Global Processes, National Institutions, Local Bricolage: Shaping Law in an Era of Globalization

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The articles by Carruthers and Halliday and by Hagan, Levi, and Ferrales in the present issue of Law and Social Inquiry provide a wonderful opportunity to carry out a brief reflection on the broader field of research on globalization and law. As the discussant and organizer/chair, respectively, of a panel on “Law between Globalization and National Institutions,” from which these two articles emerged, we use the following pages to: (1) show how both articles exemplify, in two different ways, what we call the “process turn” in globalization research, (2) identify four theoretical themes these articles speak to, relating them to the broader literature, and (3) draw some lessons for future law and society scholarship in an age of globalization.¹

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¹ The session was held at the 2004 Annual Meetings of the American Sociological Association. Joachim Savelsberg organized and chaired that panel; Marion Fourcade was the discussant. We thank Terry Halliday for his helpful comments on this piece. Questions / comments may be sent to fourcade@berkeley.edu or savelsbg@atlas.socsci.umn.edu.
THE "PROCESS TURN" IN GLOBALIZATION STUDIES

In the different but classic formulations of Wallerstein (1976) and Meyer et al. (1997), globalization (whether cultural or economic) was seen as a rather impersonal process of coercion or normative alignment. As anthropological and postcolonial critics were quick to point out, these sociological perspectives tended to privilege large-scale macrosocial forces over local processes of adjustment, articulation, ambivalence, or resistance. The two articles discussed here show how far we have come from looking at globalization as such a mindless force. In different but related ways, they both illustrate instead how global arenas and global processes are constructed from below, by actors with varying identities, strategies, and constraints.

The articles carry out this research program by analyzing two different types of global processes. Hagan, Levi, and Ferrales examine the emergence of an international legal institution—that is, an institution whose object and jurisdiction is directly constructed at the international level. In that endeavor, it bears some similarities to Dezalay and Garth’s (1996) groundbreaking study on international commercial arbitration, although its approach is both more focused and more ethnographic. Carruthers and Halliday, on the other hand, look at the transformation of a set of local legal jurisdictions under international (both economic and political) pressure. While analytically related to diffusion studies, it departs from them by considering the enormous “decoupling” between the isomorphic ceremony of formal law and the chaotic idiosyncrasies of law in practice.

The contribution by Hagan, Levi, and Ferrales examines the constitution of the new jurisdiction of international criminal law at the International Criminal Tribunal for the Former Yugoslavia (ICTY). International criminal law, Hagan and his coauthors show, is a highly contested enterprise in which actors creatively make up practices from their own legal understandings, the political demands made on them, and local institutional dynamics. Differences and shifting strategies within and between powerful nations (but most prominently within the U.S. government) are reflected in a polysemy of legal (and metalegal) frameworks, which are caught between the conflicting directions of liberal and ad hoc legalism. Such conflicts, however, are also mediated by the institutional context, as internal practices and organizational routines are adjusted in response to external challenges. The ultimate outcome of these back-and-forth processes—how international criminal justice is finally understood and carried out—can thus only be understood by linking an analysis of political forces within powerful states with a study of internal organizational changes inside the transnational institutions these states support.

2. See Silbey (1997); Halliday and Osinsky (forthcoming 2006) for reviews on this subject.
A less visible, but no less powerful form of contestation informs Carruthers and Halliday’s analysis of the spread of bankruptcy law in East Asia. On the surface, countries seem to converge. The global spread of technologies and multinational corporations, as well as the influence of international institutions and their pro-market credo, have prompted, it seems, the adoption of a standard set of legal best practices, which corporate bankruptcy law is a prominent part of. Carruthers and Halliday’s careful fieldwork, however, leads them to reject a straightforward “diffusion” argument as they examine the complex interactions between local actors in China, Indonesia, and South Korea with consultants and experts from the World Bank and the International Monetary Fund. The globalization of the local, they argue, depends on the localization of the global: who supports these efforts, where supporters are located in the institutional structure of government, and what kinds of relationship they entertain with global institutions. Ultimately, they suggest, cross-national differences in the timing of adoption, as well as in the shape of corporate bankruptcy law may be explained by (1) the country’s position in the international arena (“balance of power”), and (2) the presence or absence of a set of intermediaries to bridge the distance between the global and the local (“distance”).

