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Family Law: A blind-spot

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FAMILY LAW: A BLINDSPOT

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A. INTRODUCTION

Scholarly conversations about transnational law, or law and globalization often ignore family law.¹ While a majority of early transnational law scholars focused mostly on regulatory issues predominantly concerning economic matters, family law questions have only more recently become the object of interdisciplinary and transnational analysis.²

Why do scholars of transnational law overlook family law? The reasons are varied and may be related to one's understanding of family law or of the scope of 'transnational law' itself. A first reason is that family law is still predominantly perceived as a domestic field of inquiry, embedded within local religious or cultural values, a transnational analysis of the field may therefore seem unappealing.³ A second reason may be that family law is often understood to be distinct from market regulation,⁴ while transnational law is often characterized as predominantly interested in legal norms and actors related to market governance.⁵

Over the past few years however, family law scholars have started examining families' everyday lives and family law in relation to globalization dynamics, by looking at how domestic family law rules get influenced by human rights regimes, how different states

¹ This chapter does not discuss in depth the substantive differences that exist between various theoretical approaches to transnational law that are coloured by the doctrinal and disciplinary backgrounds of those who participate in the discussion. For a discussion about these different approaches, see Peer Zumbansen, Introduction to this volume.

² DAPHNA HACKER, *LEGALIZED FAMILIES IN THE ERA OF BORDERED GLOBALIZATION* (Cambridge University Press, 2016). See also, SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (Chicago University Press, 2006).

³ See e.g. David Bradley, *A Family Law for Europe? Sovereignty, Political Theory and Legitimation* in PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE 573 (Katharina Boele-Woelki ed., Intersentia, 2003) (noting that family law is "commonly presented as reflecting deeply embedded differences between states themselves" and arguing that this is so because family law is a "component of political economy" insofar as it reinforces "a particular system of social organisation.").

⁴ Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753 (2010).

⁵ This is not to say that economic relations are the only focus of the transnational law field. Scholars have also analyzed very a diverse range of topics going from human rights, environmental law regulation or global counter-terrorism measures. See e.g. Verlee Heyvaert & Thijs Etty, *Introducing Transnational Environmental Law*, 1 TRANSNATIONAL ENVIRONMENTAL LAW 1 (2012), *Transnational Criminal Law*, Special Issue, 6 TRANSNAT'L L. THEORY (2015).

and non-state jurisdictions regulate families, and the plurality of values these different orders represent, and how transnational families whose lives span across jurisdictions interact with global legal pluralism.⁶ This scholarship weaves together comparative, private, public and international and domestic law and strives to evaluate family laws in their social contexts.

All of the above strongly suggests that family law should be seen as an excellent example of a legal field deeply shaped *by* and implicated *in* the regulatory transformation processes which a new generation of transnational law scholarship has become more interested in. Different transnational law approaches discussed in this book—from Jessup’s landmark analysis,⁷ to more recent methodological projects critically analyzing the myriad of actors, norms and processes that intervene within the conflictual and plural transnational regulatory space, in relation to specialized areas of social activity—all point out to important opportunities to study family law in the global context.⁸

The translation law perspective brings to the fore the production of family norms beyond, below and across legal jurisdictional boundaries, by supra-national courts, human rights bodies, international organizations, as well as transnational networks of human rights activists and other—for instance religious—communities, while also allowing us to trace the migration of family norms across different jurisdictions, and

⁶ See e.g. HACKER, *supra* note 2; ROUTLEDGE HANDBOOK OF INTERNATIONAL FAMILY LAW (Barbara Stark & Jacqueline Heaton eds., 2018) D. MARIANNE BLAIR, MERLE H. WEINER, BARBARA STARK, SOLANGEL MALDONADO, FAMILY LAW IN THE WORLD COMMUNITY, CASES, MATERIALS AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW (2015); ROUTLEDGE HANDBOOK OF FAMILY LAW AND POLICY (John Eekelaar & Rob George eds., 2014). See also the European family law harmonization project in the context of European integration, COMMON CORE AND BETTER LAW IN EUROPEAN FAMILY LAW (Katharina Boele-Woelki ed., 2005); PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE (Katharina Boele-Woelki ed., 2003). In the European private international law context, see Horatia Muir Watt, *Les modèles familial face à la mondialisation (aspects de droit international privé)*, 45 ARCH. PHIL. DROIT (2001).

⁷ PHILIP C. JESSUP, TRANSNATIONAL LAW (Yale University Press, 1956).

⁸ See Peer Zumbansen, *Introduction to this book*; ; Peer Zumbansen, *Transnational Law as Socio-Legal Theory: The Challenges for “Law and Society” in a Divided World*, 67 BUFF. L. REV. (forthcoming 2019) [Zumbansen, *Transnational Law as Socio-Legal Theory*]; Peer Zumbansen, *Where the Wild Things Are: Journey of Transnational Legal Orders, and Back*, 1 U.C. IRVINE J. INT’L TRANSNAT’L & COMP. L. 161 (2016) [Zumbansen, *Where the Wild Things Are*]; Peer Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance and Global Pluralism*, 21 TRANSNAT’L. L. & CONTEMP. PROBS. 305, 323 (2012) [Zumbansen, *Defining the Space of Transnational Law*] (describing transnational law as a conceptual laboratory); Gregory Shaffer, *Transnational Legal Ordering and State Change* in TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE 5 (Gregory C. Shaffer ed., 2012).

to account for the formation of new regulatory assemblages around family issues. To take two examples discussed below, we can only fully understand the relationship between religious and secular family norms, or the adoption of same-sex marriage reforms if such a transnational legal plural approach is taken as a starting point of our legal inquiry.

But the study of family law using transnational law methodologies, also urges us to examine family law in light of the question of legitimacy.⁹ Transnational law, as understood here, is a critical project, building on and connecting domestic critical approaches with a variety of projects bringing together different yet connected disciplines—such as history, colonial and post-colonial studies, sociology or political economy—to examine the asymmetries constitutive of global governance dynamics.¹⁰ Transnational law therefore invites us to contextually analyze norms, legal actors and process in light of social and legal conflicts around the meaning of law, rights and justice¹¹.

Thus, transnational law helps us improve our understanding of the role family law plays in this new continuously evolving transnational legal context. It invites us for instance, to deploy the emerging field of transnational feminisms straddling feminist theories, post-colonial studies and political economy, to evaluate how family law creates, reproduces and legitimizes gender inequalities in the transnational context. It prompts us to mobilize colonial and post-colonial studies to assess family law's role in maintaining Empires and continuing colonial legal imposition, or inquire into how the global expansion of neoliberal transformations¹² shape family regulations. In short, the transnational law framework accentuates how the field of family law is part of broader global regulatory transformative processes and how it is deeply enmeshed with the global distribution of power, privilege and wealth.

⁹ Zumbansen, *Where the Wild Things Are*, *supra* note 8.

¹⁰ Zumbansen, *Transnational Law as Socio-Legal Theory*, *supra* note 8 (describing the critical dimension of transnational law in light of postcolonial studies).

¹¹ See Peer Zumbansen, Introduction to this book; Zumbansen, *Defining the Space of Transnational Law*, *supra* note 8.

¹² WENDY BROWN, *UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION* (MIT Press, 2015). DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (Oxford University Press 2005). On the birth of neoliberalism, see QUINN SLOBODIAN, *THE GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* (Harvard University Press, 2018).

But family law is not unilaterally benefitting from transnational law. Studying the transformations of family law in the transnational context enriches our understanding of how law interacts with society in the new regulatory environment. It reveals new regulatory assemblages situated at the intersection of global and local spaces, showing, from an under-explored vantage point, how transnational processes, norms and actors affect the most intimate aspects of human existence.¹³ Similarly, as I will discuss in this chapter, by connecting transnational law themes to family law evolving regulation, we can appreciate the ‘local’ embeddedness of legal transformations that are often associated with globalization, namely, law’s embrace of global neoliberal economic model and rationality,¹⁴ the ongoing changes affecting the production of state law, and the proliferation of human rights regimes.

