From Transnational Relations to Transnational Laws: Northern European Laws at the Crossroads (Law, Justice and Power)

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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.

From Transnational Relations to Transnational Laws

Northern European Laws at the Crossroads

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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 Hessevik (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

Introduction

Transnational Law in the Making

Anne Hellum, Shaheen Sardar Ali and Anne Griffiths[1]

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 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 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, nongovernmental 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, such as egg and embryo donation, are available through service providers in countries that have more liberal legislation than Norway.

Annika Rabo (Chapter 1) draws attention to the legal intricacies that Syrian orthodox Christians face in their country of origin and in the West. Many of the early Syrian orthodox migrants who came to Sweden were happy to be resettled in what they believed to be a Christian country. They were happy to escape the minority position of Christians under Syrian law, which constitutes a bifurcated family law system based on religion as opposed to universal citizenship. Yet Christian Syrians living in Sweden and Syria are not, as Annika Rabo demonstrates, a homogenous group.

Religious authorities in the Christian Syrian community are critical of Swedish law and decision makers who see it as their duty to help liberate women and children from male control legitimized by Syrian state law. A Syrian orthodox priest interviewed by Rabo in Syria in 2008 underlined the fact that Europe is not good for Syrians from the point of view of family life: 'People divorce over small differences. A sick spouse is cast aside and old parents are not cared for by their children.' Yet many ordinary Christian Syrians do not want Syrian orthodox family law to be applied to their situation in Sweden. They want recognition and respect for their particularity but do not consider Swedish family norms to be completely negative. Many take the view that family relations in Sweden might be 'cold' but they are 'fair', particularly where state intervention is involved. According to Rabo, many Syrians with experience from Scandinavia are impressed by the way the best interest of the child, for example, predominates over parents' interests in cases of divorce.

Set in the context of Norway's uniform legal system that on paper applies equally to all citizens, Anne Hellum and Farhat Taj (Chapter 4) explore tensions between Norwegian family law, Pakistani law, Islam and custom. They explore how the relationship between Norwegian state law and coexisting religious and customary norms are mediated through civil society interventions. Towards this end they describe how a Pakistani women's organization in Oslo (PAKWOM) tries to make Norwegian law available, accessible and acceptable to women embedded in transnational family relationships. They show how the women in the non-governmental organization have created an environment that facilitates choice and empowerment by drawing on multiple sources and networks within both the local Pakistani community and the Norwegian legal community. The outcome of this process is an enabling space where in the spirit of free and informed choice women are defining a place for themselves in the context of conflicting moral, religious and legal expectations and pressures deriving from husbands, in-laws, religious institutions and Norwegian authorities. Facilitated through cooperation between Pakistani and Norwegian women, the process stands in contrast to the confined normative repertoire that guides Internet *fatwas* or the mediation that takes place within religious institutions, as described by Shaheen Sardar Ali and Samio Bano in Part II of this book.

How the rights of sexual, social and ethnic minorities can be safeguarded without perpetuating an unequal distribution of rights, duties and power among group members – particularly between women and men and parents and children – is a highly complex and controversial issue. How should a unified family law system aiming at substantive equality strike a balance between individual women, men and children's rights as individuals while in the same vein recognizing their common cultural identity? Or is a multiculturalist model assigning different family law regimes to different ethnic and religious groups the way forward? Learning from the lifeworlds of individual men and women, it is important to bear in mind the complex and multi-sited situations people embedded in transnational relationships face. Standardized notions of gender, sexuality and family are at work both in unified family law systems in Western welfare states like Norway or segregated multicultural family law systems based on religion, like that of Syria. As the case studies show, family law regimes upholding narrow and static moral categories that exclude and stigmatize single women and sexual or religious minorities, are resisted and circumvented. To accommodate women and children's quest for protection and recognition under state law there is clearly a need to rethink established notions of the relationship between gender, sexuality, marriage and family under Northern European law.

