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Constitution-Making and Transnational Legal Order

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Constitution-Making and Transnational Legal Order. Edited by Gregory Shaffer, Tom Ginsburg, and Terence C. Halliday. Cambridge, UK: Cambridge University Press, 2019. Pp. xii, 320. Index.

Constitution-Making and Transnational Legal Order—edited by Gregory Shaffer, Chancellor's Professor at the University of California, Irvine School of Law, Tom Ginsburg, Leo Spitz Professor of International Law at the University of Chicago Law School, and Terence C. Halliday, research professor at the American Bar Foundation—builds on earlier work by Shaffer and Halliday in which they developed the theory of transnational legal orders (TLO theory).[1] TLO theory "defines a transnational legal order as 'a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions'" (p. 7).

Prior scholarship on TLO theory focused on business, regulatory, and human rights law. In this book, Tom Ginsburg, a leading comparative constitutional law scholar, joins Shaffer and Halliday as a third coeditor. The book "applies the theoretical framework of TLOs to the study of constitutional norms to assess what the TLO framework can help reveal for the analysis of, and engagement with, constitution-making and practice, and how the study of constitution-making can inform TLO theory" (*id.*).The book proceeds from the premise that individuals, ideas, and institutions from abroad have always influenced constitutions, and so the process of constitution-making is best understood as a transnational process. Bringing together leading scholars from the United States, Europe, Latin America, and Asia, the book addresses the actors, networks, norms and processes involved in constitution-making from a transnational and comparative perspective.

The book consists of ten chapters. The first chapter, coauthored by Ginsburg, Halliday, and Shaffer, presents an overview of the project. Among other things, the chapter debunks the "nationalist myth" of constitution-making, which envisions "constitution-making as the work of a small group of national authors debating first principles" (p. 4). The coauthors contend that "this common way of conceiving of constitution-making . . . is simply wrong" (p. 1). "When one examines the actual processes by which constitutional documents are made, one sees an array of transnational influences, actors, and ideas that provide the very grammar for the project" (*id.*).

The book's other nine chapters provide rich and varied analyses of the transnational forces that shape the creation, amendment, and implementation of national constitutions. Chapter Two, by Ginsburg, presents a fascinating "thumbnail history of transnational advice-giving," (pp. 29–40), documenting the fact that "the pace and intensity of transnational involvement in constitution-making has intensified since 1990" (p. 40). Ginsburg's analysis places special emphasis on the UN role in this process (pp. 42–44). Ultimately, Ginsburg concludes that constitution-making is not itself a TLO. Instead, he suggests, "it might be best to think about constitution-making as a field in which other TLOs come to engage in contests over outcomes" (p. 27).

In Chapter Three, Harshan Kumarasingham, senior lecturer in British politics at the University of Edinburgh, presents a detailed case study of Sir Ivor Jennings' role as an outside advisor to the government when Pakistan confronted a constitutional crisis in 1954. In October of that year, Governor General Ghulam Muhammad dissolved the legislature and declared a state of emergency. Jennings, one of the leading constitutional scholars of the era, "legally, and politically . . . defended a 'constitutional coup' by the Governor-General against the Constituent Assembly" (p. 55). This episode "led to the breakdown of democracy and laid conspicuous precedents for dictatorship and military rule" in Pakistan (*id.*). The chapter thus presents a cautionary tale about

[1] *See* TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer eds., 2015).

the dangers of transnational advice-giving, especially when the outside advisor becomes a pawn of powerful political forces within the country.

Chapter Four is coauthored by four social scientists—Colin J. Beck, associate professor of sociology at Pomona College, John W. Meyer, professor of sociology at Stanford University, Ralph I. Hosoki, assistant professor at Kansai Gaidai University, and Gili S. Drori, associate professor of sociology and anthropology at the Hebrew University of Jerusalem, Israel. The chapter presents a detailed empirical assessment of the impact of international human rights norms on national constitutions. Specifically, the coauthors developed a "human rights index" that provides a quantitative measure of the extent to which national constitutions incorporate human rights norms from the Universal Declaration of Human Rights (UDHR). The coauthors contend that "human rights is a clear case of a transnational legal order, where norms, actors, and institutions align to promote a particular set of practices" (pp. 88–89). Their empirical analysis demonstrates that "the number of UDHR provisions present in a constitution tracks time rather closely. More recent constitutions tend to have higher scores on the human rights index" (p. 99). The chapter concludes that "constitutions reflect the global-transnational environment at the time of their writing as much as national context" (*id.*).