In order to substantiate these different claims, in this chapter, I study three prominent critical themes in transnational law scholarship: *legal pluralism*, the *politics of the private/public distinction* and the *continuing transformation of welfare states*. In each instance, I intend to show the parallels and indeed, the correlations, between critical approaches common to both family and transnational law,¹⁵ but also the mutual learning opportunities that are often under-explored by scholars on both sides of the disciplinary divide. In order to make these different arguments more concrete, in each part I discuss different contemporary family law case studies, including the legal recognition of Muslim family law in multicultural and post-colonial societies, the regulation of transnational surrogacy agreements and the proliferation of same-sex marriage reforms across jurisdictions. My goal is not to provide definitive arguments and methodologies, or to offer a complete picture of family law’s evolutions in the global context. Rather, this chapter should be read as tentatively providing one of the many building blocks of the emerging transnational interdisciplinary conversation that sketches out some of the overlaps between family and transnational law, hints at questions that necessitate further legal research, and points to the many ways in which the insights from one field can enrich our understanding of the other.

¹³ See e.g. THE GLOBAL AND THE INTIMATE: FEMINISM IN OUR TIME (Geraldine Pratt & Victoria Rosner, eds., New York Columbia Press, 2012).

¹⁴ See *infra* D.II.

¹⁵ For the argument to short-circuit domestic and transnational critical legal theory, see Peer Zumbansen, *Law After the Welfare State: Formalization, Functionalism and the Ironic Turn of Reflexive Law*, 56 AM. J. COMP. L. 769 (2008) [Zumbansen, *Law After the Welfare State*].

B. TRANSNATIONAL LEGAL PLURALISM

I. Legal Pluralism and Transnational Law

In his landmark 1956 lectures, Philip Jessup used the family to illustrate the many limits of the narrow approach to international law adopted at the time by fellow scholars.¹⁶ According to Jessup, the family is one of the many sites of norm production, along with corporations, ecclesiastical authorities and secret societies.¹⁷ By making this claim, Jessup challenges the prevalence of state law within the legal imaginary. To do so, he adopts a more socio-legal lens to the study of law as it is applied to disputes with a transnational dimension, by incorporating in its legal analysis questions regarding how law gets produced and by whom,¹⁸ echoing claims made by anthropologists and sociologists focusing on legal pluralism in domestic contexts.¹⁹

Legal pluralism remains a central trope in transnational law scholarship²⁰ and within the broader legal globalization literature, which still grapples with questions of legal fragmentation, and legitimacy of newly formed legal structures, operating beyond and across state's boundaries.²¹ An important theme in legal pluralism, which returns in transnational law, has been the analysis of the interrelationships between non hierarchical plural 'traditional'/'state' and 'informal'/'customary' legal orders.²² This has been an important theme for legal pluralist scholars, who reject the idea of a bright line between 'official' state law and 'inofficial' law, and it has been important in the context of post-colonial legal theory, where this critique has been extended to

¹⁶ JESSUP, *supra* note 7.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Sally Engle Merry, *Legal Pluralism* 22 L. & SOC'Y REV. 869 (1988); John Griffiths, *What is Legal Pluralism?* 18 J. LEG. PLURALISM & UNOFFICIAL L. 1 (1986).

²⁰ See e.g. EVE DARIAN-SMITH, *LAW AND SOCIETIES IN GLOBAL CONTEXTS* (2015); Peer Zumbansen, *Transnational Legal Pluralism*, 1 TRANSNAT'L LEGAL THEORY 141 (2010).

²¹ This literature is extensive, see e.g. Andreas Fischer-Lescano & Gunther Teubner, *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICHIGAN J. INT'L L. 999 (2004); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society* in *GLOBAL LAW WITHOUT THE STATE* 3 (G. Teubner ed., 1996).

²² Merry, *supra* note 19 (distinguishing between "classic legal pluralism" and "new legal pluralism"). See also Boaventura de Sousa Santos, *A Map of Misreading: Toward a Postmodern Conception of Law*, 14 J. L. & SOC'Y 279 (1987)

historical trajectories of colonial imposition as it manifests itself today. Today, transnational law scholars are engaged with these insights, analyzing the encounters and the interrelationships between 'official' and 'non official' in relation to a myriad of social and legal orderings beyond, below and across states.²³

Transnational law then proposes a lens for the study of multiple overlapping law-making processes. This mapping includes the identification of the various communities that are competing for a space in which to shape the regulatory environment. Such spaces are seen to move in and out and across jurisdictional divides, constituting, thus, new normative spaces between what is traditionally understood as the 'domestic' and the 'international' field²⁴, and connecting the global with the local.²⁵ The end point of the legal analysis is not to insist on a categorical answer to the endless jurisprudential question regarding law's *nature and form*. Instead, the here endorsed approach to transnational law urges us to question the role of the state as the main legal actor, by reading *all* legal relations against the background of broader globalizing forces of cultural, political and economic interactions²⁶ in order to grasp the complexity of norm making in the global context. As I argue below, transnational law can function as a powerful lens through which these new normative spaces related to family regulation can be made visible and, comprehensible.

II. Transnational Legal Pluralism in Family Law

Rather than being only a domestic discipline, family regulation is actually shaped by a plurality of overlapping and competing legal orders, that applying a transnational law lens allows us to account for. This lens heightens our awareness to the multiplicity of norm generating authorities by prompting us to apply a multifaceted approach to what

²³ For different approaches in that regard, see Ralf Michaels, *Global Legal Pluralism*, 5 ANNUAL REV. L. & SOC. SCIENCE 243 (2009), and Peer Zumbansen, *Transnational Legal Pluralism*, *supra* note 20.

²⁴ Peer Zumbansen, Introduction to this volume

²⁵ DARIAN-SMITH, *supra* note 20 ; Zumbansen, *Transnational Law as Socio-Legal Theory*, *supra* note 8.

²⁶ DARIAN-SMITH, at 5 ; Zumbansen, *Defining the Space of Transnational Law*, *supra* note 8.

at first sight appear to be merely singular domestic or isolated international cases.²⁷ It invites us to map, in a much more detailed fashion, the various state and non-state actors that intervene in norm generating processes that take place inside and outside of official state law-making institutions. Meanwhile, it is through this more detailed scrutiny of the sites and processes of norm production that we are able to appreciate the different actors' interactions with one another and, identify the different dynamics of norm-migration in this context. Instead of scrutinizing a norm production process within 'official' state-based institution, we focus on transnational legal processes, which appear as frameworks making visible struggles among different groups for political recognition, spaces for multi-sited norm contestation, fora for the formulation of new claims, and creation of new interpretation of 'rights.'

Transnational legal pluralism aptly describes how family is regulated. At the 'domestic' level, legal pluralism is unquestionably a contemporary reality, and manifests itself in relation to religious or ethnic orders in states which accommodate different groups by allowing the application of non-state family norms when these groups are involved in family law disputes.²⁸ In other countries, legal pluralism is a consequence of settler colonialism, as indigenous legal orderings exist side by side with the settler's law.²⁹ Pluralism is also a reality in most contemporary family laws to the extent that states allow, and sometimes encourage individuals, to *contract out* from state norms, and to define their family relationships through private ordering.³⁰ Finally, private

²⁷ DARIAN-SMITH, *supra* note 20.

²⁸ This is for instance the case in India or Israel where each religious community is regulated by its particular family rules. See for an overview of different examples Hadas Tagari, *Personal Family Law Systems-A Comparative and Human Rights Analysis*, 8 INTERNATIONAL JOURNAL OF LAW IN CONTEXT 231 (2012). A different example is South Africa where state law accommodates, to a certain extent, customary family law. See e.g. David L. Chambers, *Civilizing the Natives: Customary Marriage in Post-Apartheid South Africa*, in ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES 81 (Richard Shweder, Martha Minow & Hazel Rose Markus eds., Russell Sage Foundation 2002).

