

From Transnational Relations to Transnational Laws

Northern European Laws at the Crossroads

Edited by
Anne Hellum, Shaheen Sardar Ali
and Anne Griffiths ■

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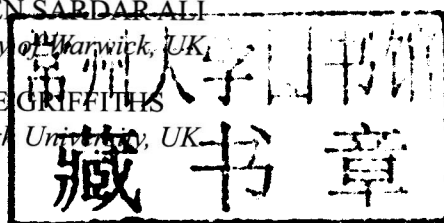
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FROM TRANSNATIONAL RELATIONS TO TRANSNATIONAL LAWS

This book approaches law as a process embedded in transnational personal, religious, communicative and economic relationships that mediate between international, national and local practices, norms and values. It uses the concept 'living law' to describe the multiplicity of norms manifest in transnational moral, social or economic practices that transgress the territorial and legal boundaries of the nation-state. Focusing on transnational legal encounters located in family life, diasporic religious institutions and media events in countries such as Norway, Sweden, England and Scotland, it demonstrates the multiple challenges that accelerated mobility and increased cultural and normative diversity is posing for Northern European law. For in this part of the world, as elsewhere, national law is challenged by a mixture of expanding human rights obligations and unprecedented cultural and normative pluralism enhanced by expanding global communication and market relations. As a consequence, transnationalization of law appears to create homogeneity, fragmentation and ambiguity, expanding space for some actors while silencing others. Through the lens of a variety of important contemporary subjects, the authors thus engage with the nature of power and how it is accommodated, ignored or resisted by various actors when transnational practices encounter national and local law.

List of Contributors

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Preface

To come to grips with the complex intersections of transnational social, economic and legal life, the chapters in this book are based on empirical studies that draw on disciplines like law, social anthropology, anthropology of law, sociology of law, media studies, gender studies, religious studies and social geography.

The book is the outcome of the international interdisciplinary research program, *Cultural Complexity* (CULCOM), led by professor Thomas Hylland Eriksen at the University of Oslo. The Transnational Law Project, which was initiated by professor Anne Hellum, formed a part of CULCOM's broader study of the relationship between transnationalism and cultural complexity. It started out with an international conference on Transnational Law arranged by CULCOM in Oslo in 2007. The Conference was followed up with a book seminar hosted by the research group Rights, Individuals, Culture and Society (RIKS) at the Faculty of Law at the University of Oslo in 2009.

We are grateful to Anne Marit Hessevick (CULCOM) for the organization of the CULCOM conference and Elisabeth Wenger Hagene (RIKS) for the organization of the book seminar. Margo Bedingfield edited the chapters. Funding for this book project was provided by CULCOM, the Norwegian Research Council's Immigration Program (IMER) and the research group RIKS at the Faculty of Law.

Anne Hellum
Oslo, October 2010

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Introduction

Transnational Law in the Making

Anne Hellum, Shaheen Sardar Ali and Anne Griffiths¹

Introduction

Transnationalization of personal, economic, communicative and religious relations has profoundly affected the role of state law and international law in all parts of the world. Accelerated mobility of people, norms, capital and technology is reflected in the current state of legal flux where local, national and international regulatory domains are constantly reconfigured (F. and K. von Benda-Beckmann and Griffiths 2005). To describe and understand how the normative plurality and complexity resulting from transnationalization is played out in Northern Europe, particularly in Norway, Sweden, England and Scotland, this book explores encounters between international, national and local norms and practices in four interrelated spheres of life and law: family, religion, media and market. Our aim is to provide an empirical foundation for a critical assessment of the assumptions and presumptions underlying legal discourse in what used to be perceived as culturally homogenous societies bounded by national borders (Twining 2000).

