

Law in the Everyday Lives of Transnational Families: An Introduction

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Abstract

In the introduction of this special issue on “Law in the everyday lives of transnational families”, we argue that in the socio-legal literature on transnationalism and transnational legal process, ordinary people as actors are missing. On the other hand, what is missing from the abundant literature on transnational families, is law, or are ordinary people. In this special issue, we look at how transnational families as legal actors are part of transnational legal processes and how transnational families meet with different types of legal rules that mingle with and influence the personal and private sphere of family life. We specific look at three issues that come up in this context: the power of law, how transnational family members use law and the role of networks and family.

Key words

Transnational families; transnational legal process; migration; law in everyday life; legal consciousness

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Resumen

En la introducción del número especial sobre "Derecho en el día a día de las familias transnacionales", defendemos que en la literatura sociojurídica sobre transnacionalismo y procesos legales transnacionales, no se contemplan las personas corrientes como actores. Por otro lado, lo que falta en la abundante literatura sobre familias transnacionales es el derecho, o son las personas corrientes. En este número especial se analiza cómo las familias transnacionales, en el papel de actores legales, son parte de procesos legales transnacionales, y cómo las familias transnacionales cumplen diferentes tipos de normas legales que atienden a, e influyen en la esfera personal y privada de la vida familiar. Específicamente, se contemplan tres aspectos que surgen en este contexto: el poder del derecho, cómo usan los miembros de las familias transnacionales el derecho y el papel de las redes de conocidos y el derecho.

Palabras clave

Familias transnacionales; procesos legales transnacionales; migración; derecho en el día a día; conciencia legal

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1. Transnational legal processes without ordinary people

It is by now commonplace to say that we live in a transnational world. The increasing flow of capital worldwide, the rising interdependency of states and national economies and international migration has led to what has been labelled 'transnational legal processes'. Laws are becoming transnational, travelling across borders just as people and goods do. Transnational processes affect the law, the state, institutions, networks of experts and normative frames (Shaffer 2012). Transnational networks of public officials, business representatives, NGOs, activists and professionals develop legal regulations that are being applied across the globe (Keck and Sikkink 1998). It is no wonder that socio-legal studies are paying increasing attention to these transnational legal processes (Cotterrell 2009, Von Benda-Beckmann *et al.* 2009, Van der Kloet *et al.* 2011, Shaffer 2012).

What are missing from these studies are ordinary people. Transnational legal processes seem to be about state change and sovereignty, an elite affair, involving institutions, businesses, networks of experts and NGOs but not ordinary people. Ordinary people are largely absent in the socio-legal literature on transnationalism.

But ordinary people are legal actors too. The law addresses them and governs them, they perceive the law in a certain way, they may use the law strategically, they may know the law only partially, they may change the law, they need lawyers and courts, or they negotiate with street level bureaucrats about their rights and obligations. As Ewick and Silbey state in *The Common Place of Law* 'the commonplace operation of law in daily life makes us all legal agents insofar as we actively make law, even when no formal legal agent is involved' (Ewick and Silbey 1998, p. 20).

2. Transnational families without law

One of the consequences of transnational developments is the existence of transnational families: families that have kin ties across national borders. They may have migrated for economic or political reasons, as a consequence of climate change, or for marriage and love, or they may have family ties with migrants. The concept of transnational families includes spouses, parents and children, but it also includes the wider, extended family (in-laws, grandparents) living across borders. They direct our focus to the personal and private space that is filled with love, friendship, fear, violence, cooperation, power, resistance and politics (Marshall and Barclay 2003).

In the literature on transnational families, the central question is how family and kinship patterns change in the process of transnationalism. Considerable attention has been paid to the issue of how family ties are maintained and transformed across borders. Several means to maintain these ties have been studied: through regular contact in the form of family visits, telephone calls, or the internet, by financial support through remittances or gifts, performing care tasks, ritual and material culture and emotional and moral support (Mason 2004, Zontini 2004, Baldassar 2007). All these activities to maintain kin ties across borders have been labelled 'kin work': the conception, maintenance and ritual celebration of cross-household ties (di Leonardo 1987). As has been argued, the maintenance of family ties through kin work is not easy or self-evident; it is hard work (Baldassar and Merla 2013).