²⁹ See e.g. Annelise Riles, *Cultural Conflicts*, 71 LAW & CONTEMP. PROBS 273 (2008) (analyzing conflicts between native American Navajo marriage rules and U.S. criminal law).

³⁰ CONTRACTUALISATION OF FAMILY LAW: GLOBAL PERSPECTIVES (Frederik Swennen ed., 2015) (examining private ordering across several jurisdictions). On how some states encourage private ordering see e.g., Katharina Boele-Wolkie & Merel Jonker, *Family Law Contractualisation in the Netherlands-Changes and Trends*, in CONTRACTUALISATION OF FAMILY LAW: GLOBAL PERSPECTIVES 311 (Frederic Swennen ed., 2015).

international law has been dealing for a long time with legal pluralism as regards the recognition of foreign marriages, divorces, parental or property rights.³¹

Besides these examples, transnational legal regimes, which operate beyond and across states also influence domestic family laws and practices. One prominent example is human rights law. As will be discussed below, equality and non-discrimination human rights norms have played a crucial role in transnational legal advocacy and in prompting states to adopt reforms legalizing same-sex marriage.³² Similarly, human rights courts—such as the European Court of Human Rights (ECTHR)—have influenced family law regulations. One example are 'domestic' rules pertaining to the filiation of children born out of transnational surrogacy agreements.³³ In the midst of an ongoing explosive debate about transnational surrogacy in France,³⁴ The ECTHR has condemned France for refusing to recognize the foreign birth certificate, and the filiation between the biological father and children born out of surrogacy agreements, arguing that this amounted to a violation of children's right to private and family life.³⁵ Accordingly, in order to satisfy its human rights obligations, in subsequent cases, French *Cour de cassation*—the supreme court in criminal and civil matters—has adopted this legal interpretation.³⁶ Recently, the Court also asked the ECTHR for an advisory opinion regarding the legal status of intended mother under French law. *Cour de cassation* has typically refused to register the intended mother as the 'legal mother,' while opening for her the possibility to adopt the child. The *Cour de cassation* asked therefore whether this legal solution was contrary to the right to children's private and family life, to which the answer was no.³⁷ Thus the short description of the case already

³¹ See e.g. R. LEA BRILMAYER, JACK L. GOLDSMITH, ERIN O'HARA O'CONNOR, CONFLICT OF LAWS: CASES AND MATERIALS (7 ED. 2015); LES GRANDS ARRÊTS DE LA JURISPRUDENCE FRANÇAISE DE DROIT INTERNATIONAL PRIVE (Bertrand Ancelle & Yves Lequette eds., 5ED., 2006).

³² See *infra*, D.I.

³³ See *infra*, C.III.

³⁴ *Protests in Paris for and against surrogacy and medically assisted reproduction*, Euronews, May 10, 2014 at <https://www.euronews.com/2014/10/05/protests-in-paris-for-and-against-surrogacy-and-medically-assisted-reproduction>

³⁵ Eur. Ct. Hum. Rts., *Menesson v. France*, App No. 65192/11, June 26, 2014; Eur. Ct. Hum. Rts., *Labassee v. France*, App. 65941/11, June 26, 2014.

³⁶ Ass. plén. July 3rd, 2015 at

https://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/619_3_32230.html

³⁷ Eur. Ct. Hum. Rts. Advisory opinion concerning the recognition in domestic law of parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, Requested by the French Court of Cassation, April 10 2019, at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22003-6380464-8364383%22%5D%7D>

illustrates some of the transnational processes through which norms migrate between domestic and international jurisdictions through multiple forms of influence that different authorities exert on each other.

Within the global context, a particularly controversial and heated debate, driven by “the politics of recognition”³⁸, concerns the application or recognition of Shari’a in family law cases.³⁹ As Ayelet Shachar argued, these are ‘privatized diversity’ claims according to which respect for cultural and religious identities requires the (secular) state to adopt a non-interventionist attitude towards family law questions, which should be left outside the public sphere.⁴⁰ These demands have triggered much controversy, in particular, those concerning the establishment or the legal recognition of faith based religious arbitration.⁴¹ Seen as potentially in tension with the respect for gender equality,⁴² these arbitrations were banned by the Canadian provinces of Québec and Ontario.⁴³ In other states, like the U.K., the controversial Shari’a councils, which apply religious laws to family disputes, seem to exist today outside the official legal system. The law does not prohibit these alternative modes of dispute settlement, but neither explicitly legally recognizes their jurisdiction.⁴⁴

³⁸ CHARLES TAYLOR, *MULTICULTURALISM: EXAMINING THE “POLITICS OF RECOGNITION”* (Princeton University Press, 1992); NANCY FRASER & AXEL HONNETH, *REDISTRIBUTION OF RECOGNITION?: A POLITICAL PHILOSOPHICAL-EXCHANGE* (Verso, 2003).

³⁹ HACKER, *supra* note 2 at 80-101; PASCALE FOURNIER, *MUSLIM MARRIAGE IN WESTERN COURTS: LOST IN TRANSPLANTATION* (Ashgate 2010) (showing how Western courts use different frameworks—legal pluralism, legal equality and substantive equality—to deal with the reception of *mahr*—formally a gift that the bride receives from the bridegroom in consideration of marriage and that becomes the property of the wife.); AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS* (Cambridge University Press 2001); Ivana Isailovic, *Political Recognition and Transnational Law: Gender Equality and Cultural Diversification in French Courts*, in *PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE* (D. Arroya & H. Muir Watt eds., 2014) (examining the reception of *talaq* in French courts in light of gender equality claims); Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law* 9 *THEORETICAL INQ. L.* 573 (2008) (providing a conceptual framework for understanding and addressing religious arbitration, drawing on Canadian legal debates).

⁴⁰ Shachar, *supra* note 39, at 577.

⁴¹ See on debates concerning religious tribunals: Machteld Zee, *Five Options for the Relationship between the State and Sharia Councils: Untangling the Debate on Sharia Councils and Women’s Rights in the United Kingdom*, 16 *J. OF RELIGION & SOC.’Y* 1 (2014); Caryn Lyte Wolff, *Faith-Based Arbitrations: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 *FORDHAM L. REV.* 427 (2006).

⁴² HACKER, *supra* note 2 at 96-97. Shachar, *supra* note 39.

⁴³ The Family Law Amendment Act, 2006, S.O. 1991, c.1, par. 2.1; Civil Code of Quebec, S.Q. 1991, art 2639. For debates concerning religious arbitration in Canada, see Shachar, *supra* note 37.

⁴⁴ On legal debates surrounding the regulation of Shari’a councils, see, Zee, *Five Options for the Relationship between the State and Sharia Councils*, *supra* note 41. A recent report recommended that Shari’a councils should not be prohibited, but that different pieces of legislation should be changed in order to decrease the recourse to these councils, see *The Independent Review Into the*

Another similarly controversial—although less high-profile—case is the legal recognition by domestic courts of foreign family law norms that are influenced by Shari'a.⁴⁵ A particularly interesting case study is provided by the transnational recognition of *talaq* divorces according to which the husband has a unilateral right to end the marital union without the necessary interventions of courts.⁴⁶ In these cases, spouses are typically foreign or dual nationals domiciled in the state that is asked to recognize the foreign *talaq*. To take the example of France, in a series of cases decided in 2004 that settle the question of *talaq* recognition, the French *Cour de cassation* has refused to recognize foreign *talaq* divorces, arguing that they were contrary to the French public order to the extent that they were in conflict with the gender equality principle protected by the European Convention on Human Rights that is applicable in France. Unlike in its previous decisions,⁴⁷ the court adopted a formal understanding of gender equality violation, no matter the context surrounding the application of foreign law. In line with the arguments of some feminist authors reflecting on the tension between gender equality and multiculturalism,⁴⁸ gender equality was here understood as *formal equality of rights*, that necessarily trumps the respect for cultural or religious identity.⁴⁹

This understanding of *talaq* as a violation of gender equality seems to gain traction transnationally. In a recent preliminary reference case before the Court of Justice of the European Union,⁵⁰ involving the recognition of *talaq* pronounced before religious authorities in Syria, the Advocate General Saugmandsgaard Øe, along with the EU Commission and several state governments, was of the opinion that a foreign law

Application of Sharia Law in England and Wales, Feb. 2018 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678478/6.4152_HO_CPGF_Report_into_Sharia_Law_in_the_UK_WEB.pdf

⁴⁵ For a comparative approach to the reception of *mahr*, see FOURNIER, *supra* note 39. For a comparative approach that analyzes different state family laws based on Shari'a and the reception of *talaq* by different courts in Western Europe, see PAULINE KRUIINGER, *ISLAMIC DIVORCES IN EUROPE: BRIDGING THE GAP BETWEEN EUROPEAN AND ISLAMIC LEGAL ORDERS* (Eleven International Publishing, 2015).

