed to be resolved through law; and "actor mismatch."¹⁵² Actor mismatch occurs when those actors who wield power in the domestic implementation of transnational legal norms are not represented at the international negotiation stage. If their interests are not taken into account, the resulting agreement is unlikely to be implemented effectively, triggering a new recursive cycle. Similarly, if domestic actors integral to implementation of a transnational legal norm are not represented in domestic law-making, they will be less invested in the law's implementation. In their case study of bankruptcy law, international institutions such as the IMF, World Bank and regional development banks looked predominantly to U.S. and U.K. national models in devising international bankruptcy law norms in light of a series of financial crises that raised concerns of a risk of global financial contagion. These financial institutions pedaled their bankruptcy law reform models to states in East Asia, using different mechanisms, ranging from coercion to persuasion to modeling, in light of the situation of the receiving state and the availability of intermediaries. These bankruptcy law reform prescriptions, however, were often successfully resisted by actors within the receiving states, even when they were actually enacted into domestic law, as in Indonesia, because local actors who were not represented in the international and national enactment processes retained power at the implementation stage. This resistance led to the reformulation of the prescriptions at the international level, with legal norm-making power shifting from the international financial institutions to UNCITRAL, an organization in which developing countries were better represented, and with the models themselves offering greater flexibility while retaining precision regarding alternatives.

In sum, transnational legal norms and institutional models are negotiated over time as part of dynamic, multi-directional, transnational legal processes. The studies in this volume illustrate when and why transnational legal norms are resisted, adapted, and appropriated. They do so through the empirical study of legal and institutional change in countries varying in their relation to centers of global political and economic power. Many of these countries are quite distal from these centers, but their politics nonetheless can trigger reassessments of transnational legal norms.

Conclusion

Positivist international law scholars tend to narrow their focus on traditional concepts of international law, and are thus skeptical of referring to transnational law, legal orders and legal processes. Yet focusing on the construction and migration of transnational legal norms through *transnational legal processes* is critical for the analysis of how national law and institutions are shaped and understood, and how international law (viewed more narrowly) itself is constituted and has effects. The studies in this

¹⁵² Halliday and Carruthers 2009, ch. 10.

volume evaluate how transnational legal norms and processes *interact* with domestic contexts. In the socio-legal tradition, they heed close attention to the variable adoption and adaptation of transnational legal norms in particular fields, and the factors that explain this variation. They focus their inquiry on distinct regulatory fields (as opposed to separate levels of governance) in order to assess how the transnational and national interpenetrate. In this way, they illustrate the factors that lead to variation in the location, type, extent, and timing of change spurred by transnational legal processes. Their combination of methods, regulatory areas, and countries help us to create a map for studying how transnational legal process works and the limits that it confronts.

The studies do not reify transnational law, but show how transnational law provides a tool for particular actors to advance their aims. Each study examines the role of public and private actors, mechanisms, and attributes of power involved in a particular transnational legal process in different countries. Through a comparative approach, the studies explain variation in countries' responses. Transnationally-promoted legal change sometimes catches and sometimes does not, and the studies explain why in light of the stakes arising from the import of transnational law.

Building from these studies and related socio-legal work, this Article has set forth a framework for evaluating how transnational legal process works and its implications for legal and institutional change. This conclusion highlights six points. First, we need to clarify what we mean by transnational law, transnational legal process, and transnational legal orders, in contradistinction to international law and global law. This Article has distinguished *two conceptions* of transnational law, the first being Transnational Law Applying to Transnational Situations, and the second Transnational Law as the *Transnational Construction and Flow of Legal Norms*. It has explained and illustrated this second conception based on empirical studies.

Second, we must more carefully specify the *dimensions* of transnational-induced change within states, since state change is differentiated. The Article identifies five dimensions: change in substantive law and practice; change in the boundary of the state, the market and other forms of social ordering; change in the institutional architecture of the state; change in the shaping and role of professional expertise in governance; and change in normative frames and accountability mechanisms and patterns of association that embed them. By viewing transnationally-induced legal change in terms of these broader dimensions of state change, we gain a richer understanding of what is at stake with transnational legal processes.

Third, the Article stresses the *heterogeneous nature* of transnational legal processes. The term transnational legal process can be misleading to the extent that it suggests that transnational legal process involves a one-way conveyance of coherent transnational legal norms until they become internalized and embedded within countries. Rather, there are often multiple transnational actors, institutions, and processes in competition with each other to convey different legal norms and prescriptions. This competition affects the relative coherence, clarity, and perceived legitimacy of transnational legal orders, and, in this way, affects the development of normative consensus regarding a transnational legal order and thus its impact within states.