The chapters all provide an actor's perspective from below. They uncover the legal constraints, inconsistencies or conflicts that individuals, groups or enterprises face in their search for secure livelihoods, freedom or economic gain. Focusing on transnational legal encounters embedded in family relationships, diasporic Islamic institutions, transnational media events and global economic transactions, the chapters provide a window into the conflicts and dilemmas that increased mobility poses for Northern European state law as to how to strike a balance between equality and difference. The Norwegian case studies are set in a Northern European protestant culture where difference is seen as a shortcoming of some kind (Gullestad 2001:54). They reveal how narrow nationalist ideas of sameness underlying legal policies that make claim to universality often result in inequalities between the majority and minority population. How laws and policies endorsing multiculturalist claims may reinforce existing inequalities within minority groups is demonstrated by the British experiences. The study of the British *Shari'a* Councils opens up space to see in evidence the multicultural project in its attempt to reconfigure social and legal discourse in matters of family law and the ambiguous experiences of British Pakistani Muslim women using

¹ We would like to thank Thomas Hylland Eriksen for insightful comments to this chapter.

such fora. Faced with a situation where rights claims are embedded in overlapping and conflicting identities in terms of religion, ethnicity, gender and social status, Northern European state law, as the chapters show, is indeed at the crossroads.

Embodying both universality and diversity, human rights are often seen as the key to the challenges that increased mobility and cultural diversity and complexity have set off in Northern Europe (Hellum 2006). The increasing body of international and regional human rights instruments and institutions has become the location of claims for welfare, justice, freedom and dignity from women, refugees, migrants and ethnic, religious and sexual minorities who until recently stood excluded from the Western equality project. Norway, Sweden, England and Scotland, the locations of this book, are facing challenges from both above and below. A growing body of international and regional human rights obligations along with an unprecedented cultural and normative diversity is challenging the national legal identity (Gorashi, Eriksen and Algashi 2009).² Accelerating international human rights obligations that call the assumed cultural homogeneity underlying national law into question and, as such, challenge privileged positions of status and power, are met with increasing state resistance in both the South and the north. In the Nordic countries there is increasing concern about the dynamic interpretation of regional human rights challenging national laws, policies and practices. In Norway, a recent study on 'Power and Democracy' raised concerns about incorporating international conventions into the law which served to undermine national sovereignty (NOU 2003:19). One hypothesis purporting to explain this growing state resistance to incorporating international human rights in the Nordic countries' legislation is the prevalence of communitarian narratives that depict these countries as ethnically and culturally homogenous and egalitarian nations with a strong emphasis on grassroots movement and participatory local democracy (Føllesdal and Wind 2009:132).

Yet the human rights arena is only one of the multiple avenues that people who fall outside the scope of national law pursue. People's search for security, justice, freedom or economic gain is increasingly reflected in social and economic arrangements drawing upon norms and values that transgress both national and international law. For the actors engaged in these endeavours, neither international nor national laws are the sole mechanisms for regulating their affairs. The concept of legal pluralism draws attention to the coexistence within the same social space of more than one body of law, pertaining to the same set of activities (Griffiths 1986, F. von Benda-Beckmann 2001, Griffiths 2002). The historical and ethnographic record shows considerable variation in the effectiveness of state laws in comparison with coexisting non-state legal orders (F. and K. von Benda-Beckmann 2006). Globalization, in terms of transnational human mobility and flows of capital, technology, ideas and norms, has had the effect of creating transnational social, economic and religious communities that to a large extent

2 This is one of the theoretical propositions of the interdisciplinary and comparative research conducted in the research project, 'Cultural Complexity in the New Norway', of which this book is a part.

regulate their own affairs. To understand the role of both international and national law in this changing sociolegal landscape, this book explores the norm-generating processes embedded in transnational personal, social, religious and economic relations. Thus we investigate the social and legal factors and forces that inform family determinations, religious decrees, media events, inter-governmental regulations or contracts regulating exchange of labour, services and goods, at the various levels at which they occur.

To come to grips with these complex intersections of social, economic and legal life, the chapters are based on empirical studies conducted by researchers who, in their engagement with transnationalism, draw on disciplines like law, social anthropology, anthropology of law, sociology of law, media studies, gender studies, religious studies and social geography:

- In Part I, Marit Melhuus, Annika Rabo, Farhat Taj and Anne Hellum rely on field research and individuals' lived experiences to explore the moral, political and legal contestations that transnational family lives are giving rise to in Norway and, to a certain extent, in Sweden. A common theme is how gay and lesbian Norwegians, Syrian Christians in Sweden and Pakistani Muslim women in Oslo create a way around social, religious and legal stereotypes that disregard their quest for welfare, belonging, equality, dignity and choice.
- In their explorations of 'living Islamic law' in the Northern European diaspora in Part II, Shaheen Sardar Ali, Lena Larsen and Samia Bano draw on a combination of written and oral sources as well as field observations. Analyzing *fatwas* from the Internet, the European Council of *Fatwas* and Research and the practices in informal *Shari'a* Councils in Britain, they draw a picture of Islam in all its pluralities with focus on the position of women. Viewed from this perspective, what emerges is the homogenizing character of these discourses and the lack of engagement with human rights principles.
- Part III illustrates the multiplicity of laws, norms and other regulatory mechanisms at work in providing governance in its varying forms, whether in relation to family intervention, business lawyers, the Internet or economic transactions. Anne Griffiths and Randy Kandel draw on data from children's panels in Scotland; Knut Papendorf interviews Norwegian and German business lawyers; Sarvendra Tharmalingam, Mohamed Husein Gaas and Thomas Hylland Eriksen examine Somali families remitting money from Norway to Somalia and Abdul Paliwala confronts the challenges of regulating cyberspace. They all describe the multi-directional aspects of regulation deriving from differentially constituted institutions and networks. A plurality of non-state actors, such as companies, non-governmental organizations and intergovernmental networks, are today involved in rule-making which until recently was considered the domain of the nation-state or the United Nations General Assembly.

- In their analyses of transnational public media events, Elisabeth Eide and Thomas Hylland Eriksen in Part IV show the complex effects of the new world order of transnational communication on the construction of identities and rights at multiple levels of law and society. Through a comparative approach they describe how universal human rights, like freedom of speech and gender equality, become transformed into standardized and static notions of cultural difference in the process.

What emerges as a common feature of these diverse and dynamic transnational fields of life and law is the plurality of formal and informal norms invoked by the different actors in their efforts to carve out viable solutions to emerging social, moral and economic challenges. To reappraise the role of the nation-state and its relationship with law, society and culture, the studies in our book locate law as a process embedded in transnational relationships that mediate between international, national and local practices, norms and values. Situating social, economic and legal activities in transnational family life, transnational procreative practices, global media events, global lawyering, Internet communication and religious regulation, this book provides a relational perspective on the making of transnational law. Asking who within a social group or community has the power and authority to define, interpret, implement and enforce law at the multiple levels at which it operates, this work seeks an understanding of how relationships of inequality, domination or control are created, reinforced or unmade in these processes. Exploring how women embedded in transnational relationships negotiate the multiple norms that have a bearing on their lives in different contexts and settings, it follows the line of investigation carved out by sociolegal women's law studies in the post-colonial South (Hellum, Stewart, Ali and Tsanga 2007:xix). Pursuing this line of investigation, the book draws the ambiguous relationship of gender, legal pluralism and power into attention by exploring how transnationalism challenges established perceptions of family, gender and sexuality in a Northern European context.

Living Transnational Law

As actors in transnational social spaces, people are subject to a multitude of restricting, conflicting and incoherent bodies of state laws, religious norms and customary practices that govern their lives. In response to the diverse and often conflicting legal, social and economic circumstances that surround their activities, they are in pursuit of ways and means of reconfiguring law to meet their needs. Describing how these efforts are manifest in practices constituting creative efforts to reconfigure legal relations, this book is about 'living law' in the era of globalization. 'Living law', we suggest, is manifest in transnational moral, social or economic practices, norms and values that transgress the territorial and legal boundaries of the nation-state.

The concept of 'living law' originates from the Austrian legal scientist Eugene Ehrlich (1862–1922). His main work, *Fundamental Principles of the Sociology of Law* (1962), contains a fundamental criticism of the assumption that law only arises from juristic law or state law. To give a realistic picture of law Ehrlich maintained that the main objective of legal science is an investigation of the 'living law'. According to Ehrlich this was 'the law that dominates in life itself, even though it has not been posited in legal propositions' (Ehrlich 1962:493–494). In his view, 'the concrete usages, the relations of domination, the legal relations, the contracts, the articles of association, the disposition of will by testament, yield the rules according to which they regulate their conduct.'