⁴⁶ For differences between national laws influenced by Shari'a, see KRUIINGER, *supra* note 45.

⁴⁷ For a historical account of the recognition of *talaq* in France, see ROULA EL HUSSEINI BEGDACHE, *LE DROIT INTERNATIONAL PRIVE FRANÇAIS ET LA REPUDIATION ISLAMIQUE* (L.G.D.J 2002).

⁴⁸ SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* (Princeton University Press, 1999).

⁴⁹ One of the proponent of this solution is Léna Gannagé for whom *talaq* violates a fundamental right, Cass. 1 civ, July 12, 2001 (2001) *Revue Critique de Droit International Privé*, 704 L. Gannagé. See for a critical appraisal of this position, Isailovic, *supra* note 39.

⁵⁰ Case C-372/16 Soha Sahyouni v. Raja Mamisch, December 20, 2017.

which does not grant the same procedural and substantive divorce rules to spouses, should not be recognized by EU courts.⁵¹ At this stage however, more empirical legal research is needed to gain a comprehensive view of the conflicts, that, if adopted in the future, this solution could create between EU legal regime, states that adopt a more contextual approach to the issue of foreign *talaq* recognition,⁵² and different international, transnational advocacy actors⁵³ but also community level actors involved in shaping a transnational norm related to *talaq*.

As all of these examples show us, only a focus on multilayered interactions between domestic, international and transnational legal orders, related to different religious and epistemic communities, allows us to truly appreciate how family regulation and its normative values evolve and how norms and discourses migrate across jurisdictions. Transnational law also prompts us to reflect critically on the conflictual nature of different actors legal demands analyzing how they relate to the question of right allocation, subordination and power distribution. This is visible in the example of *talaq* where different actors compete within different processes for defining what constitute law (can religious law be law on par with secular state law?), rights (does gender equality only entail a formal understanding of equality?) and identity (what is the scope of recognition in law of culturally hybrid identities?).

B. THE GLOBAL POLITICS OF THE PUBLIC/PRIVATE DISTINCTION

I. The Public/Private Distinction in Transnational Law

Related to the distinction in legal pluralism in transnational law scholarship between state and non-state norms is the debate surrounding the analytic and normative

⁵¹ Opinion of Advocate General SAUGMANDSGAARD ØE, September 14, 2017, Case C-372/16 Soha Sahyouni v Raja Mamisch.

⁵² KRUIGNER, *supra* note 46.

⁵³ For instance, the transnational NGO *Equality Now* which uses a combination of transnational legal advocacy and community mobilization to force governments to adopt laws that protect the rights of women and girls, has recently singled out *talaq* as being one of the main violation of gender equality in family law relations. Council on Foreign Relations, *Women and the Law: Levelling the Economic Playing Field*, New York, December 12, 2018.

purchase of the private/public distinction.⁵⁴ Public law is closely associated with public interests, state power and unequal relations. By contrast, private law is identified as regulating relations between private parties and as protecting 'private rights'. Unlike public legal relations, private legal relations are seen as autonomous from the state, and are characterized by horizontality.⁵⁵

Building on the extensive critical legal literature,⁵⁶ which exposed the illusory nature of this divide by showing that private law actually involves public interests, and has distributional consequences which structure and perpetuate power relations,⁵⁷ some transnational law scholars argue that this classification performs a problematic, de-politizing function in the global regulatory space.⁵⁸ This distinction ends up promoting and legitimizing the legal unaccountability of private economic actors, who are, 'isolated' from public law interventions and invested with major regulatory powers without bearing states' obligations, such as respect for human rights or labour law.⁵⁹ Thus, the distinction directly contributes to the persistence of an unequal distribution of power at the global level in favour of transnational private actors. Besides obfuscating true power differentials, transnational scholars argued that the

⁵⁴ Peer Zumbansen, *Transnational Law* in ENCYCLOPEDIA OF COMPARATIVE LAW 738, 740-742 (Jan Smits ed., Edward Elgar, 2006).

⁵⁵ Ralf Michaels & Nils Jansen, *Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. LAW 843, 847-853 (2006) (noting that this classification may be far more prevalent in the European legal context than it is elsewhere and listing different concepts which define private law's specific rationality).

⁵⁶ Zumbansen, *Transnational Law as Socio-Legal Theory*, *supra* note 8.

⁵⁷ See Robert Hale, *The Coercion and Distribution in a Supposedly non Coercive State*, 38 POL. SCI. Q. 470 (1923). For critical legal scholars' interventions see, MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (Harvard University Press, 1977); Duncan Kennedy, *The Stages of Decline of the Public/Private Distinction*, 130 U. OF PA. L. REV. 1349 (1982).

⁵⁸ A. Claire Cutler, *PRIVATE POWER AND GLOBAL AUTHORITY* (Cambridge University Press, 2003); A. Claire Cutler, *The Judicialization of Private Transnational Power and Authority*, 25 IND. J. GLOBAL LEGAL STUD. 61 (2018); Zumbansen, *Where the Wild Things Are*, *supra* note 8. For a critique of the public/private distinction in the context of private international law Horatia Muir Watt, *Private International Law's Shadow Contribution to the Question of Informal Transnational Authority*, 25 IND. J. GLOBAL LEGAL STUD. 37 (2018); Horatia Muir Watt, *Private International Law Beyond the Schism*, 2 TRANSNAT'L L. THEORY 347 (2011); Robert Wai, *Transnational Liff-off and Juridical Touchdown*, 40 COLUM. J. TRANSNAT'L L. 29 (2002). See similar critiques on the international 'public' side of the disciplinary divide: JOHN LINARELLI, MARGOT E SALOMON, AND M SORNARAJAH, *THE MISERY OF INTERNATIONAL LAW, CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY* (Oxford University Press, 2018) (analyzing how international trade law, the international investment law, the regulation of global finance and human rights law perpetuate neoliberalism and entrenched social inequalities); Martti Koskeniemi, *Empire and the International: The Real Spanish Contribution*, 61 U. TORONTO L. J. 1 (2011) (showing how the universalization of private law concepts of property and contract were critical in the making of 'informal empire.').

⁵⁹ See Backer, in this volume.

private/public distinction is also descriptively flawed. It fails to account for recent legal evolutions, namely a new types of actors and norms which cannot be mapped along the public/private categories. Some of these evolutions include the expansion of private actors' norm-making, the growth of hybrid regulatory transnational regimes,⁶⁰ and the proliferation of transnational private governance through contracts.⁶¹

II. The Private/Public Distinction in Family Law

Family law scholars and legal feminists have pointed out similar descriptive and conceptual flaws of the private/public distinction. Although the field still tends to be described as 'private,' this description has always been contested. For instance, historians have shown how family law is deeply involved in nation-state building projects, making family law norms highly public matters, rather than private, individualized issues.⁶² Similarly, some recent comparative family law scholarship has focused on 'constitutionalization' processes examining how family laws are being profoundly shaped by constitutional notions of individual rights and equality.⁶³ Parallel evolutions are also at play in the international context. For instance, under the pressure of equality and non-discrimination human rights norms, domestic family laws across jurisdictions, have evolved beyond heterosexual family law models.⁶⁴

⁶⁰ See e.g. Fabrizio Caffagio, *New Foundations of Transnational Private Regulation*, 38 J. L. & SOC'Y 20 (2011)

⁶¹ See e.g. THE POLITICS OF PRIVATE TRANSNATIONAL GOVERNANCE BY CONTRACT (A. Claire Cutler & Thomas Dietz eds. 2017); Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155 (2000-2001).