In Chapter Five, David Law, Charles Nagel Chair in Constitutional Law and Political Science at Washington University, St. Louis, utilizes a very different method of empirical analysis of national constitutional texts—a type of automated content analysis known as "topic modeling." "Topic modeling software breaks down a text corpus into its component topics by identifying patterns of word frequency and word co-occurrence" (p. 114). "In the context of topic modeling, 'topic' is a term of art that refers simply to a set of words that have a particular probability of appearing in conjunction with each other" (p. 122). Law's central conclusion is striking: "constitution-writing is more a barometer of geopolitical hegemony and TLO influence than a technical, apolitical exercise in institutional design" (p. 123). His analysis suggests that most constitutions in the world fit into one of four categories: Commonwealth constitutions that arise from British colonialism; Latin American constitutions that derive from Spanish colonialism; Francophone constitutions that arise from French colonialism; and socialist constitutions that are the byproduct of the diffusion of socialist ideology (pp. 128–40). Each of the four categories can be considered a transnational legal order. Law concludes that topic modeling exposes "the linguistic markers of competing transnational legal orders" and the analysis "captures the rise and fall of empires" (p. 149).

In Chapter Six, Paul Craig, professor of English law at Oxford University, analyzes the work of the European Commission for Democracy Through Law, generally known as the Venice Commission. He shows that the Commission "plays an important transnational role in the dispersion of legal norms concerning democracy, human rights, and the rule of law" (p. 169). Craig emphasizes that there are four "layers that can be discerned in the study of constitutions: the making and terms of the constitution itself; constitutional amendment; legislation that impacts directly or indirectly on the meaning and application of the constitutional terms; and constitutional practice" (p. 172). He acknowledges that "it would be possible to conceive of a TLO that was solely concerned with the making and terms of constitutions" (p. 175). However, he contends, "a TLO thus conceived would miss much if it excluded the second, third, or fourth dimension articulated above" (*id.*). This is an important point to which I return below. For now, it bears emphasis that, in Craig's view, the Venice Commission is not itself a TLO. Rather, it is one of several related organizations that seek "to foster respect for democracy, the rule of law, and human

rights" (p. 179). That group of "interlocking organizations," viewed collectively, constitute a TLO inasmuch as they "foster adherence to the relevant values" (*id.*).

In Chapter Seven, Kim Lane Scheppele, Laurence S. Rockefeller Professor of Sociology and International Affairs in the Woodrow Wilson School and the University Center for Human Values at Princeton University, analyzes the rise of "legalistic autocracies," in which "ambitious leaders are swept to power with (often large) plebiscitary mandates and they seek to govern under the appearance of law, but often outside a framework of separated and checked powers that is the hallmark of a liberal state" (p. 196). The leaders' "careful attention to constitutional form while hollowing out liberal constitutional content is what marks legalistic autocracies as a special category among competitive authoritarian regimes." (p. 197). Leading examples of legalistic autocrats include Hugo Chavez in Venezuela, Rafael Correa in Ecuador, Viktor Orbán in Hungary, Vladimir Putin in Russia, and Recep Tayyib Erdoğan in Turkey (pp. 205–19). Scheppele contends that the transnational community of constitutional consultants "has created a particular form of 'transnational legal order' that has allowed the new autocrats to escape detection—and even to thrive" (p. 190). The problem stems, in part, from the fact that transnational constitutional consultants give local leaders "a set of choices rather than a one-size-fits-all model" (p. 192). The "menu of options" approach empowers legalistic autocrats "to pick from the set of comparative constitutional practices advocated by constitutional TLO experts not the constitutional best practices but instead the constitutional worst practices" (p. 197).

Chapter Eight, written by David E. Landau, Mason Ladd Professor and Associate Dean for International Programs at Florida State University College of Law, discusses "the downside risks of constitution-making moments" (p. 234). Landau shows that "across a range of recent cases, constitution-making has helped to erode democracy" (*id.*). One factor that exacerbates the risk to democracy is "that constitution-making moments often occur during unique moments of stress and weakness for the domestic institutional order" (p. 236). Consequently, the domestic legal/institutional order creates few obstacles or constraints to thwart aspiring autocrats who seek to take advantage of a constitution-making moment to erode democracy. Unfortunately, the international legal order also imposes relatively weak constraints. However, Landau discusses four different transnational models that "may have some promise at limiting abusive acts of constitution-making, but that all also have serious pitfalls" (p. 247). He concludes that "international legal actors may achieve the best results from an approach that seeks modest gains" from each of the four models he analyzes (*id.*).