Instead of studying norms and actions as parallel or congruent forms we are attempting to come to grips with the living law, focusing on transnational sociolegal life as process. To understand the complex and multi-sited processes of sociolegal life that transnational relationships give rise to, following the legal anthropologist Sally Falk Moore's concept of 'law as a semi-autonomous social field', we extend the line of investigation to transnational social fields. Law, as Falk Moore suggested in 1978, should be studied as a process observable to the anthropologist in small social fields 'in terms of its semi-autonomy – the fact that it can generate rules and customs and symbols internally, but that it is vulnerable to rules and decisions and other forces emanating from the larger world that it is surrounded by' (Moore 1978:55, 56). Addressing legal pluralism in terms of the existence of several normative orders in a social field, Falk Moore, at that point in time, emphasized that semi-autonomy, in terms of interacting state laws and customary and religious norms, was not a phenomenon exclusively related to tribal communities but a feature of all nation-states in the world. Similarly, John Griffiths (1986), among others, has argued that legal pluralism is not just a product of the colonial counter but is to be found in all states, whether situated in the North or South, in the 'developed' or 'underdeveloped' world. Henrik Zahle and Hanne Petersen use the term 'polycentricity' in an effort to capture the consequences of legal pluralism in Northern European law (Petersen and Zahle 1995). Describing how, in the era of globalization, law is constituted in an intersection of different legal orders, Boaventura de Sousa Santos uses the term 'interlegality' to characterize the mixed and porous character of law (Santos 1987:208). In dealing with the multiple positionalities of people living transnational lives, methodological approaches that analyze the interaction between international, national and local norms in postcolonial Africa and Asia are highly relevant in Northern Europe (Hellum 1999, Ali 2000, Hellum *et al.* 2007:xix).

Pursuing this line of investigation the chapters in this book show how the dynamics of accelerated mobility of people, technologies and laws reinforce the semi-autonomous character of law. In Northern Europe, the geographical location of this book, national law is under pressure from above, below, within and without. Its semi-autonomy and porosity is, as the chapters show, closely linked to expanding human rights obligations and unprecedented cultural and legal pluralism embedded in increasingly transnational families, expanding

religious institutions and global market relations. The living law that is emerging in these overlapping and conflicting transnational semi-autonomous social fields is embedded and shaped by networks of power in terms of resources and information. How relationships of inequality, domination or control are created, reinforced or unmade in the course of these processes is the overall focus of this book. Locating the case studies in Northern Europe, the book explores, through a sociolegal lens, the relationship between both national majorities and minorities and between majorities and minorities within the minority groups. The diverse and ambiguous outcomes of these transnational processes in terms of gender, class and status demonstrate the advantages and disadvantages that legal pluralism poses for differentially situated actors in various contexts and settings.

Family Lives and Family Laws: Transnational, National and Local Sites of Contestation

Increased mobility of people, technologies and laws have turned family lives and family laws into a site of moral, political and legal contestation in all parts of the world. In Norway, Sweden and England a plurality of family forms challenges the cultural sameness that was a precondition for national family law (even if it never fully realized its aspirations). A recurrent concern of individuals within minority groups, ranging from gay and lesbian Norwegians to Syrian Christians in Sweden and Pakistani Muslims in Norway and Britain, is to find a way around social, religious and legal stereotypes that disregard their quest for welfare, belonging, equality, dignity and choice. In an attempt to escape undesired control of economic, sexual, procreative and marital relationships embedded in state-law, custom or religion, people manoeuvre within and between different national, social and religious norms. Liberal democracies in Scandinavia and Britain are confronted with a dilemma concerning laws and regulations affecting these increasingly diverse and complex family relations. Women's multiple identities as individual citizens and members of ethnic and religious minorities epitomize the conflicts and dilemmas that arise.

Facilitating new forms of procreation, the global availability of new reproductive technologies opens up family space by including previously excluded and stigmatized categories of people. Marit Melhuus (Chapter 2) addresses the question of childlessness that drives Norwegian women and men to pursue procreation as a form of belonging through the use of new reproductive technologies. She explores encounters between the imageries of belonging that stem from new reproductive technologies on offer in a global market that are at odds with the narrow family norms and values regulated by national laws embedded in Norwegian legislation. In a series of efforts to uphold the ideal of the heterosexual, married couple as the natural unit of family life, Norwegian legislators have curtailed people's access to assisted procreation. Melhuus shows how national legal efforts to circumscribe people's procreative choices fail in a situation where reproductive technologies,