⁶² NANCY COTT, *PUBLIC VOWS. A HISTORY OF MARRIAGE AND THE NATION* (Harvard University Press, 2000); Philomila Tsoukala, *Marrying Family Law to the Nation*, 58 AM.J.COMP.L. 873 (2010).

⁶³ MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 88-89 (University of Chicago Press, 1989). For an analysis of U.S. law, see, David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM.L.Q. 529 (2008).

⁶⁴ In the European regional context: Eur. Ct. Hum. Rts., *Orlandi and Others v. Italy*, Applications nos. 26431/12; 26742/12; 440572/12; 60088/12, December 14, 2017; Eur. Ct. Hum. Rts., *Oliari and Others v. Italy*, Applications nos. 18766/11 and 36030/11, July 21, 2015 (finding that Italy has breached article 8 protecting the right to private and family life). See also, Eur. Ct. Hum. Rts. *Vallianatos and Others v. Greece*, Applications nos. 29381/09, 32684/09, November 7, 2013 (concluding that the law which recognizes different sex unmarried couples is discriminatory on the basis of sexual orientation), Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* (April 1st 2008) (holding that same-sex partners should be treated like spouses with regard to survivor's pension scheme); C-147/08, *Romer* (May 10, 2011) (finding that there is discrimination on the ground of sexual orientation if a pensioner who has entered into a registered life partnership with a person of their own gender receives a supplementary retirement pension lower than that granted to a married, not permanently separated, pensioner, in cases in which registered partner is comparable to marriage). In the Inter-American system of human rights: IACHR, *Atala Riffo and Daughters v. Chile* (February 24, 2012) (finding that the state violates its human rights obligations by denying custody to a parent because of

Feminist legal scholars have repeatedly argued that the public/private distinction creates, obscures and legitimizes women's subordination across different sectors.⁶⁵ By relegating family matters to the 'private' sphere of the home, seen as reserved for women, and by classifying family relations as 'private' matters, the law disadvantages women and perpetuates women's unequal position in society.⁶⁶ The entire legal structure, they argue—from contract, tort, to criminal, family and tax law—is geared towards legitimizing the ideology of male domination, leading the state to condone violence against women, and depriving women of dignity, autonomy and equal citizenship.⁶⁷ These critiques have been relatively successful, inspiring a range of domestic and transnational policies concerning domestic violence.⁶⁸

Moreover, by treating the home as 'private' and different from the market, which is coded as 'public,' the distinction has also occluded how domestic work such as caregiving activities, usually performed by women, is treated as acts of 'love,' and end

their sexual orientation); IACHR, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017) (finding that states should legalize same-sex marriage in application of the right to equality).

⁶⁵ Frances Olsen, *Constitutional Law: The Feminist Critiques of Public/Private Distinction*, 10 CONSTITUTIONAL COMMENTARY 319 (1993); Frances E. Olsen, *The Family and the Market: A Study of the Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) [hereinafter, Olsen, *The Family and the Market*].

⁶⁶ Olsen, *Constitutional Law: The Feminist Critiques of Public/Private Distinction*, *supra* note 89; Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 151 (David Kairys, ed., Pantheon, 2d ed. 1990)

⁶⁷ CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 193 (1989) ("[T]he legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited domestic labor. It has preserved the central institutions whereby women are deprived of identity, autonomy, control, and self-definition. It has protected a primary activity through which male supremacy is expressed and enforced."); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1020 (1984) ("The rhetoric of privacy... reinforces a public/private dicotomy [sic] that is at the heart of the structures that perpetuate the powerlessness of women."). See also, Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557 (2006) (examining the conflict between radical feminists that challenge privacy as a basis for asserting rights and liberal feminists' defence of privacy, and proposing how privacy could be reconstructed independently from its gendered origins). Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE. L. J. 2117 (1996).

⁶⁸ Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law and the Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1263 (2009) (noting that "the reform project was remarkably successful" insofar that domestic violence is a crime throughout the U.S., some states have adopted mandatory arrest policies that require police to arrest upon probable cause, and 'no-drop policies' according to which prosecution of domestic violence is required even if the victim does not cooperate). For the critiques of feminists' turn to the criminalization of the domestic sphere, see Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007). For transnational legal changes, see MERRY, *supra* note 2; Sally Engle Merry, *Constructing a Global Law-Violence Against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941 (2003).

up being legally and economically unrecognized⁶⁹, despite the obvious benefit to the state⁷⁰ and it being a condition for capitalism to thrive.⁷¹ Feminist counter proposals have ranged from demanding wages for housework⁷² to alimony reforms, and to policies, which would change the distribution of labour between partners at home.⁷³

From the perspective of transnational law, as understood here, these critiques invites us to (re)consider the role that family law plays in the broader global social context, and to assess, the global politics of private family law.

III. The global politics of 'private' family law

Transnational law scholarship's invitation to bridge domestic and transnational legal debates, by connecting 'private' law (i.e. family law) questions with issues of legitimacy, alerts us to the global distributive effects of family law, legal discourses and practices surrounding family law. The critical approach requires a close examination of how transnational actors, institutions and processes are involved in the design and struggle over family law norms and values, and how these processes legitimize or challenge prevailing dynamics of inequality and domination.

⁶⁹ Frances E. Olsen, *The Family and the Market*, *supra* note 89. In the global context see Catherine Hoskyns & Shirin M. Rai, *Recasting the Global Political Economy: Counting Women's Unpaid Work*, 12 NEW POLITICAL ECONOMY 297 (2007).

⁷⁰ MARTHA A. FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (The New Press, 2004); Martha Fineman, *Cracking the Foundational Myths, Independence, Autonomy and Self-Sufficiency*, in FEMINISM CONFRONTS HOMO ECONOMICUS 180 (M. Fineman & T. Dougherty eds., Cornell University Press 1991).

Not only is the family perceived as occupying the private sphere. It is conceptualized as embodying values and norms very different from the institutions occupying the public sphere, particularly those of the market. Family relationships are cast as different in functioning and form than relationship existing in the public world. Families are altruistic institutions held together by affectional bonds. Of course, any serious consideration of the family reveals that it is a very public institutions, assigned an essential public role within society.

See also, Katharine Silbaugh, *Turning Labour into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996); Olsen, *The Family and the Market*, *supra* note 89.

⁷¹ See the contributions of materialist feminism on how social reproduction is complementary to and necessary for capitalism to operate, see e.g. MATERIALIST FEMINISM. A READER IN CLASS, DIFFERENCE AND WOMEN'S LIVES (Rosemary Hennessy and Chris Ingraham eds., Routledge 1997).

⁷² SYLVIA FEDERICI, *REVOLUTION AT POINT ZERO: HOUSEWORK, REPRODUCTION AND FEMINIST STRUGGLES* (2012).

⁷³ See special issue *Symposium on the Structure of Care*, CHI.-KENT L. REV., issue 3, 2001.