What is missing from this literature is law. Transnational families are in their everyday activities and relationships at least potentially influenced by multiple sets of law and institutions (Levitt and Glick Schiller 2004). Their orientation may be to plural and possibly fundamentally different legal systems and normative orderings at the same time. Legal anthropologists call this a situation of legal pluralism (Tamanaha 2008).

Nevertheless, although law is often mentioned as one of the factors shaping kin ties, it is hardly studied systematically. Thus, we know little about how law shapes kin ties and family dynamics (Dreby and Adkins 2010, Mazzucato and Schans 2011), with the possible exception of citizenship and immigration law (Menjivar 2012). However, kin work across borders may be very difficult or even impossible without law. For example, paying a family visit abroad may require a legally valid marriage, reporting birth of the child to the foreign consulate, legalising documents, acquiring visas, passports and dual citizenship. Hence, several fields of law may be involved, not only immigration and citizenship law, but also family law and social security law, and at different levels: national laws, European Union law and international law. Moreover, although acquiring these rights and documents in two countries may facilitate transnationalism, they are not at all easy to obtain and retain.

This special issue is inspired by both strands of literature: the socio-legal literature on transnational legal processes and the literature on transnational families. We bring them together, adding ordinary, transnational family members into transnational legal processes and adding law into transnational families. We look at how transnational families as legal actors are part of transnational legal processes and how transnational families meet with different types of legal rules that mingle with and influence the personal and private space of their family life.

3. Transnational families: who are they?

Before we turn to a discussion of theoretical concepts used in the contributions, a few cautionary notes on the concept of transnational families are provided.

First, this special issue includes two types of transnational families: migrants who bring some of their family members with them and leave others behind and so-called 'mixed families' with partners of different nationalities and/or ethnicities.¹ Mixed families are rarely studied in the literature on transnational families, as transnational space is generally perceived as an ethnically homogenous space, only inhabited by ethnic co-others (Morosanu 2010). However, as is demonstrated in several contributions in this issue (Sportel 2013, Kulk and De Hart 2013), mixed families also have family ties across borders and come into contact with multiple legal systems and institutional arrangements.

Second, the literature on transnational families is predominantly focussed on migrants from developing countries migrating to the developed world, as transnationalism is perceived as a means to cope with the marginalised social position of migrants (Basch *et al.* 1994). The contributions in this issue, however, encompass various geographic locations and different directions of migration: from Turkey to Denmark, from Morocco and Egypt to the Netherlands, but also vice versa, Mainland Chinese migrants returning from Canada to China, domestic workers migrating from the Philippines to Hong Kong, retirement migrants moving from the Netherlands to Spain. This also means that we overcome the focus on marginalised migrants, by including 'migrants of privilege' (Croucher 2009) who not only have an advantageous legal position as highly skilled workers or European Union citizens, but they are also economically well-off. Herewith, we hope to give a more diverse and more accurate picture of the role that law actually plays.

¹ We acknowledge that the concept of 'mixed families' is problematic, since it is often the norms of the social environment and context, and not the couples themselves, that determine whether they are considered to be mixed or not. E.g. in the Netherlands the marriage of a youngster born in the Netherlands with Dutch nationality to a spouse from Morocco will be considered an 'ethnically mixed' marriage if he or she has native Dutch parents but not if his or her parents are of Moroccan descent. This first type of marriage will be considered 'ethnically mixed' in most continental European countries, but in the United States, where both partners will be considered white and Caucasian and the focus is on interracial families, it will not be perceived as mixed.

The final issue to be addressed here is who transnational families actually are. As Levitt and Jaworski (2007, p. 132) have pointed out, not only migrants, but also non-migrant family members occupy transnational spaces. These non-migrants may be the children of migrants, or partners in transnational marriages. Although transnationalism may not be central in their lives, and they may never visit the home country of the migrant family member, they are raised in homes where people, values, goods and, as we argue, laws from somewhere else are present on a daily basis.

Nevertheless, we should be cautious not to overstate the transnational claim (Smith 1998, p. 11). It may be not that easy for real people with real lives to maintain transnational ties (Favell 2003), they may not wish to do so or ties with the home country may be forced upon them against their wishes, such as in the cases where marriage partners are left behind (Liversage 2013), or in the case of divorce (Sportel 2013). Hence, in our definition, transnational families means nothing else than that the members of these families have crossed borders and potentially meet with two legal systems. The extent to which they actually lead transnational lives may vary considerably across, but also within, groups.

