

Transnational Law

Transnational Law

Cases and Problems in an Interconnected World

Alfred C. Aman, Jr.

ROSCOE C. O'BYRNE PROFESSOR OF LAW
INDIANA UNIVERSITY
MAURER SCHOOL OF LAW

Carol J. Greenhouse

ARTHUR W. MARKS '19 PROFESSOR OF ANTHROPOLOGY
PRINCETON UNIVERSITY



CAROLINA ACADEMIC PRESS

Durham, North Carolina

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ISBN 978-1-42249-640-4
eISBN 978-1-63284-978-6
LCCN 2017939772

Carolina Academic Press, LLC
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

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Preface

The term “transnational law” was coined in 1956 by Phillip Jessup, when he gave his Storrs Lectures at Yale Law School that title.¹ In those lectures, he claimed that transnational law includes “all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.” In the decades since Jessup’s lectures, the term *transnational law* has become well established, even if its usage remains slippery—sometimes referring to practical questions such as jurisdiction and remedies, and sometimes to theoretical questions such as arise in relation to the disciplinarity of law, or the status of law as scientific knowledge, or the distinction between academic and political work.² In general, transnational law is taken to refer to the body or bodies of law that govern across jurisdictions, or in the gaps between them. This casebook takes its point of departure in the possibility that those apparent gaps may be fully inhabited. We approach our subject matter from a vantage point grounded in the various legal settings in which domestic legal institutions struggle with questions arising from the tensions between the inherently extraterritorial aspects of capitalism and the presumptively territorial commitments of national sovereignty.

Jessup’s celebrated formulation serves us well, since—at least for our purposes—its key elements are in his references to *transcending national frontiers* and to the *partial fit* with standard legal categories. These phrases are related, in that they point to the relevance of domestic law as the main location of transnational law, and, correspondingly, to the ways transnational law flows through standard categories while also unsettling them. That is our approach in this volume: we focus on the relationship between domestic and transnational law, as that relationship is institutionally produced in treaties, agreements, codes, and judgments, and as it introduces both constraints and opportunities for those who would choreograph the movements of

1. PHILLIP JESSUP, *TRANSNATIONAL LAW: STORRS LECTURES ON JURISPRUDENCE* (1956).

2. “The ambiguity of technical terms, legal concepts and principles coincides with the daily challenge to position oneself and one’s work. This anxiety is particularly prevalent where academic research, writing and teaching is so intertwined with real politics. The open-endedness of categories such as labour law, economic law, social law, ‘public’ and ‘private’ law, allows us to lay bare and to make visible ‘national traditions’ of legal scholarship; in turn, these traditions are themselves intertwined, non-linear, disputed and contested.” Peer C. Zumbansen, *Transnational Law* (Comparative Research in Law & Political Economy, Research Paper 09/2008) <http://dx.doi.org/10.2139/ssrn.1105576>.

people, goods, and capital investment. The traditional authority of the president in foreign affairs, for example, takes on new meaning—and significant new powers—in the context of a world economy now reliant on trade agreements and other such protocols. There are many such examples in the materials of the book; their common touchstone is uncertainty.

Accordingly, we delve into the shifting ground under issues of trade, territoriality, separation of powers, and related questions in the following chapters. For now, suffice it to say that our goal in this book is not a comprehensive account of transnational law. Such would entail a major review of the law of trade, banking and securities, family law, telecommunications, human rights, humanitarianism, immigration, and international law, as well as standard domestic law categories such as torts, business law, constitutional law, criminal law, property and administrative law—among other components of the standard law curriculum. While we intend this book to be useful to students, scholars and practitioners as a stand-alone resource, we would be well pleased to know that it is useful as a supplement to resources in these fields (including more technical and comprehensive accounts of transnational law principles, procedures, jurisdiction and litigation). We also hope that the book will be useful to social science scholars engaged with law.

It would be natural for readers to expect an account that follows the contours of the world economy. However, the seemingly borderless world of global capitalism is only one vector of contemporary transnationalism. Others inhere in highly territorialized or localized scenarios—since that is where people live, work, shop and vote, and that is where companies are located and corporations registered. Our approach emphasizes the tensions between globalism and localism as domestic law contends with problems that—as Jessup phrased the matter—transcend national frontiers. Our attention to the local aspects of transnational law also invites analytical resources beyond law. This is an interdisciplinary account, drawing especially on anthropologists' ethnographic accounts of law. Contrary to the stereotype of anthropology, ethnographic accounts of law do not deal mainly with custom or quaint localisms, but with the ways interpersonal relations and various forms of collective social life both shape and are shaped by their context in regional, national and transnational affairs. Ethnography is especially useful, then, as a resource for understanding both the diversity of human arrangements under common or uncommon constraints, and interrelationships among categories of law that, seen from above, might seem to be unrelated (e.g., kinship obligations and international investment—an example from Chapter 6).