Recognizing that international and national law can never be an abstract neutral position there is need to develop a united set of principles that, without losing focus on difference, can provide a form of equality under the law. Anne Hellum (Chapter 3) suggests we take a closer look at the global equality and non-discrimination standard embedded in the United Nation's Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In her view it constitutes an important mechanism for including different categories of women that have been excluded in national and local contexts on the basis of legal, social and religious paradigms that derive from

narrow stereotypical perceptions of gender, sexuality or ethnicity. Due to its recognition of cultural differences that fall outside the scope of dominant national family and gender values, the global equality and non-discrimination standard often meets with state resistance. State resistance is not limited to states that make reservations to the Convention with reference to religious and customary family law regimes. The Norwegian state's reluctance to make existing reproductive technologies available on a non-discriminatory basis epitomizes the tension between the notions of equality based on cultural sameness and equality based on cultural difference in the context of a state that has ratified CEDAW without reservations. By limiting access to certain technologies the Norwegian Biotechnology Act reproduces the dominant ideal of cultural sameness whereby those who fall outside the scope of the Act are deemed inferior.

Calling the assumed cultural homogeneity underlying national law into question, in Northern Europe the acceleration of international legal obligations and sociocultural diversity have led to a revitalization of national cultural and legal values (Gorashi, Eriksen and Algashi 2009). This development is reflected in inconsistent and ambiguous legal responses. Ruling that a prohibition against the *hijab* in the workplace constitutes indirect gender discrimination, the Norwegian Gender Equality Appeals Board, as shown by Hellum, is engaging with difference to achieve equality of result. This speaks to a process whereby the equal status norm is re-embedded in social relationships so as to prevent women from being excluded from the national equality project. On the other hand, inequalities between majority and minority women are often ascribed to cultural differences. Addressing judicial responses to cultural defence in honour killing cases, Hellum also shows how human rights principles ensuring women equal protection under the law is transformed through a nationalist legal discourse that reinforces popular nationalist sentiments assuming cultural sameness. Rendering women equal protection under the law, the Norwegian judiciary, like that of India and Pakistan, uses language that relegates honour crimes to other spaces, less civilized than the law of the nation state. By using a legal discourse clustering around a civilized/uncivilized divide, the national judiciary is upholding a dichotomy between what is embraced as the 'self' and what constitutes the 'other'. In a similar vein, Hellum and Taj point out how national information campaigns directed at migrant women and their families in Norway have almost exclusively focused on female genital mutilation, forced marriages and honour killings. Not a single campaign has been carried out to inform migrant women about the laws that protect them against discrimination on the basis of gender and ethnicity. So the inequalities between majorities and minorities in Norway, in spite of the dominant equality rhetoric, often appear to be ascribed to the migrant's own culture and not to any discrimination related to the majority's stereotypical perception of migrant women. Law and policy makers in this field thus use egalitarian ideas in ways that, in Marianne Gullestad's terms, '… marginalize specific groups by simultaneously creating dichotomies asking for sameness' (Gullestad 2001:54). **Transnational Religious Relations: Muslims in the European Diaspora**

The oft-repeated remark that Islam is not simply a religion but a code of life is pertinent to our present discussion as it provides a theoretical framework for understanding why and how the *Shari'a* as the overarching umbrella of principles permeates every sphere of life. Islamic law therefore will always be more than the black letter law; it is the law in its sociological, political, moral and economic context. Islamic law through its secondary sources, including *'urf* (custom, practice of communities), has a robust living law dimension that has played an important role in its transformative processes over the centuries. The contributions in Part II of this book mirror this reality, where the actors seek out and accept certain principles of *Shari'a* and Islamic law while at the same time challenging, resisting and interpreting these in accordance with their individual sociolegal contexts.