4. Some theoretical reflections on law, legal consciousness, family and networks

Three common themes in the contributions in this issue are worthwhile to explore a bit more theoretically. These three themes, which we will address in the next sections, are 'the power of law', 'the use of law by transnational family members and legal consciousness', and 'the role of family and networks'. We focus on these themes in order to find out how they construct, shape, influence, or frustrate the everyday lives of transnational families.

4.1. The power of law(s)

What role does law play in the everyday lives of transnational families? From the literature, two contradictory possibilities arise. On the one hand, law may constrain the choices of transnational family members or their ability to move transnationally (Salih 2002). On the other hand, more commonly, it is claimed that law may offer opportunities for transnational family members for strategic action or legal system shopping, in which family members may translate their claims back and forth between different legalities. The contributions in this volume show that it is not the one or the other but both are true. Law is vital in shaping the geographical and temporal trajectories of transnational families (Ho 2013), but how it does so, varies across time and context and for different family members. Hence, law may offer opportunities for 'cherry picking' for some, while others in the same group are disadvantaged (Ackers and Dwyer 2004).

At least, transnational families may try to use the law as something that offers opportunities. Ho, in her contribution on highly-skilled mainland Chinese families in Canada, describes how the deskilling they face in Canada, despite their advantageous legal position, leads to a constant deliberation on whether to stay in Canada or return to China. In making these choices, they try to consider their options in both legal systems carefully, sometimes deciding to let one of the parents stay in order to safeguard Canadian citizenship. Opportunities are also shown by Tas, in his contribution on the working of the Kurdish Peace Committee, a council for Alternative Dispute Resolution, that offers members of the Kurdish Diaspora a choice between the official British state legal system and the informal mediation process in solving their familial issues.

The constraints of law are most obvious in the contributions on immigration and citizenship law (Constable, Liversage, Ho). Transnational families are often mixed-status families, meaning that some family members have citizenship, while others may have no legal status at all, or a fragile status, without the right to permanent

residence. Hence, legal tactics and the use of inconsistencies in the law may be involved in order to keep the family together, as Constable writes in her contribution on foreign domestic workers in Hong Kong. The foreign domestic workers are meant to leave the country after their job is done, and even if they have a spouse and child with a strong migrant status or even Hong Kong citizenship, that does not mean the mothers may claim a legal status. Some, however, are able to make use of the law to secure a permanent residence permit.

A second aspect of the constraints of law is the severance of legal ties to the country of origin as a consequence of migration. The legal relationship with the country of origin is not self-evident and may be forfeited, in terms of loss of citizenship, registration, or social rights. Thus, the highly-skilled Mainland Chinese migrants in Canada, who had to give up Chinese citizenship in order to become Canadian and subsequently returned to China after disappointing migration outcomes, returned not as full citizens in China but as a socially and legally marginalised group, excluded from citizenship and certain benefits such as health insurance, subsidised schooling for children and pension schemes (Ho 2013). Gehring (2013), in her contribution on Dutch retirement migrants in Spain, demonstrates the loss of social rights in the Netherlands that may occur as a consequence of moving abroad. As Dutch migrants cannot take long-term care provisions with them, they may be forced to return to the Netherlands, while others may have enough money to buy into private care and remain in Spain.

The latter point draws our attention to another aspect of the power of law, already mentioned, that the opportunities or constraints of law do not apply to everyone in the same way. As transnational families are not always cooperative units, but full of tensions, conflict, power struggles and inequalities (Dreby and Adkins 2010), law may work out differently for different family members. In fact, what may be opportunities for one family member may be the constraints for another. This is vividly demonstrated by Anika Liversage's contribution on residency rights of Turkish marriage migrants in Denmark. The dependence of one partner on the other, as a consequence of immigration law, significantly impacts power struggles during divorce, providing one partner with more leeway than the other. Thus, immigration law is a tool of opportunity in controlling the physical location of one partner and for the other partner it is a tool of constraint.

A final reason to nuance the dichotomy of opportunities and constraints is that even restrictive immigration and citizenship laws, but also other fields of law, that aim to protect the hegemonic interests of the local citizens and nation-state borders and thus constrain the mobility of transnational families, have to offer some sort of protection to migrants in order to maintain legitimacy. Thus, even vulnerable groups of transnational families are within the law, as they learn about and learn to use various local, national and international laws (Constable 2013).