FOUR THEORETICAL THEMES AND THE WIDER LITERATURE

Four theoretical themes arise from these two articles: first, the role of local actors in globalization; second, the interdependence and mutual constitution between the global and the local; third, the question of global convergence versus domestic divergence; and fourth, the asymmetrical relations among actors on the global stage. Let us take each of these themes in turn.

(1) In their focus on the actual, concrete processes that lie under the phenomenon we call globalization, the articles redirect scholarly attention toward the question of agency and its role in articulating the local with the global: How do local actors on the ground—professional experts, public officials, activists—construct this global domain through their myriad of (necessarily) local actions and decisions? How do they use their transnational connections in their strategic struggles to impose their authority on a particular field? How do they navigate between their positions vis-à-vis global and national constituencies?

As mentioned above, much of this actor-centered approach was pioneered by Dezalay and Garth (1996) in their landmark book about the construction and transformations of International Commercial Arbitration. Drawing on Bourdieu’s field analysis, Dealing in Virtue managed to tell a story that was concretely constructed out of the personal trajectories of the field’s main actors, as well as those of the institutions they serve. Hagan et al.’s careful
reconstruction of the ICTY judges' actions in light of their evolving situation vis-à-vis external constituencies clearly follows this line of analysis (although it does not examine the broader interpenetration of legal strategy and social position that plays so prominent a role in Dezalay and Garth's analysis). Likewise, Carruthers and Halliday are interested in the concrete construction of the law on the ground, and their article goes into fascinating detail about the personal trajectories of, and interactions between, experts from international institutions, consultants, and local public officials.

(2) Second, and related, both articles emphasize the interdependence between the global and the local: the global does not exist outside of its relationship to, or more specifically its incarnation in, local practices and institutions. In this sense the relationship between the global and the national is not one of interaction but of mutual constitution. In Carruthers and Halliday's article, for instance, the "global" standard of corporate bankruptcy law partly emerges out of the universalization of some local problem. Indeed what turned corporate bankruptcy law into a major issue worldwide is the fact that corporate solvency was perceived (constructed) to be one of the main reasons behind a local catastrophe—the Asian financial crisis. The solution, which was promoted worldwide, however, was also based on a local model—in this case, U.S. bankruptcy law. The global, in sum, is never entirely global: it always involves the globalization of some local rule—which rule prevails, however, is usually defined by relations of power in the global economy and polity (Santos 2005). We will shortly return to this point.

(3) Carruthers and Halliday prominently address the question of global convergence versus national divergence in legal frameworks and practices. They suggest, however, that there is no need to choose between the two interpretations. There is convergence in the purely formal sense that countries pass a law about corporate bankruptcy. And in that narrow sense their finding vindicates the world society approach (e.g., Meyer et al. 1997; Frank, Hironaka, and Schofer 2000). Yet, as much institutionalist literature also suggests (e.g., Guillen 1994), they also find profound differences in the intent, content, and, especially, the implementation of these legal frames and rules.

This issue has been discussed by neo-institutionalist scholars as "decoupling," a situation in which nation-states introduce policy changes to gain or maintain international legitimacy, without, however, rigorously implementing these changes (Buttel 2000). Meyer and Rowan (1977) had earlier termed such adaptation at the level of organizations "ceremonial conformity." Schofer and Hironaka (2005) recently spelled out the conditions under which actual conformity occurs: first with the structuration of institutional environments, that is with the clarity and coherence of norms and scripts; second, with the persistence of institutional environments; and finally with their penetration of subunits of the adapting society. Boyle, McMorris, and Gomez (2002) demonstrated the explanatory power of the latter factor when they examined the likelihood with which human rights norms against female genital cutting, widely adopted in legislation throughout the globe, are in
fact implemented. Clearly, these factors are distinct but may overlap with Carruthers and Halliday’s argument about “power differentials” and “distance” from the “diffusing” institutions. Future work may bridge such conceptual gaps and provide a more detailed empirical specification of such concepts as “institutional penetration” or “distance,” to better evaluate how they shape legal adaptation and implementation.