The very construction of the European Muslim diaspora with its fluid and transnational nature offers a fascinating canvas where 'classical' notions of Islamic law are reinterpreted against a contemporary backdrop. A departure from historical *Siyar* (Islamic international law) lies in the fact

that Muslims have voluntarily and permanently settled in a non-Muslim jurisdiction while maintaining channels of relationship and communication with their countries of origin. Are they now part of an international *ummah* subscribing to a 'pristine' universal *Shari'a* and Islamic law or a transnational community navigating diverse laws and regulatory norms (of Islamic law, the new home country and the country of origin)? These questions are critical as they inform how individuals and communities order their lives and regulate themselves and how they interact with the host country's national laws. What are the mechanisms employed by the European Muslim diaspora to cope with their new identity?

Two opposing trends are visible from the case studies in this book; the first is the diaspora as a site of contestation for the various ethnic, racial and cultural identities of Muslims now living as 'European Muslims'.3 The desire for an overriding Muslim identity and freedom from a particular ethnicity is visible in all three studies. A number of strategies are employed in this regard. For instance, in Bano's study of *Shari'a* Councils, Muslim communities in Britain assert their 'Muslim-ness' by creating informal dispute resolution institutions. In Ali's study of cyberspace *fatwas*, young women of Pakistani origin are advised to subsume their South Asian culture in a universal *ummah* identity, whereas in Larsen's study of the European Council of *Fatwa* and Research, a minority *fiqh (fiqh al-aqalliyat)* is being generated to respond to the diasporic existence of European Muslims. Thus the Islamic juristic techniques of *darura* (necessity/duress) and *maslaha* (public interest/good) are invoked to make permissible what would normally not be accepted in a Muslim country or jurisdiction.

Simultaneously, and in consonance with the pluralist Islamic legal tradition, the second trend is a resistance against this uniformity of norms. The *Shari'a* Councils of Britain do not invoke *fatwas* of the European Councils in their opinions; neither do the Internet *fatwas* cite the opinions of the *Shari'a* Councils (of Britain).

A third element running through the living law of the European Muslim is the use of Islam and Islamic norms as a regulatory mechanism. It is at the level of communities that living Islamic law emerges as both a liberating factor and a controlling device. Thus Muslims of Norway resist the non-South Asian version of the 'triple' divorce despite *fatwas* and other exhortations to the contrary. British Muslim women are forced to approach the *Shari'a* Councils to validate their divorce despite clear injunctions to use the mainstream English legal system as enunciated in minority *fiqh*.

Departing from the traditional doctrinal approach to the study of Islamic law, this book turns attention to the living law of Muslim diasporic communities in Europe. Locating themselves in emerging Muslim institutions, such as the unofficial *Shari'a* Councils in the United Kingdom, the European Council for *Fatwa* and Research (ECFR) and the numerous 'global' *fatwa*-giving websites, Samia Bano, Lena Larsen and Shaheen Sardar Ali offer insights beyond Islamic law as described in the books. Drawing on Islamic doctrine and how it is reconfigured in the diaspora, their studies offer an empirical, contextual and dynamic approach to understanding the tenuous relationship between cultural diversity, religious pluralism and human rights and equality before the law in contemporary Europe and beyond. These chapters demonstrate how diasporic, religio-cultural constituencies are formulated and strategies devised to resist the dominant socio-political order as well as to control communities and appropriate power and authority within them. The focus for all three case studies is women, gender relations and dispute resolution in the sphere of family law, indicating the centrality of these issues within Muslim discourse in general and in the diaspora in particular. The case studies also show the selectivity and limits of transnational flows of normative principles in the field of family law.