In Chapter Nine, Javier Couso, professor of law at the Universidad Diego Portales in Chile, presents a case study of Chile to examine the possibilities and limits of a constitution-making TLO. He contends that there now exists "a fully formed transnational legal order" related to constitution-making, insofar as some constitutional protections for individual rights are "normatively compelled" (p. 267). However, says Couso, "in spite of its success in the areas of rights and procedures, the dominant (liberal) TLO regulating constitution-making processes has not been as successful with regard to the sections of the constitution that organize political power" (*id.*). With respect to structural constitutional provisions, the case study of Chile shows that "the creation and implications of a transnational legal order for constitution-making . . . face political obstacles that can be impossible to overcome" (p. 274). As a result, Couso concludes that Chile, "after having one of the best processes of constitution-building ever implemented in Latin America . . . ultimately failed to deliver a new constitution" (p. 280).

In the final chapter of the volume, Abrak Saati, senior researcher at the University of California, Irvine School of Law, contends that there is an emerging transnational legal norm

requiring "participatory constitution-making in post-conflict states and in states in transition from authoritarian rule" (p. 283). However, "the norm of participatory constitution-making . . . 'sticks' better in some contexts than in others" (p. 284). Saati analyzes why the norm sticks better in some countries than others. Her answer relies on the concept of "norm localization," a process in which "domestic actors build congruence between transnational legal norms and local beliefs and practices" (p. 298). Saati's analysis distinguishes between "norm institutionalization" and "norm internalization." She contends that "institutionalization is a necessary condition for successful norm diffusion, [but] it is not a sufficient condition. For norm diffusion to be successful, institutionalization must be followed by internalization" (p. 300). Ultimately, "the question of whether or not norm diffusion is successful depends on local power hierarchies and how incumbent persons in government positions as well as members of the political opposition believe that the norm in question will help them advance their own agendas and objectives" (*id.*).

Each of the individual chapters in the volume makes an important contribution to scholarly literature in the field. The authors employ a variety of different methodological approaches; every chapter is well researched, well written, and well argued. Nevertheless, this reader is left with the impression that the volume as a whole falls short of the ambitious aims that the editors articulated in the book's first chapter.

To appreciate this point, it is helpful to recall Paul Craig's division of constitution-making into "four sedimentary layers": "the making and terms of the constitution itself; constitutional amendment; legislation that impacts directly or indirectly on the meaning and application of the constitutional terms; and constitutional practice" (p. 172). Craig says: "It would be possible to conceive of a TLO that was solely concerned with the making and terms of constitutions . . . [but] a TLO thus conceived would miss much if it excluded the second, third or fourth dimension articulated above" (p. 175). Moreover, Craig notes, a narrow focus on the first layer would be at odds with "the recursive nature of TLO theory, which accords prominence to the way in which 'the production and implementation of transnational legal norms among international, transnational, national, and local lawmakers and law practitioners dynamically and recursively affect each other'"(*id.*).[2] The book, viewed as a whole, presents a rich account of the dynamic and recursive interactions among various actors with respect to the first of Craig's sedimentary layers, and to some extent the second layer (constitutional amendment). However, the volume as a whole says very little about the dynamic implementation of transnational legal norms in Craig's third and fourth layers: legislative implementation of constitutional norms and other forms of constitutional practice.

To be fair, application of TLO theory to the third and fourth layers presents daunting challenges, which the editors acknowledge. In their words: "A significant empirical challenge, from the perspective of TLO theory, is how to assess the settling of a TLO. In contrast to the conception of a normative order that exists only in written transnational norms, by definition a TLO can be said to be institutionalized only where there is concordance among transnational, national, and local legal norms *in terms of practice*" (pp. 11–12) (emphasis added).

To begin to assess the "settling" of a TLO in constitutional practice, it is helpful to recall Javier Couso's distinction between constitutional provisions that protect individual rights and "the sections of the constitution that organize political power" (p. 267). I will refer to these as structural provisions and rights provisions. With respect to structural provisions, the essays in this volume suggest that global constitutional practice has not settled on a single TLO. Liberal constitutional democracies generally include structural constitutional provisions that divide power—both on

[2] Craig, at 175, *quoting id.* at 38.

paper and in practice—among various governmental actors to avoid excessive concentration of power in the hands of one person or one governmental body. The chapters by Scheppele and Landau, in particular, demonstrate that authoritarian leaders undermine democracy by adopting the structural forms associated with liberal, constitutional democracies, while still managing to concentrate power in their own hands. Assuming that a central goal of constitutional democracy is to structure power relationships in a manner that prevents the rise of dictatorial leaders, it seems clear that a "constitutional democracy TLO" has not been institutionalized because there is no "concordance among transnational, national, and local legal norms in terms of practice" (p. 12).