From the emerging field of transnational feminist perspective, that bridges and integrates feminist theory, colonial and post colonial studies and political economy,⁷⁴ it becomes possible to bring to the fore the interactions between gender, race and sexuality in the analysis of global contemporary family law evolutions. This interdisciplinary framework can help us revisit the contemporary heated legal and political debates surrounding key family law regulatory areas such as the regulation of transnational surrogacy, which from a domestic phenomenon,⁷⁵ has become a truly global concern.⁷⁶

The transnational law perspective, as understood here, urges us to identify different norm-generating actors involved in the regulation of transnational surrogacy—from states, and state courts, to international organizations such as the Hague Conference on Private International Law, and human right courts,⁷⁷ to the plethora of industry

⁷⁴ See e.g. CHANDRA TALPADE MOHANTY, *FEMINISM WITHOUT BORDERS: DECOLONIZING THEORY, PRACTICING SOLIDARITY* (Duke University Press 2003); WOMEN'S ACTIVISM AND GLOBALIZATION: LINKING LOCAL STRUGGLES AND GLOBAL POLITICS (Nancy A. Naples & Manisha Desai eds., Routledge, 2002); M. JAQUI ALEXANDER, CHANDRA TALPADE MOHANTY, *FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES* (Routledge, 1997), Maylei Blackwell, *Geographies of Difference: Transborder Organizing and Indigenous Women's Activism*, 42 *SOCIAL JUSTICE* 137 (2016); Maylei Blackwell, Laura Briggs & Mignonette Chiu, *Transnational Feminisms Roundtable*, 36 *FRONTIERS* 1 (2015); *Gender, Justice and Neoliberal Transformations*, S&F ONLINE, (Fall 2012/Spring 2013) at <http://sfonline.barnard.edu/gender-justice-and-neoliberal-transformations/> *Gender, Globalization and Social Change in the 21st Century*, Special Issue, 18 *INTERNATIONAL SOCIOLOGY* (2003); *Globalization and Gender*, Special Issue, 26 *SIGNS* (2001).

⁷⁵ See for instance in the U.S. context, Darren Rosenblum et al., *Pregnant Men?: A Conversation*, 22 *YALE J. L. & FEMINISM* 207 (2010); Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 *L. & CONTEMP. PROBS.* 109 (2009) (describing how in the U.S. legal actors and feminist movements framed surrogacy over time and showing how feminists gradually lost interest in the issue of surrogacy accepting a more pragmatic approach to its regulation).

⁷⁶ On the rise of transnational surrogacy agreements, see HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *A STUDY OF LEGAL PARENTAGE AND THE ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS*, PRELIMINARY DOCUMENT No. 3 C (March 2014) at <https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf>. There is an extensive literature on the legal regulation of transnational surrogacy: INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL (Katarina Trimmings & Paul Beaumont eds., 2012); Sital Kalantry, *Regulating Markets for Gestational Care: Comparative Perspectives on Surrogacy in the United States and India*, 27 *CORNELL J. L. & PUB. POL'Y* 685 (2018); Cyra Akila Choudhury, *The Political Economy and Legal Regulation of Transnational Commercial Surrogate Labor*, 48 *VAND. J. TRANSNAT'L L.* 1 (2015); Yasmine Ergas, *Babies Without Borders: Human Rights, Human Dignity and the Regulation of International Commercial Surrogacy*, 27 *EMORY INT'L L. REV.* 117 (2013); Katarina Trimmings & Paul Beaumont, *International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level*, 7 *J. PRIVATE INT'L L.* 627 (2011); Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 *ILSA J. Int'l & Comp. L.* 369 (2012); Daniel Gruenbaum, *Foreign Surrogate Motherhood: Mater Semper Certa Erat*, 60 *AM.J. COMP. L.* 475 (2012); Ruby L. Lee, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 *HASTINGS WOMEN'S L. J.* 275 (2009).

⁷⁷ Eur. Ct. Hum. Rts., *Mennesson v. France*, App No. 65192/11, June 26, 2014; Eur. Ct. Hum. Rts., *Labassee v. France*, App. 65941/11, June 26, 2014; Eur. Ct. Hum. Rts. *Paradiso and Campanelli v.*

actors, as well as transnational human rights activists groups—⁷⁸and assess how the multiplicity of conflicting norms regulating surrogacy agreements play out in this multilayered context.⁷⁹ More importantly, the transnational critical perspective leads us to engage and revisit the ‘scandal’⁸⁰ that over the recent years became associated with transnational surrogacy.

For many feminists and legal scholars, surrogacy is contrary to gender equality, because it leads to the commodification of surrogate mothers and deprives them of their autonomy and harms their dignity.⁸¹ This normative analysis is reflected in Daphna Hacker’s recent critique of surrogacy in the context of Israeli parents’ experiences that had recourse to Indian surrogates. According to Hacker the contractual practices leave the surrogate mothers without bargaining power and amount to “extreme legal objectification” in which surrogates are perceived as “*outside the law* as humans and only *inside the law* as for-rent baby ovens.”⁸² Another critique voiced by feminists is that transnational surrogacy fuels a global market for cheap labour,⁸³ and that it constitutes neo-colonial forms of oppression of women of color.⁸⁴

Italy, App No. 25358/12, Jan. 27, 2017 (finding that Italian authorities’ removal of the child born out of surrogacy did not violate intended parents’ private and family life).

⁷⁸ See e.g. Cornell International Human Rights: Policy, Advocacy Clinic, National Law, University-Delhi, *Should Compensated Surrogacy be Permitted or Prohibited?, Policy Report Evaluating the New York Parent-Child Security Act of 2017 that Would Permit Enforceable and Compensated Surrogacy* (Sept. 2017) at

<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2685&context=facpub>; Memorandum on The Surrogacy (Regulation) Bill 2016, authored by Aparna Chandra, Mrinal Satish and Sital Kalantry, at <https://cpb-us-e1.wpmucdn.com/blogs.cornell.edu/dist/2/7529/files/2017/08/CLPG-NLU-Delhi-Cornell-Memorandum-on-Surrogacy-Bill-2016-1s985d1.pdf>.

⁷⁹ On the interplay between ‘domestic’ ‘private’ international family law and human rights law, see e.g. Ivana Isailovic, *The ECtHR and the Regulation of Transnational Surrogacy Agreements*, EIJL Talk! July 25, 2014, at <https://www.ejiltalk.org/author/iisailovic/>.

⁸⁰ Prabha Kotiswaran, *Do Feminists Need an Economic Sociology of Law?* 40 J. L. & Soc’y 115, 133 (2013).

⁸¹ HACKER, *supra* note 2 at 138 (listing problematic contractual practices in India before the country closed itself to international surrogacy); MURIEL FABRE MAGNAN, *LA GESTATION POUR AUTRUI: FICTION ET REALITE* (FAYARD, 2013); SUSAN MARKENS, *SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION* (University of California Press, 2007); MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* (1996). This is also the position of some European states, like France, Germany and Switzerland, see Ergas, *supra* note 76, at 155-156.

⁸² HACKER, *supra* note 2 at 138.

⁸³ See Choudhury, *supra* note 76 at 22-24.

⁸⁴ *Id.* at 24-26 (describing different arguments according to which surrogacy constitutes the oppression of women of color).

But other feminist scholars have complicated this dominant subordination/objectification narrative. Prabha Kotiswaran, for instance, has used her ethnographic work in India to point to the structural similarities between sex work, bar dancing and surrogacy and the ways in which women experience this kind of labour. She argues that the current feminist category of 'reproductive labour' is too narrow and should be extended to include these different forms of work performed outside traditional affective relational networks.⁸⁵ Similarly, Cyra Choudhury has analyzed different domestic legal regimes and discourses influencing the regulation of transnational surrogacy, and concludes that none of the traditional feminist normative framings (i.e. subordination/objectification) provides a compelling description of surrogates' everyday lives. Minimizing neither the problem of exploitation associated with surrogacy nor the stigma that surrogates bear, she convincingly argues that surrogate mothers are not women without agency, and that surrogacy could be a rational and preferable economic choice in some contexts.⁸⁶ Instead of objectification/exploitation frame, she argues, the surrogate should be perceived as a *worker* performing hazardous work that should be regulated through more protective labour and contract law provisions.⁸⁷

C. TRANSFORMATIONS OF THE WELFARE STATE

Within this legally fragmented and plural context, transnational scholars have demonstrated the continuous transformations of states and their law.⁸⁸ This final part of this chapter looks at two conceptualizations of state change that are of interest here, and how they can explain ongoing family law evolutions: the first one is the notion of 'transnational legal ordering,' developed by Gregory Shaffer and Terence Halliday. The second one is the erosion of the welfare state in the context of pervasive neoliberalism, characterized by privatization, fiscal austerity as well as the cultural triumph of economic rationality across different sectors of the society.⁸⁹ Here, my primary aim is

⁸⁵ Prabha Kotiswaran, *The Laws of Social Reproduction: A Lesson In Appropriation*. 64 NORTHERN IRELAND LEGAL QUARTERLY 317 (2013).