Our book is arranged in three parts, after an introductory chapter that elaborates the scope and aims of the volume and explicates the key terms of its analysis. Part I (“Governance through treaties and international agreements”) first takes up the law, politics, and social effects of multinational agreements on tariffs and climate change. Part II (“Rights and responsibilities offshore”) takes up situations from the spheres of multinational corporations in which offshore investment creates complex webs of public-private interlegality with heavy consequences for workers. Part III

(“Governance through government”) considers the implications of transnational law for the relationship between judicial and arbitral regimes, and, in the U.S., in relation to questions of judicial review and separation of powers—culminating in a discussion of what we call the transnational executive.

In addition to emphasizing the book’s selectivity in focusing on particular dilemmas of transnational law where its social and political effects are particularly evident, we should also note the book’s periodization—for the most part—in the Clinton, Bush and Obama years. Divided government and impeachment during the Clinton years, followed by the intensive unilateralism of the Bush years and the obstructionist response to the Obama administration in the U.S. Congress, have made for a turbulent domestic front in relation to presidential power, “free trade,” human rights, collective bargaining, and immigration. The case materials reflect that turbulence, as territoriality became increasingly politicized in terms of its potential for encoding unilateralism in the security context, and, more recently, restrictions on immigration, particularly across the southern border of the United States. Such rationales and codings are sometimes explicit (as in the case materials discussed in Part III) but not always; our commentary teases out these wider realms of significance as the Trump administration begins.

In sum, we hope that our interdisciplinary effort will be helpful to readers interested in law as a dimension of contemporary transnationalism. In each chapter, we offer critical and activist perspectives, as well as those of the relevant courts or other legal institutions—both to remind readers that law and markets remain indelibly interconnected, and that the character and consequences of those interconnections are not givens. A more equitable world is always possible.

Acknowledgments

We wish to thank students from the Indiana University Maurer School of Law who served as research assistants during the course of this project. Ryan Weiss '13 and Jillian Rountree '13 provided invaluable help in the early stages of this book. As the project neared completion, we benefitted from assistance in many forms from a superb team: Alexandra Muir '16, Drew Waldbeser '16, Michael Ruderman '16, Landyn Rookard '16, Alexander Avtgis '17, Brandon Dawson '17, Allison Gardner '17, Stephanie Goldkopf '18, Zena Braish '18 and Brad Schlotter '18. Each of these students contributed significantly to the completion of this book and we are very grateful for all of their help.

In addition, our very special thanks to Jane Leigh Decker, who took on the heavy responsibility of managing the permissions process. Her dedication and steady hand, as well as her judicious treatment of the many issues that arose, were indispensable to timely completion of the work. We are extremely grateful.

Professor Aman would like to express his gratitude to Professor Peer Zumbansen, for their many exchanges on the subject of transnational law, particularly in connection with their participation as co-conveners of an international and interdisciplinary Summer Institute (SIASSI), initiated by Professor Zumbansen, on “Regulating the World Society: Law, Governance and the Quest for Global Justice.” The Summer Institute was held under the joint aegis of the Institute for Advanced Study (Wissenschaftskolleg zu Berlin) and the National Humanities Center, in Berlin and Bloomington, Indiana (in 2011 and 2012, respectively).

A book of this kind is woven of many threads, and for each of us as co-authors, these tie back to years of conversations with colleagues and with students too numerous to mention by name. We are deeply grateful to our respective institutions—Indiana University Maurer School of Law and Princeton University—for many forms of material and intellectual support. We feel particularly fortunate to have had opportunities to hone our own ideas over the years in stimulating dialogue with undergraduates, graduate students and law students in our respective seminars at Indiana and Princeton. This book is for them.

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Nebraska Law Review: Harold Hongju Koh, *Transnational Legal Process*, 75 Nebraska Law Review 181 (1996)

Oxford University Press: Ole Jacob Sending and Iver B. Neumann, *Governance to Governmentality: Analyzing NGOs, States, and Power*, 50 International Studies Quarterly 651 (2006)

Stanford Journal of Civil Rights and Civil Liberties: Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 Stanford Journal of Civil Rights and Civil Liberties 165, 166–69 (2007). Reprinted with the permission of the Stanford Journal of Civil Rights and Civil Liberties solely for this English-language edition.

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