Hence, there is no dichotomy but a continuum of opportunities and constraints. Contributors in this issue, in our view rightly, use the term 'navigating' the multiple legal systems, rather than cherry picking or strategic use (Constable 2013, Ho 2013, Kulk, De Hart 2013). Navigating is a more suitable term in this context, as it makes clear that it is not that easy for transnational families to translate claims back and forth, strategically use the law or 'cherry pick' across borders, without denying their agency or placing them outside the law.

4.2. How transnational family members use law: legal consciousness

Focusing on how ordinary people 'go about with law', it will not come as a surprise that legal consciousness is one of the central concepts in this collection of articles.

In their ground-breaking study *The Common Place of Law*, Ewick and Silbey used the concept of legal consciousness in new ways, looking at how people talk about law in their everyday lives, and how their perceptions of law influenced the way

they handled law (Ewick and Silbey 1995; Ewick and Silbey 1998; Ewick and Silbey 1999). They found that, irrespective of gender, ethnicity or class, people tell three stories about law: before the law, with the law, and up against the law. Those who are before the law, see the law as just, impartial, and rational with clear and well-known rules and procedures, distanced from everyday life. Those who are with the law, see law as a resource they can utilise to serve their own goals and see it as a game they can win, if played right and with the right means, such as a lawyer. Those up against the law see law as unjust, an oppressive system, arbitrary and unpredictable. People will violate the law, or try to circumvent the law by such means as white lies, foot-dragging, or making scenes. According to Ewick and Silbey these three stories are always present at the same time in how people talk about law. They note however that disadvantaged groups, based on gender, race or ethnicity and class, are more likely to tell the up against the law story. Hence, the social position of people, and the experiences that arise from that position, are vital for their legal consciousness (Nielsen 2003, p. 1087).

Ewick and Silbey's work has spurred a growing body of literature on legal consciousness that has painted an increasingly diverse picture, studying various disadvantaged groups such as the disabled, same-sex couples and lower class female divorcees (Nielsen 2000, Hull 2003, Marshall and Barclay 2003, Engel and Munger 2007, Hernández 2010). These studies show how legal consciousness is fluid and contextual and that people may shift in their legal consciousness as a result of the interface of perceptions, experience, and interaction with legal services, courts, and other members of the community (Hernández 2010).

What these studies have in common is that they all look at citizens within national borders. So far, the legal consciousness of non-citizen migrants has received limited attention, with the exception of undocumented migrants and immigration law (Abrego 2011, Schwenken 2013). Abrego has observed that the legal consciousness of undocumented migrants varies across generations, although their legal status is equally precarious. First generation migrants feel they have no rights and no opportunities for making claims. On the other hand, the 1.5 generation, those who migrated as minors, feel they have a right to be legalised, especially if they are highly skilled because of educational training, and they are willing to fight for it. Their position is also informed by the protection they find in the educational system that legitimises their presence as students, although they are still excluded from the wider legal system as undocumented migrants. Consequently, if even among undocumented migrants legal consciousness differs, this is certainly true for the diverse groups of transnational families that are brought together in this issue.

Legal consciousness is fluid and contextual, and is not formed by individuals in isolation, but by individuals in a social context and environment (Abrego 2011, p. 361). This raises the question of how legal consciousness may fair in a transnational environment. In the socio-legal literature on law and transnationalism, it has been acknowledged that transnational legal processes can have an impact on the legal consciousness of elites involved in these processes (Merry 2006, Shaffer 2012, p. 247). But what about the legal consciousness of ordinary people? Schwenken (2013), like Abrego writing on undocumented migrants, observes how migrants living in Germany develop a transnational legal consciousness. In talking about law, their hope of the legalisation of their status is awakened by examples from other legal systems: Spanish immigration law, European law and international conventions. She notes that a transnational legal consciousness allows for a more playful way to engage with restrictive laws, a tool to claim rights.

From the contributions in this issue, Kulk and De Hart most explicitly address the question whether transnational family members develop a transnational legal consciousness. Writing on Dutch-Egyptian couples in Egypt, he found that in a transnational context, legal consciousness may be significantly impacted by the

perception of both the law in the country of origin and the country of residence. Secondly, shifts in the socio-legal position as a consequence of migration also have an impact on legal consciousness.

As Kulk and De Hart state in their contribution, studying legal consciousness in a transnational context offers the opportunity to study it as a dynamic process and as part of the formation of larger communities and networks. We will address this last issue in the next paragraph.

