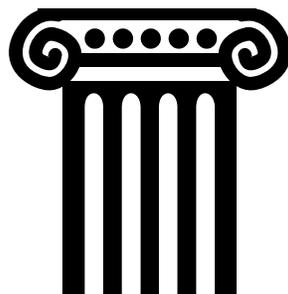


# University of Minnesota Law School

Legal Studies Research Paper Series  
Research Paper No. 11-38



## **Transnational Recursivity Theory: Halliday & Carruthers' *Bankrupt***

**Gregory C. Shaffer**

This paper can be downloaded without charge from the Social Sciences  
Research Network Electronic Paper Collection at

# Transnational Recursivity Theory: Halliday & Carruthers' *Bankrupt*

by Gregory Shaffer<sup>1</sup>

Terence Halliday and Bruce Carruthers' book *Bankrupt: Global Lawmaking and Systemic Financial Crisis* is a major work, providing new ways to see and assess the relation of global norm-making and national lawmaking. The authors build and apply theory along the following dimensions within a single book, addressing (i) the construction of global norm-making; (ii) the intermediating processes through which global norms are conveyed to national settings; (iii) the national enactment and implementation of global norms; and (iv) the recursive processes through which global norm-making and national lawmaking interact dynamically over time. They engage in "emergent analytics" in that they build theory inductively as part of a dynamic, interactive process with empirical assessment of practice (Nourse & Shaffer 2009), in their case from sustained field work in multiple sites of global and national governance. By immersing themselves in this substantive topic over years, the authors provide us with insights found nowhere else in the law and globalization literature. After providing a brief overview of some of the authors' key findings, this essay examines the challenges that this work faces if it is to have a long-term theoretical impact, as it merits.

## 1. Major contributions

The book makes many notable contributions, of which three are highlighted here: its study of the mechanisms for the diffusion of global legal norms, its study of the role of intermediaries in conveying these legal norms, and its study of how even weak states can foil the strategies of powerful ones regarding policy reform, leading to recursive processes of global norm-making and national lawmaking.

First the authors show how quite different mechanisms are used to convey global legal norms in a single policy area in light of power asymmetries and variations in the role of intermediaries. This finding sets forth a challenge to global polity theory which tends to focus on a single mechanism of diffusion. Halliday and Carruthers, for example, find that coercive measures were used to a greater extent with Indonesia in light of its weaker power position. For Korea, although it was also in a vulnerable position during the Asian Financial Crisis, the mechanism of persuasion was more central to effecting legal change, in part because of the role of Korean professional intermediaries educated abroad and plugged into transnational policy networks, including through Korea's OECD membership. In China, in contrast, change occurred primarily through the mechanism of modeling, as China modeled its national bankruptcy law reforms on global templates.

Second, Halliday and Carruthers provide important advances in theorizing the role of intermediaries. They typologize intermediaries in terms of their competencies, power, and loyalty. 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, and nongovernmental organizations.

---

<sup>1</sup> Melvin C. Steen Professor of Law, University of Minnesota Law School.

Third, Halliday and Carruthers develop and apply the concept of recursivity, which links the study of global and national normative and legal change as part of a single dynamic process. They stress the role of feedback loops between the global and domestic levels in the production and diffusion of legal norms, and contend that scholars need to assess the production of global legal norms diachronically in response to the frequent foiling of global prescriptions at the time of domestic implementation. They show how recursive processes are driven by the indeterminacy of legal texts, ideological contradictions within these texts, diagnostic struggles over the problem the texts aim to address, and actor mismatch between those that adopt global norms and those key to their implementation. While scholars have previously attended to the “gap” between the initial law-in-the-books and the law-in-action across domains of law, much less attention has been given to the way the law-in-action can spur changes in the law-in-the-books. Halliday and Carruthers integrate this aspect as well in their analysis of lawmaking and implementation over time.

Some commentators may critique the authors’ recursivity concept, finding that it is overly focused on law, to the exclusion of other forces, in focusing on the dialectical relation of the law-in-the-books and law-in-action. For me, however, the concept is about the relation of law and politics at multiple levels over time, examining how both global and national law and politics reciprocally respond to each other at the lawmaking and implementation stages. This view of the concept of recursivity involves a subtle but important difference about the primacy given to law in law’s study.

## **2. Three Challenges**

This work faces three main challenges if the theorizing is to take hold broadly within the academic literature, as it should. The first challenge with this book is that it might not be sufficiently read because of the subject area, bankruptcy law, which though fascinating as is anything once one delves into it, may be too technical to incite some readers. Yet the authors show us the merits of delving deeply in a single issue area across levels of social organization, while simultaneously thinking laterally about a study’s broader theoretical implications.