⁸⁶ *Id.* at 30.

⁸⁷ *Id.* at 58-60

⁸⁸ See e.g. SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (Columbia University Press 1996).

⁸⁹ BROWN, *supra* note 12; HARVEY, *supra* note 12.

to show how transnational law scholars' critical findings can help us theorize some of the contemporary evolutions in family law. I argue that the recent proliferation of same-sex marriage across different jurisdictions is an excellent example of 'transnational legal ordering.' Similarly, by identifying how domestic legal evolutions enable the expansion of neoliberal policies and rationality,⁹⁰ the transnational perspective invites us to better understand how domestic family law has made possible neoliberal transformations, and vice versa, how transnational neoliberal policies have influenced family regulations.

I. Same-sex Marriage Reforms as Transnational Legal Ordering

Transnational legal ordering refers to the process of production, flow and consolidation of transnational norms—namely, norms that originate in treaties, private codes of conduct or standards—in a particular field through the action of multiple actors, including governmental officials, business officials, but also civil rights activists. This transnational constellation in turn generates transnational legal orders, which can be more or less salient or fragmented, depending on whether norms are clear, coherent and whether or not they are supported by transnational practice. How does domestic change happen within the process of transnational legal ordering? For Shaffer and Halliday, the answer can be found in the process of 'recursivity', denoting "a multidirectional, diachronic process of legal change"⁹¹, where "the transnational and local are held in tension, the actors engaged in transnational legal processes seek to influence local lawmaking and practice, and the national legal norms, adaptations, and resistances provide models for and feed back into transnational lawmaking."⁹²

How does this model allow us to evaluate changes in family law? A good example of transnational ordering is the adoption of same-sex marriage reforms across various

⁹⁰ Peer Zumbansen, *Law After the Welfare State*, *supra* note 15 at 768 ("The challenges of globalization to domestic state-originating welfare programs...had a very domestic face.... Globalization...further accentuated and fuelled a transformation of public governance that was already beginning to unfold from within the cores of western welfare states.")

⁹¹ Gregory C. Shaffer, *Transnational Legal Process and State Change*, 37 LAW & SOC. INQUIRY 229, 238 (2012).

⁹² *Id.*

jurisdictions. Domestic, comparative and human rights legal scholars often adopt the convergionist narrative to account for this legal transformation,⁹³ emphasizing the ‘incremental path’ followed by different jurisdictions, the influence of human rights, and the role that cross-fertilization between domestic and international courts played in the process. In this narrative, same-sex marriage follows the decriminalization of homosexuality and the adoption of anti-discrimination laws and does so in a context in which different courts and legislators observe each other and then mobilize similar legal arguments. Among those is the promotion of equality and the prohibition of discrimination.⁹⁴ The work of David Paternotte on same-sex marriage reforms, which bears important similarities with Halliday’s and Shaffer’s TLO model, however complicates this narrative by providing a more granular description of transnational processes, institutions and actors who are involved in the construction of same-sex marriage as a transnational equality law norm.⁹⁵

Paternotte describes the role of transnational advocacy networks in the adoption of same-sex marriage in very different jurisdictions and how these networks interact with states and international institutions.⁹⁶ Without minimizing the importance of legal and political processes on the domestic level, Paternotte argues that the usual domestic justifications—such as secularization, a relative decrease in homophobia, or the influence of international norms on domestic law—cannot fully account for the recent rapid diffusion of same-sex marriage reforms. Instead, he argues, legal changes should be understood in light of what he calls ‘global politics of same-sex marriage.’⁹⁷ This denotes the decisive role that transnational formal and informal networks of advocates, and (mainly European) legal experts, have played in forging the success of same-sex marriage claims in a growing number of jurisdictions around the world.

⁹³ Ivana Isailovic, *Same Sex but not the Same. Same-sex Marriage in the U.S. and France and the Universalist Narrative*, 66 AM. J. COMP. L. 267 (2018) (describing the convergionist legal narrative, and providing its conceptual and normative critique).

⁹⁴ For a recent example of this argument, see ANGIOLETTA SPERTI, CONSTITUTIONAL COURTS, GAY RIGHTS AND SEXUAL ORIENTATION EQUALITY (Hart, 2017).

⁹⁵ DAVID PATERNOTTE, REVENDIQUER LE “MARIAGE GAY”: BELGIQUE, FRANCE, ESPAGNE (l’Université de Bruxelles, 2011). David Paternotte, *Global Times, Global Debates? Same-sex Marriage Worldwide*, 22 SOCIAL POLITICS: INTERNATIONAL STUDIES IN GENDER, STATE & SOCIETY 653 (2015).

⁹⁶ Paternotte, *Global Times, Global Debates?* previous note.

⁹⁷ *Id.*

In this transnational context, legal experts played a crucial role by acting as legal advisors for various countries, and by using their contacts with NGOs to frame same-sex marriage as a human rights issue, namely as a question of legal discrimination on the basis of sexual orientation.⁹⁸ According to Paternotte, it was the translation of claims supporting same-sex marriage into the legal language of equality and discrimination that explains the transnational proliferation of same-sex marriage reforms. Moreover, human rights claims connected same-sex marriage to democratic principles, making same-sex marriage the yardstick against which the modernity of a state is evaluated, which in turn put a normative (and economic) pressure on states.⁹⁹ Same-sex marriage is thus an example of ‘transnational legal ordering,’ to the extent that its adoption at the domestic level is a consequence of a combination of transnational and local legal and political processes, involving the deployment of international, European and domestic legal norms challenging domestic practices and definitions of gender and sexuality.

II. Neoliberalism and Family Law

Another focus of transnational law scholarship is the relationship between the *welfare state* and *law*, or the relationship between law and political economy. Since the 1980s, neoliberal precepts have become the unquestioned ‘background ideas,’ which guide political action and provide frames through which people see or make sense of their social environment.¹⁰⁰ Peer Zumbansen provides one illustration of how transnational law engages with the law’s role in the continuous transformations of welfare states. He argues that the triumph of economic rationality has been considerably driven by legal changes inside welfare states.¹⁰¹ Tracing the evolutions of different legal theories from the 19th century onwards, Zumbansen shows how formalism and functionalism, which were initially in tension, ended up justifying the turn from public to private

⁹⁸ *Id.* at 659 (noting that “historically European, this network is increasingly active at the global level...”). For a critique of law’s emancipatory role in the global context, see e.g. Ivana Isailovic, *Beyond Marriage*, OXFORD RESEARCH ENCYCLOPEDIA, LGBT POLITICS AND POLICY (forthcoming, 2019).

⁹⁹ Paternotte, *Global Times, Global Debates?*, *supra* note 95, at 667-668.

¹⁰⁰ Vivien A Schmidt, *The Roots of Neo-liberal Resilience: Explaining Continuity and Change in Background Ideas in Europe’s Political Economy*, 18 THE BRITISH JOURNAL OF POLITICS AND INTERNATIONAL RELATIONS 318, 320 (2016).

¹⁰¹ Peer Zumbansen, *Law After the Welfare State*, *supra* note 15.

regulation, limiting state interventions, and legitimizing the depoliticization of law which came to be perceived as a neutral tool in the hands of experts.¹⁰² Thus, he argues, today's revival of legal formalism limits law's intervention in order to allow for social self-governance, while legal neo-functionalism is associated with markets needs, detached from political conflicts that used to define law's goal.¹⁰³

Family laws and policies seem to be an excellent vantage point from which to observe the global legal transformations and erosion of welfare states, given that—as political economists and historians have demonstrated—family laws and norms are central to the functioning of welfare states.¹⁰⁴ For political economists, understanding the provision of welfare, necessitates studying simultaneously the role family, the labour market and the welfare state play in the distribution of resources.¹⁰⁵ The analysis of the 'family wage,' at the heart of the industrial era welfare states, according to which economic resources—welfare and wage—are allocated primarily to male-headed, nuclear, heterosexual families, in which the husband is the main breadwinner while women's domestic work remains unpaid, helps understand the interplay between family law, gender, race and political economy. The demise of welfare states also implies an economic and gendered model for the family. In her fascinating study of the economic and family values changes in the U.S., political scientist Melinda Cooper recently showed how the neoliberal assault on the welfare state is closely associated with the promotion of conservative family values in law, and the notion, that family—the nuclear married family—should be economically self-sufficient.¹⁰⁶ Similarly, examining how the global economy operates requires understanding the role of households in subsidizing capital accumulation through unpaid work.¹⁰⁷

¹⁰² *Id.* at 796.