Samia Bano's study of unofficial non-statutory *Shari'a* Councils in Britain (Chapter 7) describes how family law matters are resolved according to Muslim family law. Her work 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 such fora. Drawing upon fieldwork data she argues that Muslim women's capacities and potential for autonomy, agency and choice within the formations of social and religious legal pluralism cannot be understood within the dichotomous variables of insider/outsider, Muslim/non-Muslim and state law/religious law. Instead she draws upon the narratives of the women themselves and embraces notions of complexity and ambiguity. Bano's contribution is cast within the framework of 'multicultural legalism'. She highlights the difficulties inherent in the British state's attempts to respond to its obligations to its minority citizens through its legal system. These attempts have inevitably brought Muslim communities (among others) into conflict with the dominant and official legal system in the area of family law, leading to unofficial parallel institutions within these communities, like the *Shari'a* Councils. Bano's work gives an example of members of Muslim communities creating unofficial 'legal' space to resolve family law issues 'Islamically' as a strategy for appropriating authority within their communities and as a controlling mechanism over Muslim women. This is supported by Bano's research findings where the majority, if not all, applicants to the *Shari'a* Councils are women. In an historic context the 'Muslim woman', both within and beyond the European Muslim community, is seen as the repository of Islamic values.

Lena Larsen focuses on questions related to family law and personal status (Chapter 6). Cases dealt with by the European Council for *Fatwa* and Research (ECFR), a *fatwa*-giving body established to serve Muslims in Western Europe, are presented and analyzed with focus on the position of women. Her study highlights the complex interplay between transnational understandings of religion, culture and tradition in emerging diasporic Muslim space. The composition of the European Council for *Fatwa* and Research (in its membership) reflects this transnationality, negotiating between *fiqh* and the imperatives of social reality within a fast globalizing diaspora. Larsen's analysis depicts the Council as a project to define Western Europe as a 'local' jurisdiction using minority jurisprudence as a strategy for acquiring authority over Europe. Larsen's study of the Council also highlights the fact that Muslim women are seen as markers of community identities, especially within a diasporic context, and thus an important constituency not to be neglected. This is borne out by the *fatwas* that invariably address Muslim women in response to questions addressed to the Council.

Shaheen Sardar Ali (Chapter 5) takes this discussion of *fatwas* forward, broadening it out to explore the discourse of Internet *fatwas* relating to women and gender relations and its potential implications for transnational and international family law norms within a plural Islamic legal tradition. Unlike the earlier two studies situated in Britain (Bano, Chapter 7) and Western Europe (Larsen, Chapter 6), Internet *fatwas* situate themselves in an international, global and universal framework and context recalling the universal nature of the Muslim *ummah*. Having said that, most of the questions and responses have been framed by what we might broadly define as 'Western' Muslims or diasporic Muslims; a plausible fact due to limited access of this facility to wider 'virtual' Muslim audiences in the non-West. The websites appear to have a multiple agenda of 'Islamizing' Muslim men and women particularly in the West; hence the ethical, moral emphasis and tenor of the *fatwa* alongside the legal content of the response. Like Larsen's findings, Internet *fatwas* contain a strong pedagogical aim as they explain concepts and issues in the format of an online 'lecture'.

All three case studies suggest that emerging Muslim institutions, be they *Shari'a* Councils in Britain, the European Council for *Fatwa* and Research or Internet *fatwa*-giving websites, appear to be a manifestation of counter-hegemonic sites of Islamic sociolegal, political and religious discourse, since they challenge existing hegemonies of ethnicities, schools of juristic thought and locations. For instance, British Muslims of Asian origin or descent seek affirmation of their 'pure' and 'pristine' Islam by challenging a South Asian 'notion' of Islam in the triple divorce or in clothing and European Muslims are offered a flexible approach towards inter-faith marriages in stark contrast

to the mainstream Muslim interpretation on this point. Internet *fatwas* on women and gender issues also appear counter hegemonic to the male-dominated discourse within the Islamic legal tradition by seeking 'logical', 'rational' reasons for the Muslim women's dress code, rules of contraception, and so on.

Simultaneously, these chapters suggest that these institutions are in themselves hegemonic in that they are a form of regulation of family and family formations through religion. Decisions of *Shari'a* Councils, the European Council for *Fatwa* and Research and Internet *fatwas* also highlight a counter hegemony and resistance to the dominant 'Western' discourse by ensuring that the discussions remain within the Islamic and Muslim framework and communities. Likewise, the *Shari'a* Councils reflect a resistance to the dominant legal system and what is perceived as the British state's insensitivity to engaging with Islamic law.

