

Transnational Law and Privatized Governance

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The transnational legal field is comprised of a strikingly diverse variety of actors, institutions, networks, and processes that contribute in important ways to globalization. Transnational law firms and the lawyers comprising them, in particular, play a central role in creating and enforcing the laws that form the normative infrastructure for global capitalism. Today, geographically mobile lawyers specialized in international and transnational commercial law, mega-law firms, and elite networks of lawyers work the law and contribute to its diffusion throughout the developed world and increasingly into pockets of the developing world. They are creating a legal order that is increasingly private, autonomous, and transnational in that the laws are removed from local and national legal systems. Transnationalized laws mediate local and global political economies and societies by disciplining localities according to global standards of conduct. They thus have significant implications for local individual and collective autonomy or self-governance and give rise to specific concerns and questions.

A central concern is the role that transnational law firms play in the dialectic or tension between globalization and autonomy. Do they have an impact on the autonomy of individuals, groups, governments, or corporations? What is their substantive legal focus? What organizational form(s) do they take? How do they operate? Are their organizational forms, legal focus, and operations influenced by globalizing processes? Do these firms facilitate globalization? Can their operations give rise to ways to enhance and promote the autonomy of individuals or groups?

Research reveals that law firms are important in managing the interface of globalizing processes and local autonomies. These firms operate at precisely the points where global laws are first created and later enforced against individuals and groups such as governments, corporations, and Indigenous peoples. Transnational law firms create global laws, practices, and dispute resolution regimes that are delocalized in that they are not dependant upon local or national legal systems of law. As legal enforcement remains a prerogative of states and national legal systems, these same laws and practices must be relocalized in order to be enforced. Transnational law firms thus bridge the global and the local.

Transnational law firms are shaped by forces of globalization and may be regarded as transnational in several ways. First, they are transnational in areas of substantive law, reflecting important developments in the global political economy associated with the globalization of capitalism. Transnational law firms specialize in international investment, trade, and financial law, international commercial arbitration, international sale of goods, cross-border mergers and acquisitions, hostile takeovers, joint ventures, capital market transactions, debt restructuring, privatizations, and other commercial transactions associated with the transnational capitalist mode of production. Second, they are transnational in organization, involving both spatial location and organizational forms. In terms of spatial organization, transnational law firms have multiple locations and are concentrated in major commercial centers and global cities, such as New York, London, Tokyo, Frankfurt, and Paris, in order to service their clients who have transnationalized their services and to compete with other service firms who have similarly transnationalized. With regard to organizational forms, transnational

law firms exhibit different degrees of decentralization. Some operate transnationally through foreign offices, while others have developed strategic alliances or merged with local law firms.

Transnational law firms are also transnational in terms of their law-making processes, their methods and style of lawyering, and their dominant legal culture. In this sense, they are not only shaped by globalizing processes, but these firms in turn shape and facilitate globalization. Transnational law firms utilize unified databases, legal forms, and practices that are delocalized and denationalized, as well as similarly delocalized and denationalized laws and methods for dispute resolution. They prize American-style entrepreneurial lawyering and private transnational law-making, while the dominant culture is one of a neo-liberal market discipline geared to the continued transnational expansion of capitalism. This culture regards law as properly facilitating the global expansion of capitalism by removing national and local restrictions on trade, investment, finance, and the enforcement of commercial transactions through privatized regimes of dispute resolution. The dominant legal culture thus constitutionalizes the subordination of local political economies and societies to the conditions required for the further expansion of capitalism through private regimes of accumulation. These firms thus serve the needs and interests of transnational capitalism and the transnational capitalist class. They participate in creating the legal regimes that have in some instances worked a dispossession of local individuals and groups. For example, bilateral investment agreements (BITs), which are the dominant legal forms governing foreign investment activities, impose binding obligations that limit the legislative and policy autonomy of local individuals, communities, and governments. BITs discipline local activities, subordinating local autonomy to the autonomy of transnational financial and investment corporations.

Private transnational law-making by mega-firms raises important concerns about human autonomy, both individual and collective. It raises considerations about the democratic legitimacy of laws that privilege private capital accumulation by subordinating local human autonomy to the autonomy of global corporations. Indeed, private transnational law-making challenges basic understandings of the rule of law and the democratic accountability of institutions of global governance. Importantly though, this is not necessarily a one-way process. In fact, recognizing the dialectical tension between the delocalizing and relocalizing operations of transnational law firms directs attention to the conditions of possibility for the emancipation of local individuals and collectivities both through and against law. The point of relocalization may be usefully regarded as a terrain of struggle that opens up exciting opportunities for emancipatory politico-legal strategies. Such strategies contest the subordination of the autonomy of local peoples and governments to the autonomy of global corporations and institutions. This raises the transformative potential of private international law and local or national interventions to enhance local human autonomy. Here the ability to assert local controls through antitrust and securities legislation that combine private remedies with public purposes, or through tort law, delict, and the laws of contract that engage in social regulation by protecting the interests of third parties, consumers, environmental protection, collective bargaining, or the protection of weaker parties in commercial transactions is of central concern. Of related concern is the potential for local laws and regulations to hold transnational corporations accountable for their corporate social responsibility commitments in labour, human rights, environmental, and corporate governance relations. Such interventions would take advantage of the centrality of transnational law firms to the localization of global capitalism by contesting this one-dimensional market civilization both through and against law. The distinction is critical for it opens up the possibility of practices that, through and against law, foster human autonomy.

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