

THEORIZING TRANSNATIONAL LEGAL ORDERS

This panel was convened at 9:00 a.m., Thursday, March 31, 2016 by its moderator Gregory Shaffer of the University of California Irvine School of Law, who introduced the panelists: Terence Halliday of the American Bar Foundation; Hannah Buxbaum of Indiana University Maurer School of Law; Tom Ginsburg of the University of Chicago Law School; and Paulette Lloyd of the U.S. Department of State.

INTRODUCTION AND CONTEXT

*By Gregory Shaffer**

This panel addressed the issue of theorizing transnational legal orders (TLOs). It was cosponsored by the international legal theory, international economic law, and government attorneys interest groups of the American Society of International Law.

The panel was inspired by the edited volume by myself and Professor Terence Halliday entitled *Transnational Legal Orders* (Cambridge University Press, 2015). The book has some precedents in the work of important international law scholars, in particular Judge Philip Jessup and professor and former Legal Advisor of the U.S. Department of State Harold Hongju Koh. In his 1956 Storrs Lectures, Jessup famously broadened attention from traditional public international law to what he called “transnational law,” which he defined as all law that “regulates actions or events that transcend national frontiers,” thus including public international law, private international law, and “other rules which do not wholly fit into such standard categories.”¹

Dean Koh refocused attention from transnational law as a body of law to transnational legal process, which, to quote him,

describes the theory and practice of how public and private actors—nation-states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.²

In our book, we turn attention to the rise and fall of “transnational legal orders” from a socio-legal perspective. We define TLOs as *a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions*. As Halliday explains below, these orders involve the interaction of lawmaking and practice at the transnational, national, and local levels, giving rise to the settlement and unsettlement of legal norms across national jurisdictions. We thus do not focus only on international regimes and international law at the international level. We rather address the interaction of international law, national law, private standard setting, and local practice.

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¹ PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956).

² Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181, 183–84 (1996). Koh viewed transnational legal process as “seeking to shape and transform personal identity” so that political elites and broader societies “internalize” international law norms. He contended that “[r]epeated participation in the transnational legal process . . . helps to reconstruct the national interests of the participating nations.” Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 *HOUS. L. REV.* 623, 634 (1998).

In the book, we explain how our theoretical framework compares with regime theory in international relations and its offshoots, as well as other theoretical approaches.³ Our theory builds from regime theory, as it does from the legal frameworks of Judge Jessup and Dean Koh. Yet it also differs from regime theory, particularly in the following three ways. First, while regime theory focuses on international relations and does not integrate domestic politics in its analysis of normative development and change, domestic law and politics are endogenous to TLO theory. Second, while regime theory is nation-state-centric, TLO theory does not posit unified nation-states and does not focus on states as the sole relevant actors in creating TLOs. Rather, TLO theory calls attention to the fragmentation and disaggregation of the state in its constituent branches and agencies, as well as to the key role in TLOs of private actors, such as professional lawyers, business associations, and nongovernmental organizations. Third, while regime theory did not directly address law and law's normativity,⁴ TLO theory foregrounds the role of law, legal norms, legal institutions, and legal reasoning.

In the remainder of this session, Terence Halliday first introduces the theoretical framework of transnational legal orders and notes how it can be applied across different domains of law. Paulette Lloyd then presents her work, with the political scientist Beth Simmons, in which they use the TLO framework to assess the development of a TLO to address human trafficking. Hannah Buxbaum then applies the framework to address the area of derivatives regulation as part of a transnational financial legal order, one that remains decentered engaging private international law. Tom Ginsburg concludes by presenting his assessment of the transnational elements of national constitution making, for which he has coordinated a symposium with Professor Halliday and myself, at the University of California, Irvine School of Law, cosponsored by the American Bar Foundation.

THE THEORY OF TRANSNATIONAL LEGAL ORDERS

*By Terence C. Halliday**

What Are Transnational Legal Orders?

A transnational legal order (TLO) arises when actors seek to solve problems that span national borders by *legal* means. The spectrum of problems is, in principle, open-ended. Efforts to create TLOs by individuals, states or nonstate actors have been directed to international commerce (e.g., liability in carriage of goods by sea, trade wars), finance (e.g., double taxation, lack of credit and capital in domestic markets, bank failures), business failures (e.g., restructuring of failing corporations), health (e.g., access to lifesaving medicines, food safety), human rights (e.g., human trafficking, atrocities in civil conflicts), environmental degradation (e.g., climate change), and failed political and legal institutions (e.g., rule of law). Therefore, any social, economic or political issue that norm entrepreneurs can successfully frame as a ‘‘problem’’ to be solved in whole or in part by law may become a terrain for construction of a TLO.

³ For further discussion, see Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 21–28 (Terence C. Halliday & Gregory Shaffer eds., 2015).

⁴ For instance, a comprehensive review of regime theory published in 1997 by Hasenclever, et al. had no entry for ‘‘law’’ in the index, and the term ‘‘international law’’ is scarcely found in the entire text. See ANDREAS HASENCLEVER, PETER MAYER & VOLKER RITTBERGER, *THEORIES OF INTERNATIONAL REGIMES* (1997).

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