Cross-fertilization of ideas, opinions and arguments within a transnational framework are another common feature of the *fatwas* case studies. Thus a single *fatwa* will encapsulate and recall viewpoints of a number of *muftis* from various parts and institutions of the Muslim world as well as scholars of the Muslim diaspora. Strangely enough, Bano's empirical findings point to the fact that *Shari'a* Councils do not appear to 'cross-fertilize' their decisions. On the other hand, the discourse on human rights is pointedly invisible in its usage although claims, entitlements and obligations are addressed. This is evident from the research into the European Council for *Fatwa* and Research by Lena Larsen in this volume as well as from the Internet *fatwas*.

What is not apparent from any of the studies is whether Muslim communities in the diaspora accept and internalize these examples of Islamic living law – the decisions or recommendations from the *Shari'a* Councils or the *fatwas* from the European Council for *Fatwa* and Research and from the Internet – as the contemporary understandings of Islam, Islamic law and Muslims.

Emerging Muslim institutions are confronted with the challenge of responding to questions relating to family law, women and gender relations but from the perspective of plural identities, for example, a Muslim who is also a Pakistani and a British citizen, an American of Syrian origin who is a Muslim, and so on. The Islamic legal tradition is thus under pressure to respond to the anxieties of Muslims in Muslim majority countries as well as in the Western, predominantly non-Muslim jurisdictions and having to make decisions impacting on their lives and those of their families and communities. All three contributions reflect these anxieties.

In these studies, the discourse of international human rights and women's human rights was absent, barring a single *fatwa* 'discovered' by Ali regarding the reproductive rights of women. Even in transnational and international spaces such as these, this absence is telling of the parameters within which these institutions keep their discourse. It is also important to make the point that all three studies indicate a clear aim to remain in control of the discourse and its parameters: it is to remain within the Islamic tradition and within Muslim communities with Muslim women as the main participants or recipients of the knowledge or discussion thus generated. 'Gatekeeping' of themes, questions and knowledge is thus evident; knowledge is power and is therefore used selectively by those insiders who control the production of it. **Transnational Forms of Governance and Rule-making**

Accelerating mobility of people, capital and information has led to important changes in the ways in which government is exercised. A plurality of non-state actors, such as companies, non-governmental organizations and the International Monetary Fund, are today involved in rule-making which until recently was considered the sole domain of the nation-state (F. and K. von Benda-Beckmann and Griffiths 2009, Griffiths 2009). The plurality of regulative actors and frameworks are clearly related to globalization of governance, trade and communication. While located in an increasingly transnational setting, involving a series of non-legal institutions like the

World Bank, the World Trade Organization and the Internet, the regulations of the nation-state continue to play an important role, albeit in a context which renders them only one of the factors that are taken into account in the decision-making process of the subjects of national law. Given the diversity of these institutional players and social actors, the ways in which they interact and the linkages between them, it is clear that states have had to respond to the creation and deployment of a whole range of technologies connecting multiple centres of power. Recognition of these features acknowledges the increasing variation in the functions of governing. This involves public and private dimensions (for example through privately funded public services such as hospitals) and the creation and recourse to expert knowledge derived from epistemic communities (that is communities of experts that are spread across the world).4 These communities not only act as conduits to transport law across the globe but also establish themselves as important sources of lawmaking transnationally, for example in the regulation of financial institutions such as stock exchanges (Griffiths 2002) or in fisheries management (Wiber 2009). These characteristics have led a number of scholars (Sand 2004, Joerges 2005, Griffiths 2009) to talk in terms of 'governance' rather than 'government' in an attempt to move away from a top-down, Westphalian, hierarchical concept of government, to embrace the more multi-directional aspects of regulation that arise from the mobilization of a whole array of networks that cross-cut one another horizontally and vertically, within and beyond territorial boundaries.