Fourth, we must identify and evaluate the *factors that explain variation in the impact* of transnational legal processes. Do impacts vary as a function of identifiable factors? This Article organizes these factors into three clusters: the nature of the

transnational legal order; its relation to the receiving state; and the particular political, institutional, and cultural context of the receiving state. Where transnational law is clear, coherent, and perceived to be legitimate, it is best positioned to bear influence. Asymmetries of power between the transnational legal order and the receiving state create opportunities for the use of coercive mechanisms, but the effectiveness of these mechanisms may be limited at the implementation stage. Intermediaries are critical for conveying and adapting transnational legal norms to local settings. Finally and crucially, the impact of transnational law depends on the fit of a transnational legal norm with domestic demand in light of domestic contests for power, institutional capacities and path dependencies, and the extent of change at stake. Where the trajectory of change within a state is synchronous with the transnational legal norm, or where powerful domestic actors wish to harness it as leverage in domestic struggles, then transnational legal processes are more likely to be transformative. Where domestic demand is lacking, change will more likely be thwarted or be purely symbolic. Because the reception of transnational legal norms is mediated by domestic institutions and configurations of power, the transnational legal norm is often appropriated, adapted, and used in distinct and unanticipated ways.

Fifth, studies need to address the *multi-directional nature* of transnational legal processes. Theorizing transnational law in terms of being adopted, adapted, or resisted within national contexts constitutes only part of transnational legal processes. Those focusing only on the issue of transnational law's reception fail to capture how national dynamics can generate new politics that affect the transnational legal norm in question. These responses include those of not only states that are strong and proximate to international institutions, but also those that are weak, distant, and peripheral. Assessments of transnational legal process should address the dynamic processes pursuant to which the national reception of transnational legal initiatives interact with the production of transnational legal norms.

Sixth and finally, changes of national law and institutions *cannot be reduced to international realpolitik*. Law plays a mediating role together with configurations of power. Changes are often initiated, negotiated, and implemented by the agents, practitioners and institutions of law – government lawyers, legal departments of international organizations, judges, private lawyers, corporate legal officers, legal academics, and lawyers for non-governmental organizations. This complex of legal actors is not uniform in its legal views nor united in a policy agenda, and it operates in the shadow of configurations of national and global power structures.¹⁵³ These actors nonetheless form an important part of the politics of transnational lawmaking and transnational legal norm conveyance. Moreover, national institutions and legal norms are resilient. When transnational legal processes lead to legal and institutional change, they do so in context-specific ways involving the intermediation of transnational legal processes with domestic institutions, political struggles, and cultural norms. The accompanying studies provide empirical grounding for understanding these processes and their impacts.

Although this Article and the accompanying studies are not prescriptive, their implications for the advancement of any normative goal are critical. What's at stake is the effectiveness of transnational legal processes and legal orders, on the one hand, and the degrees of freedom that states and non-state constituencies retain to determine their

¹⁵³ Cf. Dezalay and Garth forthcoming 2010; and Halliday, Feeley, and Karpik 2007.

futures, on the other. Whether one is an advocate of international or transnational law in promoting state change in a particular domain, or a resister of such international and transnational pressures and influences, understanding the broader institutional and social implications of transnationally-induced legal change, and the factors which promote or impede it, is critical. That's what is at stake in the larger project, whether the substantive field of concern entail human rights law, public regulatory law, or private business law. This Article is not normative in its approach, but its framing implicitly reflects two normative concerns. First, understanding the processes of international and transnational law's production, which often has a structural tilt in favor of certain states and non-state actors, is important for understanding their relative effectiveness (or ineffectiveness) at the implementation stage. In this way, the project draws attention to the role of legitimacy of transnational legal orders. Second, it is important that international and transnational law scholars give greater attention to the implications of international and transnational law processes in non-U.S. and non-European states in light of their particular contexts, and in the process give greater voice to the perceptions and priorities of constituencies in those locales.

The study of transnational legal processes and state change beckons for further analysis, and thus calls for systematic research agendas. The costs of engaging in this research are relatively high, but so are the payoffs. When is transnationally-induced legal change primarily symbolic and when does it have practical effects? When are particular national institutions, such as courts and legislatures, empowered or disempowered? What are the critical factors and conditions? What spurs the reassessment and development of transnational legal norms over time? How do transnational legal orders maximize their authority? By focusing on the dynamic interaction of transnational legal norms and national law and institutions in particular regulatory fields, the studies in this volume provide the basis for a richer understanding of transnational legal process and state change, its opportunities, its limits, and its implications.

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