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ARTICLES

Socio-legal Studies in a Transnational World

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The concept of transnationalism refers to border-crossing activities and social relations, such as family relations, migration, international trade and international organisations. This special issue looks at the relevance of such developments to socio-legal studies.¹

Of course, transnationalism is hardly a new phenomenon. Colonialism could be seen as a transnational legal process on a vast scale and what could be called transnational advocacy networks emerged as early as the 18th century (e.g., the anti-slavery movement with ties between Haiti, Great Britain, and France).² However, the extent to which transnational developments are now occurring is new and characteristic of modern times. The transnational effects of events, situations and actions are nowadays supposed to arise more rapidly, directly and powerfully than in the past.³

In the introduction to this special issue we explain the relevance of transnationalism to socio-legal studies and the usefulness of the sociology of law for studying transnational law and transnational processes; we also discuss three challenges that transnationalism poses for the sociology of law.

Transnationalism is an important topic in the sociology of law for three reasons. First, the laws that we study are becoming transnational, travelling across borders just as people and goods do. Transnational law refers to legal regimes that cross national borders or regulate activities and events that cross national borders; it is a result of legal developments: the *transnationalisation of law*. Examples of this process are found in several contributions in this special issue. Alex Jettinghoff analyses how and why a common European Union patent system developed, albeit with great difficulty. The persistent opposition of a coalition of parties, including member states such as Germany, the United Kingdom and the Netherlands, big industry and patent judges and lawyers, considerably hampered its development. Jettinghoff shows that rule making in a transnational context can be a real challenge.

Jaap Van der Kloet's contribution on the development of a standard for agricultural produce, GlobalGAP, is another example of the development of transnational law. Leading West European supermarket chains initiated and directed the development of international guidelines and a certification system governing

1 Earlier versions of the contributions in this issue were presented as papers at the Annual Meeting of the Dutch-Flemish Law and Society Association VSR 'Law in a transnational context' on 14 and 15 December 2009, in Kleve, Germany.

2 Merry 1992; Featherstone 2007.

3 Cotterrell 2008.

suppliers and producers of fruit and vegetables throughout the world. This voluntary standard has developed to become a standard which de facto is obligatory, reproducing and magnifying power inequalities in the global agri-food system, between supermarkets and their suppliers and between the developed and developing world. Suppliers and actors in the developing world are 'standard takers' rather than 'standard setters' in transnational areas.⁴

In the Forum contributions, Jeff Handmaker and Tobias Arnoldussen address the difficulties surrounding the work of the International Criminal Court (ICC) and its legitimacy in safeguarding human rights around the globe. These contributions vividly illustrate the difficulties of transnational rulemaking, but also show that it will continue nevertheless.

The second reason why transnationalism is relevant to the sociology of law is that socio-legal processes, influenced by transnationalism, affect the law. These processes occur in both national and transnational contexts as the result of economic, political and cultural developments: the *law under transnationalism*, which is discussed by Iris Sportel and Antoinette Vlieger. Sportel explains what happens when family law systems that remain national are used and implemented in a transnational context, as a consequence of migration back and forth between the Netherlands and Morocco. What Sportel calls a field of legal aid emerged to help individuals deal with divorce procedures in two countries. Vlieger's contribution is especially sombre about what happens to law under transnationalism, demonstrating that law does not play any clear role at all in the protection of Filipina and Indonesian domestic workers in Saudi Arabia and the Arab Emirates.

A third reason we believe transnationalism is relevant to the sociology of law is that classic socio-legal themes may gain a new and exciting lease of life when used in a transnational context. We turn to Sportel's and Vlieger's contributions again to illustrate this point.

Vlieger's contribution about domestic workers brings to mind the classic study of sociologist Aubert about the effectiveness of the 1949 law that aimed to improve the situation of domestic workers in Norway.⁵ A law regulating the obligation to have a written labour contract, maximum working hours, payment for working late and other issues turned out to have very little effect in practice and came nowhere near to achieving its aim.⁶ Aubert explained this outcome in terms of ignorance of the law among employees and employers, and the lack of any effective means of implementation. Vlieger attributes the ineffectiveness of a written contract to the fact that many domestic workers were not permitted to read the contract before signing it or because the contracts were changed on their arrival in the Middle East. The nature of the relationship between employee and employer offers a further explanation: the *relational distance* between them means that domestic workers will not readily have recourse to the law to resolve conflicts with their employers. More effective strategies for a domestic worker are

4 Nadvi 2008.

5 Aubert 1966.

6 Schwitters 2008, p.92ff.

either complying with the employer's expectations or leaving the job. Against this background, it is hardly surprising that transnational standards aiming to give domestic workers the same rights as other employees have little meaning for Filipino or Indonesian domestic workers in Arab countries, despite (in the sweeping statement made by the director of the International Labour Organization) 'history ... being made'.⁷ Vlieger's study exemplifies what Aubert's insights mean in a transnational context. The domestic workers' lack of knowledge may be even more significant, but it may also be more complicated for them to use the exit option and leave their employers, especially in the absence of viable alternatives. Sportel used Sally Moore's classic concept of *semi-autonomous social field* in a transnational context, as did Pool in the context of Polish labour migration to the Netherlands.⁸ Although Moore's concept was originally designed for a local or national context, Sportel illustrates its usefulness in a transnational context in her study of legal aid consisting of state institutions, non-governmental organisations (NGOs), lawyers and others who travel back and forth between Morocco and the Netherlands, developing shared norms for how to deal with transnational Dutch-Moroccan divorces. Both Sportel and Pool conclude that state actors are part of semi-autonomous social fields. The European working group of large supermarkets in Van der Kloet's article can also be considered a semi-autonomous social field, operating in a transnational context. Those supermarkets set up one common food safety standard and developed mechanisms to ensure compliance with it. By buying food products only from certified farms, supermarkets wield their economic power to force farmers to opt for certification.