The chapters by Griffiths and Kandel (Chapter 8), Papendorf (Chapter 9), Paliwala (Chapter 10) and Tharmalingam, Gaas and Eriksen (Chapter 11) in this volume directly address the relationship between regulation, governance and communication in dealing with family, market and Internet relations. The multi-faceted nature of law and plural legal norms and orders not only arises in the context of cross-border migration or transnational families but may also become evident among citizens who are not particularly mobile themselves but who encounter a diversity of conflicting values and standards that derive from international human rights jurisprudence, national law and local norms and values that are embedded in a local setting. The study by Griffiths and Kandel in this volume explores how the United Nations Convention on the Rights of the Child and the European Convention on Human Rights and Fundamental Freedoms are put into operation and interpreted in the local domain of children's hearings, often referred to as children's panels, in Glasgow. These deal with children under sixteen who are in need of compulsory measures of supervision under the Children (Scotland) Act 1995. Based on sociolegal research carried out on the children's hearings system in Glasgow, they address how international and national legal standards are being integrated or resisted in terms of local actors' perspectives on their implementation. What national law embraces, namely a balance between children's welfare and rights that involves a transparent and open process, takes on another meaning for the children and families concerned that is generally one of silence and circumspection. Thus communication is not a straightforward process but embodies a range of elements that may leave participants operating at cross-purposes to one another. The study demonstrates how international concepts, such as participation, have a different salience for different people, such as panel members and the children and families that they deal with, although they all operate within the same national jurisdiction and share a common, territorial base, the city of Glasgow. Such findings raise important questions about how the 'local' is to be perceived and located in relation to national and transnational processes that embrace law. For although the actors may be said to be 'local' in that they are located within the bounded space of a city, they nonetheless find themselves situated within very different types of networks that separate them from one another in terms of power and status. These different networks reflect different life worlds that embrace differing priorities and values that have an impact on how law is perceived. In many cases what is important for children and families is the local, 'informal' law of family and neighbourhood that takes precedence for them over the international standards that panel members seek to apply in terms of national law. Thus public and private and formal and informal domains intersect in ways that make it hard for panel members to reconcile the differing norms and values that impinge on the process of creating good citizens through intervention in families.

From another perspective, Papendorf's qualitative study of Norwegian and German law firms highlights the extent to which the regulation of trade relations has been taken over by contracts drawn up by business lawyers or multilateral organizations, like the World Trade Organization, who rule through soft law. In response to the changing demands of a global market, lawyers and law firms are establishing transnational economic and legal links. In these transnational business firms it is the lawyers who develop strategies for globally-oriented, competitive corporations and generate rules needed to promote the growth in world trade. In this situation, given the need for flexible mechanisms that can respond to the rapidly changing demands of the market, it is not national legislators and judges who control the process but lawyers who regulate their business environment through contracts and their organizational practices. The growth in global lawyering has long been recognized as posing a threat to national sovereignty because it does not constrain itself to the application of the law of the nation-state (Dezelay and Garth 1996, Teubner 1997a and b, Vismann 2000). In documenting how Norwegian and German law firms adapt themselves to the needs of trade and industry through a range of administrative as well as legal practices, Papendorf points to another conception of sovereignty that may be reconceived as 'an effect of practices associated with law and other forms of regulation that construct relations between the state, its population and the market' (Perry and Maurer quoting Ong 2003:xiv).