4.3. The role of family and networks

The role of family and networks becomes clear in almost all contributions. Networks may consist of several migrant groups, families, friends, NGOs, lawyers and others. In relation to law, two important functions emerge from the contributions. First, family and networks may offer forms of support in dealing with law and finding solutions. Second, stories and information about law may circulate within networks and have an impact on how law is dealt with in the future.

Family members offer different forms of support in dealing with law, as the contributions by Tas and Liversage illustrate. Tas demonstrates how family support was often vital in finding solutions to a variety of issues: marital conflicts, domestic violence and property disputes. Liversage demonstrates how families can minimise the power of migration law, by supporting the marriage partner with the precarious legal position, or preventing the partner with the stronger legal position from using the power of law. However, as Tas notes, sometimes the support offered was more about protecting the interests of the family as a whole than the interests of the vulnerable family member. Hence, forms of support offered by family and networks may also curtail people, especially women, in the options that are available to them.

The importance of information shared within networks and communities is especially demonstrated by Gehring and Kulk and De Hart. Gehring describes how Dutch retirement migrants live in close proximity to each other at the Costa Blanca in Spain, where they have Dutch companies, doctors, lawyers and care facilities available to them and they are organised in social clubs. Within this social environment, legal rules become part of their transnational environment: they frequently talk about law, sharing information and strategies to 'get away with it', during informal meetings and activities. In this process, they develop norms about avoiding the law to get the best of both worlds that are passed on to newcomers as part of their welcome to the community.

Similarly, Kulk and De Hart found that the community of Dutch migrants living in Egypt shares information and stories about mixed couples and Egyptian family law. Importantly, as Kulk and De Hart explain, these stories were not about their own experiences with Egyptian law but those from unidentified third persons that were reproduced time and again. The stories became increasingly archetypal and stereotypical as they were being told and retold. In these discourses typologies of victimhood of Dutch women were developed, in which naïve Dutch women were abused by Egyptian men and clever Dutch women informed themselves about handling the law in order to prevent such abuse. Kulk and De Hart note how some people enjoyed recounting these stories; as such, it became a form of transnational gossip, as a source of entertainment, information and a mechanism for influencing others of the social group (Dreby 2009). Sportel, in her article on conditions in marriage contracts, further illustrates how such frames of transnational marriages as 'risky' and 'mixed' may fuel a practice among couples of concluding marriage contracts that aim to protect them from those dangers. Thus, stereotypical frames about women and law become part of how the world is framed and constrains future perceptions of law by individuals, by passing them on to newcomers to the community. These frames become transnational as they travel across borders and are reported in Dutch media, on internet forums and the like.

5. Why the study of law in everyday life makes sense

The contributions in this special issue have an interest in the common place of law in the daily lives of ordinary, transnational family members in common. They cover a range of disciplines (sociology, sociology of law, anthropology), fields of law (immigration law, citizenship law, social security law and family law), and types of law (formal state law, informal rules, private arrangements). The last paragraph of this introduction addresses the question why it makes sense to do this kind of research. Why should we care about how lay people experience the law?

First of all, as already stated, ordinary people are legal actors too. Lay people, in dealing with the law, interpret that law, and when they act according to that interpretation they socially construct the law. This is a collective, not an individual, construction. Through stories about law and legal situations, gossip, media coverage, legal aid, and interactions with legal professionals, law is constructed in the consciousness of groups of people. The well-known Thomas theorem applies here: 'If men define situations as real, they are real in their consequences.' The law as it is believed to 'really' be by legal professionals, should better take note of the reality of daily legal life, because, if it does not, the danger is that law will 'hang in the air' ineffectively, unable to address the needs of people.

Second, understanding the daily existence of the law makes one realise why there is a difference between law in the books and law in action. The law is powerful, but in practice it has to compete with other norms and with practices that also carry weight. The law says what should be done and which rules apply, but many people understand only half of it, or do not agree with it and try to circumvent it, the result of which is that many legal rules will not have the intended effects.

Finally, we are of the opinion that the study of law should be a complete study. Studying law without also taking into account the perceptions of the people who are addressed by that law, is like studying sports by describing and analysing the rules of existing games, without ever having observed a baseball or a football match, and without ever having asked the opinion of the players in the field. We hope that this collection of articles on law in the everyday lives of transnational families will lead to a better scientific understanding of what law is, what law does, and for what law is used.

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