A second challenge is that some commentators may find that the book contains too much in one package, and should have been divided into two or three books in order to gain analytic leverage in its critique of existing theoretical approaches. For example, the authors could have one book that focuses on the construction of global norms and provides a critique of global polity theory, and a second book that focuses on the political economy of domestic policy making, and provides a critique of comparative political economy. As regards global polity theory, their careful empirical field work convincingly captures the politics of the construction of global norms and the variation of their impacts. As regards comparative political economy, they demonstrate the importance of comparing national systems in global context, and show how national politics feed back into the construction of global norms. Yet the authors were correct in writing a single book, complemented by a series of articles on specific components, for it is by combining their arguments into a single book which enables the authors to provide powerful critiques of existing comparative political economy and global polity theory. Were they to segregate their study into separate studies of global and national lawmaking, we would be left with the blind spots characterizing global polity theory and comparative political economy. It is through linking the study of the global and the local within a single analytic frame that the authors make their major contributions.

The one simple thing that the book lacks, in my view, is a single brand name which captures the ambitions of their analytic approach, and which provides a common name for further empirical research on other issue areas in this vein. Since the authors' key theoretical contribution is encapsulated in the concept of the "recursivity" of global and national processes, I suggest we call their analytic framework *Transnational Recursivity Theory*. Such a label would encompass a new field of work that requires the simultaneous study of the construction of global legal norms, their transnational transmission, their reception in national legal systems, and the processes through which this reception feeds back and potentially reshapes the globalizing legal norm. I use the word "transnational" to capture the cross-border nature of these dynamic processes which involve global, regional and sometimes bilateral exchanges over time (Shaffer 2010).<sup>2</sup>

The third major challenge is whether the authors' findings ultimately play out in other substantive areas, which the next section addresses.

### 3. Application across Issue Areas

The key issue regarding the relevance of the theorizing built by Halliday and Carruthers is whether it applies across issue areas. Are the findings limited to a subject area, that of bankruptcy law? Do the same findings apply across such broad categories as global business law, global regulatory law, and global human rights law? These questions apply to three sets of questions: *why* turn to international law; *how* is international law produced; and *what* explains variation in international law's effects (Ginsburg & Shaffer 2010). For example, global bankruptcy law arises both from the desire to coordinate national law around common standards to address transnational insolvencies, and (most importantly) to ensure transnational policy cooperation to address systemic concerns raised by financial crises. Human rights law, however, does not raise such cooperation and coordination concerns. Countries rather agree to human rights treaties for expressive reasons, which is why much of global polity theory focuses on human rights oriented issues. Does this difference affect the processes and outcomes we see?

Similarly, there is variation in how international law is produced and has effects. Global bankruptcy law is generally of a "soft" variety in that the key treaties are not formally binding, but rather provide templates for national policy reform. The authors' concept of recursivity thus refers to recursive cycles between global "norm-making" and national "lawmaking" in the bankruptcy field. However, in an increasing number of areas of global policy, we find binding lawmaking (not just norm-making), as with the agreements of the World Trade Organization, which are subject to mandatory international dispute settlement. These variations raise the question of whether the nature of the global or transnational legal regime relate to variations in the regime's effects on national law and practice.

Halliday and Carruthers' work nonetheless provides a baseline for assessing the impact of variations in global and transnational legal orders on the prospects of state change. These orders may include global, multilateral, regional and bilateral norms and institutions. They may include amalgams of hard law and soft law varying in their precision, obligatory nature, and institutionalization of dispute settlement.

We can assess variation in transnational legal orders along different dimensions, such as in terms of the degree of normative settlement regarding the issues addressed and the extent of issue alignment among the various legal orders that may address an issue. In the area of

---

<sup>2</sup> This framework essay for a special issue draws significantly from Halliday and Carruthers' work.

bankruptcy, for example, a rough global consensus was reached, and roles were allocated among global and transnational organizations in line with this normative consensus. However, issues remain much less settled in other areas, such as that of the regulation of genetically modified foods to give one example (Pollack & Shaffer 2009).<sup>3</sup> In that area, as well as others, actors “forum-shop,” institutions compete, and norms can conflict, raising the issue of which TLO will be determinative in setting norms, regulating behavior and adjudicating disputes. Further work is required to assess the impact of variations in global and transnational legal orders on the degrees of freedom states retain to implement policy.

#### **4. Conclusion**

*Bankrupt* is a major work that builds new theory that needs to be applied and tested across issue areas of business, regulatory and human rights law. The book opens up a world for further socio-legal research.

#### **References**

Ginsburg, Tom and Gregory Shaffer. 2010 (forthcoming). How International Law Works: What Empirical Research Shows, in *The Oxford Handbook of Empirical Legal Studies*, eds. Peter Cane & Herbert Kritzer (Oxford: Oxford University Press).

Nourse, Victoria and Gregory Shaffer. 2009. Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory. *Cornell Law Review*, vol. 95, pp. 61-137.

Pollack, Mark and Gregory Shaffer. 2009. *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (Oxford: Oxford University Press).

Shaffer, Gregory. 2010. Transnational Legal Process and State Change: Opportunities and Constraints [under review, to confirm cite shortly].

---

<sup>3</sup> This book likewise assesses the recursive interaction of national and international lawmaking.