In the 'virtual' world Paliwala explores the way cyberspace's construction of new Internet cultures also transforms economic and regulatory cultures – that is modes of production and regulation. Competition in this context not only involves capturing access to and control of the communicative resources available through the Internet but also embodies contestation over differing approaches to and perceptions of what the 'global commons' entail. On the one hand creating a new space for collaborative, non-capitalist, democratic engagement that is emancipatory for its constituents or the 'multitude' (Hart and Negri 2000) or, on the other hand, protecting state and property interests by harnessing the power of capital to develop and control new modes of regulation and production with their inclusionary and exclusionary powers. For Baxi (2006) and others (Klein 2005, Rajan 2006) it is the latter that is at stake and that represents new techno-scientific modes of production that, far from being emancipatory, stand for new modes of domination. The tensions between these perceptions are particularly pertinent when considering the North/South digital divide that raises questions about the ability to 'be empowered with the language that the box works in', as well as the resources that can be mobilized to combat the asymmetries of power that exist. These include forms of resistance to attempts to ringfence access to and control of the Internet through legal definitions of property relations, commercial market power and the architecture of code that structures cyberspace. Such resistance takes the form of file sharing; the commons movement involving organizations such as ISOC, W3C, ITEF and IRTF that support the Internet's open architecture: Free/Libre and Open Source systems (FLOSS) and Content movement (FLOSS-C), as well as the GNU/LINUX operating system and piracy. In addressing these developments Paliwala observes that 'struggles for social justice for new cyber-identities and the excluded have to take into account the complex realities of the new modes of regulation'.

Tharmalingam and Gaas examine the impact of financial regulation in Norway on the *hawala* remittance system in the wake of the September 11 attacks on the United States of America in 2001. In their chapter the authors note the importance of remittances that link diasporic communities all over the globe. Derived from a well-established historical practice by Somali pastoral nomads known as *abbaan*, the *hawala* system involves the transfer of money from immigrants to family, local communities and local businesses in the South. This is accomplished through Somali social networks located in different countries throughout the world that facilitate the transfer of money through their extensive contacts. Practised by a number of communities, including Kenyan, Ethiopian and Sudanese refugees, remittances are vital to the well-being of Somalia, providing much needed support to citizens of a country that has been plagued with civil war, loss of banking institutions and forced migration since 1991. The authors demonstrate how attempts were made to dismantle or formally regularize the *hawala* system after the September 11

attacks. What had previously been viewed as a positive development became subject to a security perspective that viewed international migration as a threat to internal and global security. One consequence of this development was the closure of the remittance company, Al-Barakaat, and its network by the United States authorities that had a negative impact on Somalia's economy and trade. Under pressure to restructure informal money transfer systems, the Financial Action Task Force (FATF), an inter-governmental body, was established. The national legislation of states that emanated from the task force recommendations varied greatly, from the more moderate regulations favoured by the United Kingdom and Sweden, to more rigorous measures employed by countries such as France and the Netherlands, and which in Norway was so draconian that it made it illegal for remittance companies to operate. Despite developments such as the Somali Finances Services Association founded to follow the guidelines and recommendations of the task force, not a single *hawala* company has been formalized in Norway. In the meantime, the need for remittances has not abated – they are estimated to account globally for more than double the official development aid. Thus Somalis continue to remit money illegally as there are no organizations enabling them to remit through formal, legally-sanctioned institutions. Such a situation, far from fostering legalization, has created insecurity among those sending and receiving money with the potentially unintended consequence of driving the system underground in a way that would render it even less accountable or transparent. *The Role Networks*