Even so, Professor Couso contends that there now exists "a fully formed transnational legal order" related to constitutional provisions that protect individual rights (p. 267). The coauthors of Chapter Four express tentative agreement with this assessment: "human rights may, in fact, constitute a coherent transnational legal order (TLO) by itself" (p. 86). The chapter's quantitative analysis of national constitutions using the "human rights index" provides empirical support for this claim. However, neither Couso nor the coauthors of Chapter Four analyze the question whether incorporation of international human rights norms into the text of national constitutions actually leads to improved protection for human rights in practice.

For the past two decades, scholars have debated the question whether ratification of human rights treaties tends to improve protection for human rights. In a controversial article published almost twenty years ago, Oona Hathaway presented detailed statistical analysis to support her claim that "treaty ratification is not infrequently associated with worse human rights ratings than otherwise expected."[3] Hathaway's research prompted other scholars to conduct their own statistical analyses in an effort to prove that ratification of human rights treaties really does lead to improved human rights protection, at least in some cases.[4]

Regardless of whether treaty ratification leads to improved human rights protection, the question posed, but left unanswered, by the present volume is slightly different. Does incorporation of international human rights norms into the text of national constitutions result—in actual on-the-ground practice—in improved protection for human rights within domestic legal systems? There are some *a priori* reasons to believe that incorporation of human rights norms into domestic constitutions might be more consequential than ratification of human rights treaties. First, in dualist countries, treaty ratification does not have any formal domestic legal consequence because the treaty lacks domestic legal effect in the absence of implementing legislation.[5] However, in almost all dualist countries, human rights norms incorporated into national constitutions are judicially enforceable, even without implementing legislation. Second, in most monist countries, treaties rank lower in the hierarchy of domestic laws than do national constitutions.[6] Since constitutional norms have a higher rank, one might expect domestic courts to enforce those norms more vigorously. Third, there is ample evidence that, in certain countries, incorporation of international

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[3] Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1940 (2002).

[4] *See, e.g.*, BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009) (concluding that ratification of human rights treaties has the greatest positive impact in countries that are neither stable democracies nor stable autocracies).

[5] *See generally* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY (David Sloss ed., 2009).

[6] *See generally* NATIONAL TREATY LAW AND PRACTICE (Duncan B. Hollis, Merritt R. Blakeslee & Benjamin Ederington eds., 2005).

human rights norms into national constitutions has had a transformative effect on domestic human rights protection. South Africa and Argentina are two leading examples of this phenomenon.[7]

In sum, *Constitution-Making and Transnational Legal Order* raises the intriguing question whether there is currently a transnational legal order that "authoritatively order[s] the understanding and practice of law across national jurisdictions" by supporting the incorporation of international human rights norms into national constitutions and by facilitating the actual implementation and enforcement of those constitutional norms in domestic legal practice (p. 7). Three points merit emphasis in this respect. First, although international law does not obligate states to incorporate international human rights norms into domestic constitutions, the incorporation of such norms into national constitutions is one possible mechanism for states to implement their international obligations under human rights treaties. Second, there is abundant evidence that many states have, at least on paper, incorporated international human rights norms into their national constitutions.[8] Third, as of this writing, there has been very little scholarship that undertakes a detailed, empirical analysis of the question whether such incorporation actually contributes, in practice, to improved protection for human rights. Such analysis is long overdue. Until that analysis is undertaken, we cannot say with confidence whether there is an effective transnational legal order for the constitutional protection of internationally recognized human rights.

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[7] *See* John Dugard, *South Africa*, *in* SLOSS, *supra* note 5; Mónica Pinto & Nahuel Maisley, *From Affirmative Avoidance to Overriding Alignment: The Engagement of Argentina's Supreme Court with International Law*, *in* ENGAGEMENT OF DOMESTIC COURTS WITH INTERNATIONAL LAW (André Nollkaemper, Antonios Tzanakopoulos & Yuval Shany eds., forthcoming 2020, on file with author).

[8] In addition to Chapter Four in this volume, see Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L.J. 61 (2013).