A second way to approach the question is by analyzing legal change as a response to the common challenges faced by nation-states at given historical periods. For instance, most countries were confronted with the emergence of a “social question” in the nineteenth century and responded with different degrees and types of policing, as well as burgeoning welfare policies. While trends of structural change may be general, and countries watch and borrow from each other in constructing their responses, local actors’ interpretations are always constructed through historically evolved institutions of knowledge production and political and legal decisionmaking, as well as by local cultural norms and cognitive frameworks (Savelsberg 1994; Dobbin 1994; Sutton 2000; Savelsberg 2004; Savelsberg and King 2005). In short, the local actors toward which Carruthers and Halliday as well as Hagan, Levi, and Ferrales direct our attention to in this issue, act under nation-specific institutional and cultural conditions that much of the comparative research literature has theorized about.

What is especially interesting about Carruthers and Halliday’s article is the combination of neoinstitutionalist arguments (of the sort discussed above) with a more structural argument à la Wallerstein (1976) about position in the world economy. As such, it opens interesting avenues for theoretical cross-fertilization. Future research may look more systematically at how changes in a country’s power position (in the case of an economic crisis, for instance) may affect the closeness vs. openness of its institutions vis-à-vis global legal models, or its willingness to actually implement legal rules that had been adopted out of pure ceremonial conformity. Another possible direction would be to explore how differences in national institutional arrangements and cultures are translated into global-local “distances,” and how they affect the mediating or bridging possibilities discussed by Carruthers and Halliday.

Finally, the globalization process is itself embedded in a broader global economy and institutional order dominated by the United States. The articles explore this relationship between globalization and Americanization more or less explicitly, and suggest no simple answer. The relationship to the United States may hasten global diffusion (e.g., the case of South Korea), but it may also hinder or modify its direction, particularly if the relationship is defined antagonistically.

3. The substantial literature on the relationship between economic crisis and institutional change (e.g., Hall 1989; Dobbin 1993; Fourcade-Gourinchas and Babb 2002) suggests the relevance of these questions.
For instance, the diffusing rule may be localized and reappropriated as something explicitly “other” than the (American) model it originated from. Saguy (2000), for example, shows how French activists and lawmakers, while adopting sexual harassment laws, nonetheless drew powerful symbolic boundaries against its meaning and shape in the United States, where the laws were pioneered. This type of argument is clearly in line with Carruthers and Halliday’s observations on the Indonesian case. Hence, the dominant position of the United States may both contribute to the international rise of certain issues but also inform, through the need of actors or countries to position—and often distance themselves vis-à-vis the American models they are borrowing from, the persisting national differences noted above, or (in the case of Hagan, Levi, and Ferrales’ article), the legal creativity of international legal institutions, such as the ICTY. At any rate, the power asymmetries between various types of national and international actors in lawmakering deserves more attention than it has so far received.

The picture to emerge is thus complex and not free from contradictions. Its complexity will only grow if we include into our analyses other powerful actors than the United States, such as the European Union, Russia, or China. The considerable U.S. influence on the ICTY for instance—an institution that is both located within Europe and in charge of judging a genocide that took place at Europe’s doorstep—is, at best, a puzzling fact that merits to be addressed in its own terms.

CONCLUSION

The questions raised here need to be kept in mind if we want to understand the life, behavior, meaning, and culture of law in the contemporary world. It suggests that we follow these articles’ lead to explore (1) the concrete actions and processes through which “legal globalization” comes about; (2) the mutual constitution of global and local legal actors and actions; (3) the filtering of global legal processes through specific institutional contexts and cultures; and (4) the complex, multifaceted role played by the United States in this legal globalization process—and perhaps also the feedback effects of the process itself on the United States (and the American legal profession in particular). There is, in short, still much to be done.

REFERENCES


4. See Fourcade, forthcoming, for such an analysis involving the economics profession.