¹⁰³ *Id.*

¹⁰⁴ SUSAN PEDERSEN, *FAMILY, DEPENDENCE, AND THE ORIGINS OF THE WELFARE STATE IN THE UK AND FRANCE 1914-1945* (Cambridge University Press, 1993); GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (Princeton University Press, 1990); Immanuel Wallerstein & Joan Smith, *Households as an Institution of the World- Economy*, in *CREATING AND TRANSFORMING HOUSEHOLDS: THE CONSTRAINTS OF THE WORLD ECONOMY 3* (Immanuel Wallerstein & Joan Smith eds., Cambridge University Press 1992).

¹⁰⁵ ESPING-ANDERSEN, *supra* note 104.

¹⁰⁶ MELINDA COOPER, *FAMILY VALUES: BETWEEN NEOLIBERALISM AND NEW SOCIAL CONSERVATISM* (MIT Press, 2017).

¹⁰⁷ Wallerstein & Smith, *Households as an Institution of the World- Economy*, *supra* note 104.

For the most part however, family law scholars still typically understand family law as being distinct from ‘the market’.¹⁰⁸ This complicates the critical study of how neoliberalism, as an economic theory and cultural worldview, interacts with family law doctrines, rules and practices. In contrast, recent interventions in family law¹⁰⁹ and transnational feminist scholarship¹¹⁰ indicate ways in which to start drawing connections between family law, transnational advocacy, and processes of norm creation, migration and implementation, suggesting a more comprehensive agenda of resistance against neoliberal policies. For instance, the above mentioned discussions about the transnational regulation of surrogacy needs to be considered in light of a broader analysis of how law structures the global market for reproductive services, and how law can address inequalities that inhere in the global surrogacy market.¹¹¹

Other examples illustrate how domestic family law evolutions enable global neoliberal reforms and are subordinated to neoliberal tenets. For Alison Alstott, neoliberalism in the United States permeate family law by focusing on negative liberties rather than on positive rights.¹¹² To illustrate her claim, she contrasts major constitutional law cases in family law which protect individual rights from state intrusion, on the one hand, and, courts’ rejection of positive rights that would allow individuals to obtain resources needed to conduct family life, on the other.

Another way of critically assessing the role of family law in enabling a neoliberal agenda is to analyze the way in which transnational economic organizations influence

¹⁰⁸ Halley & Rittich, *supra* note 4.

¹⁰⁹ See e.g. JUNE CARBONE & NAOMI R. CAHN, *MARRIAGE MARKETS, HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (Oxford University Press, 2014); Philomila Tsoukala, *Household Regulation and European Integration: The Family Portrait of a Crisis*, 63 AM. J. COMP. L. 747, 754, (2015); Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS. 25 (2014); Kerry Rittich, *Black Sites: Locating the Family and Family Law in Development*, 58 AM. J. COMP. L. 1023 (2010); Chantal Thomas, *Migrant Domestic Workers in Egypt: A Case Study of the Economic Family in Global Context*, 58 AM. J. COMP. L. 987 (2010); Hila Shamir, *The State of Care: Rethinking the Distributive Effects of Familial Care Policies in Liberal Welfare States*, 58 AM.J.COMP.L. 953 (2010).

¹¹⁰ *Gender, Justice and Neoliberal Transformations*, S&F ONLINE, (Fall 2012/Spring 2013) at <http://sfonline.barnard.edu/gender-justice-and-neoliberal-transformations/>; Manisha Desai, *Transnational Solidarity, Women’s Agency, Structural Adjustments and Globalization*, in *WOMEN’S ACTIVISM AND GLOBALIZATION: LINKING LOCAL STRUGGLES AND GLOBAL POLITICS* (Nancy A. Naples & Manisha Desai eds., Routledge 2004) (examining the gendered effects of structural adjustment programs and transnational mobilization challenging neoliberal policies).

¹¹¹ See *supra*, C.II.

¹¹² Alstott, *supra* note 109.

family regulation.¹¹³ One such example is Philomila Tsoukala's work on Greek households regulation in the context of the Greek sovereign debt crisis in 2008/09.¹¹⁴ One of Tsoukala's main arguments of interest here is that EU austerity measures—namely, the conditions attached to the loans received by Greece—affected the regulation of the family by dramatically weakening the role of families as precarious safety nets within Greek society, without replacing previous safety measures with alternative welfare mechanisms.

One such measure imposed by the EU, concerns annual property taxes, aimed at increasing labour mobility. As Tsoukala argues, given the high rate of home ownership in Greece, this measure, paired with a new policy adopted by the Greek government facilitating expropriations, had the effect of notably decreasing the household's capacity of accommodating its members' needs. In a context in which austerity measures have become central to EU economic governance and are imposed through the economic policies coordination mechanism throughout the euro-zone,¹¹⁵ similar measures concerning housing policies migrate across EU member states. Their aim is to increase the labour mobility and incentivize individuals to move around in order to take up jobs. But as Tsoukala shows, same economic policies risk having different effects in light of the various role families play in the organization of the welfare. They risk crippling households' ability to provide basic welfare in states in which the provision of welfare relies essentially on the household, like in Greece. In other cases, these measures target the provision of welfare by the state, and can have the effect of putting pressure on low-middle income households that cannot rely on the provision of welfare by the state, as was the case, for instance, in the Netherlands.¹¹⁶

The transnational perspective, as understood here, directly builds on this kind of interdisciplinary scholarship. It does so in two ways: on the one hand, we are invited

¹¹³ See e.g., Rittich, *supra* note 109 at 1026 (arguing that “the family itself is increasingly an object of direct policy intervention and legal reform”). See also for an example of how the European Union work-life balance measures promote and legitimize the neoliberal turn underway in the EU: Ivana Isailovic, *Neoliberalism, the EU and the Question of “Work-Life Balance,”* Nov 4, 2018, Legal Form, <https://legalform.blog/2018/11/04/neoliberalism-the-european-union-and-the-question-of-work-life-balance/>

¹¹⁴ Tsoukala, *supra* note 109.

¹¹⁵ Philomial Tsoukala, *Eurozone Crisis Management and the New Social Europe*, 20 COLUM. J. EUR. L. 31 (2013).

¹¹⁶ Tsoukala, *supra* note 109 at 792-793.

to analyze the multiplicity of local, national, regional and transnational actors, norms and processes that are involved in the evolutions of family law norms towards a neoliberal model, and identify the plurality of modes of resistance and struggles surrounding neoliberal family law, on the other.

E. CONCLUSION

In this chapter, I have argued that although conversations about transnational law have for a long time omitted questions concerning family law, there seems to be a reciprocal learning opportunity where the two fields meet. The here offered examples provide compelling evidence for the argument that family law could and, indeed, should inform transnational legal theory and, vice-versa. The variations of transnational law with a focus on new but also 'old' actors, norms and processes, of transnational legal ordering with an interest in the continued role of the state in the production, the dissemination and the 'settling' of transnational legal normativity, along with the continuously expanding body of scholarship in critical theory, could prove instrumental in the study of family law against the backdrop of border-crossing policies and emerging regulatory assemblages. Given the importance of the family in most individuals' lives, and the intricate connections between family law and broader economic, cultural and political transformations, a thus conceived *transnational family law* might offer crucial insights into the future study of law and society in a global, plural and increasingly unequal world.