These chapters, in common with other chapters in this volume, illustrate the multiplicity of laws, norms and other regulatory mechanisms that are at work in providing governance in its varying forms, whether in relation to family intervention, business lawyers, the Internet or media and communication. They exemplify the multi-directional aspects of regulation that, like other contributors' chapters, derive from differentially constituted networks. For Griffiths and Kandel these networks embody different forms of knowledge and values from those of the professionals, such as social workers, who apply their own codes and institutional imperatives in servicing panels to the more personal and social sets of relations that bind children and families in the neighbourhoods in which they live. In the case of Papendorf, the networks involve a web of relations in which lawyers, business corporations and legal firms come together in different types of constellations to create competitive commercial entities in a global market place. For Paliwala, the emancipatory aspects of cyberspace derive from the possibility of communicative collaboration that derives from a complex set of 'nodal' networks involving 'global, national state, business and non-governmental organizations'. Uncircumscribed by territorial boundaries, they permit the creation of a transcultural and 'netizen' culture that allows for new forms of hyper-cultural identity to emerge. Networks are crucial to the successful operation of the *hawala* system that Tharmalingam, Gaas and Eriksen discuss, for the transnational transfer of money or resources from Norway to Somalia and vice versa. Formal legal developments in Norway have, however, rendered these networks 'illegal' in an attempt to impose a more regularized, Western model of finance on the *hawala* system. This Western model is ill-suited to the needs of Somali immigrants and disaporic communities because it does not have the accessibility, flexibility, relative cheapness and understandings of local culture the *hawala* system offers. The imposition of such a model, in response to misleading assertions by the media about the 'informal' financing of terrorist organizations like Al Qaeda, has led to remittances taking place outside the control of state law. This has created a feeling of disenchantment among Somalis who perceive that, in rendering the current *hawala* system illegal or illegitimate, they are not being treated with the equality or respect associated with the inclusive policy of multicultural Norway. *The Role of Experts*

In dealing with access to and the dissemination of various forms of information or knowledge, Papendorf and Paliwala expressly address the role of experts in this process. For Papendorf, the driving force behind the network is the desire to create an ever more specialized pool of expertise to serve the interests of the business community. This involves restructuring working relations to focus on those who can provide the necessary skills in this area and bypassing those whose legal skills do not fit the required paradigm. In Paliwala's case, expertise is necessary to construct the

language of code providing for access to and use of the Internet. Such expertise can work to enhance or constrain public participation in this medium, since it can be used to provide open access and file sharing or to circumscribe it through protected access and licensing agreements. For Griffiths and Kandel, however, the role of experts, while invisible, exists in the control of what gets to be said, by whom and when, as well as how those in charge interpret the law in situ. By determining the order of proceedings, panel members, especially chairs, create the framework for participants' interactions, while other professionals, like social workers who are usually called on to speak first, create a foundational base of knowledge upon which a child and family's circumstances and behaviour are evaluated. Both shape the flow of a hearing and have an impact on the processes of communication and participation. Information and how it becomes constructed as 'knowledge' that impacts on the proceedings is central to the operation of hearings. In acknowledging the adaptations that Norwegian lawyers and law firms have made with regard to their concentration on business expertise, Papendorf raises the issue of the effects of this kind of development on the provision of legal services that are outside the commercial domain, such as social security law. He echoes Rogowski's (1995:131) concern when he asks, 'have the business lawyers of the globalized corporations not gone a bit too far when it comes to adapting the legal core sphere of activity to the economical framework?' In acknowledging how United States leadership has affected the property fencing of the global digital knowledge commons and the radical opposition to it, Paliwala acknowledges that on the global stage it is predominantly an American model of regulation that drives the global harmonization of laws and practices. Despite attempts to overcome the limitations of this approach, for example through utilizing Floss-C software, hurdles still exist. For, as Paliwala observes, implementing Floss-C 'is not merely about the software itself but the paraphernalia of systems knowledge, engineering, attitudes, consultancies and aid finance which forms obstacles to overcoming pro-Microsoft tendencies'. As a result there is a danger that progressive software may become subordinate to the interests of capital with all the implications that this has for developing countries' access to and use of the Internet. In the case of transnational remittances, the role of experts is key in restructuring financial services to accommodate a more formal model of regulation embracing licensing and registration, in their attempts to mould Somali remittance companies into a more regularized legal framework, more in keeping with Western systems. This raises questions about what forms of knowledge become privileged as 'expertise' that take precedence over other forms of knowledge. For in approaching the *hawala* system from a security rather than a development perspective, versions of local knowledge and experience associated with the system are overtaken by the demands of financial experts who form part of an epistemic community that seeks to enforce its regulatory blueprint for financial services across the globe. *

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 like Norway, Sweden, Britain 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.

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