According to Cotterrell, 'the meaning of both "law" and "society" in the socio-legal field needs to be radical re-examined in the face of legal transnationalism.'⁹ His main argument is that old ideas about law and society are no longer appropriate. Socio-legal scholars, he says, 'should treat law as a continuum of unstable, competing authority claims' including those by non-state actors.¹⁰ Society should be conceptualised as 'networks of community' in which state actors may be present, but by no means necessarily play an important or central role.

Thomas Faist and Keebet Von Benda-Beckmann address this issue. Von Benda-Beckmann presents a perspective on transnationalisation of law that takes into account what happens in localities. In her view 'transnational social or legal spaces are important localities for studying law in plural legal contexts'. For Von Benda-Beckmann transnational social space not only consists of actors who move across borders, but also of actors staying put. Many studies focus too much on only one context whereas individual actors never operate exclusively in transnational social spaces but also in other networks. She draws on empirical research in varied settings.

7 Countries adopt new UN standards to improve conditions for domestic workers. www.un.org/apps/news/printnewsAr.asp?nid=38744, last visited 26-8-2011.

8 Pool 2011.

9 Cotterrell 2009, p.482.

10 Cotterrell 2009, p.481.

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Faist's case study on dual citizenship looks at the intersection of transnational approaches and issues of governance and law. In his view, transnational social spaces are populated both by non-state actors (such as migrants, NGOs and criminals), and by state-actors (nation and supranational institutions). For Faist, transnational processes are definitively critical to understanding the regulation of legal and political membership. 'Cross-border processes in transnational worlds, global discourses on human rights and new forms of supranational membership all impact our understanding of national citizenship.'

Challenges for Sociology of Law

In our view, the sociology of law is especially competent to study transnational law and transnational processes. Transnationalism touches on the core of the sociology of law, i.e., studying the relation between law and society and the social working of law on the 'shop floor'. The sociology of law possesses a valuable, empirically rich body of theory that addresses particular aspects of transnationalism.¹¹ Aubert's and Moore's theories are examples of this, as is Griffiths' social working theory. Despite its competence, the sociology of law struggles to make explicit the transnational aspects of its work. Perhaps there is an assumption that transnationalism is about what happens across borders. However, we do not necessarily have to travel to Saudi Arabia, Morocco or Kenya, as some of the authors in this volume did. The impact of transnationalism can be found around the corner among the Westland farmers, our Dutch-Moroccan neighbour, or patent lawyers in Amsterdam, all of whom are affected by transnational developments.

Transnationalism poses at least three challenges for the sociology of law. The first challenge concerns what happens outside the nation state's borders. Socio-legal scholars should not take the nation state as primary point of reference, argue Faist and Von Benda-Beckmann, because both state boundaries and social boundaries are constantly being redrawn and the nation state is not the only field or space in which actors operate. This is, for example, demonstrated by Jettinghoff and Van der Kloet: the actors involved in the 'quest for a transnational patent system in Europe' and the development of a transnational food standard mainly operate in transnational fields.

The second challenge is that the sociology of law should focus less on state actors since it assumes the involvement of non-state actors in the development, implementation and enforcement of norms. Non-state actors like NGOs and businesses are increasingly getting involved in regulating human behaviour. They not only develop norms, they are also involved in monitoring compliance and enforcement. In his contribution, Van der Kloet describes how West European supermarkets have developed a common standard for food safety which is complied with by more than 102,000 farmers and growers in more than 100 countries.

11 Cotterrell 2009.

Finally, transnationalism means taking notice of how rules are used in different localities. This issue is most explicitly addressed by Von Benda-Beckmann, who argues that ‘a sound, grounded analysis of transnationalising processes should include the use that is made of law, and this includes taking seriously the place and locality in which this occurs.’ Vlieger, in her contribution, shows how contracts concluded in Indonesia and the Philippines work out for domestic workers in Saudi Arabia and the United Arab Emirates.

In conclusion, we believe transnationalism is a significant concept in the sociology of law, since it may help socio-legal scholars to develop a fuller understanding of the development and social working of law. Studying socio-legal issues from a transnational perspective means taking into account, or at least considering, the importance of phenomena that reach across nation state borders and the role of non-state actors in the field under study.

The question that arises, with which we want to conclude this introduction before we give the floor to the authors who have contributed to this special issue, is: how transnationally minded are socio-legal scholars in the Netherlands and Flanders? To what extent do we, for example, meet Von Benda-Beckmann’s suggested criterion for sound, grounded analysis, i.e., analyzing what transnational regulation means for those who are regulated by it? In our opinion, we could do more to understand the local impact of transnational phenomena. With this special issue we hope to encourage more of our peers to address this issue more frequently.

References

- V. Aubert, ‘Some social functions of legislation’, *Acta Sociologica* 1966 (10), p.99-110.
- R. Cotterrell, ‘Spectres of transnationalism: changing terrains of sociology of law’, *Journal of Law and Society*, 2009 36 (4), p.481-500.
- R. Cotterrell, ‘Transnational Communities and the Concept of Law’, *Ratio Juris* 2008 21(1), p.1-18.
- D. Featherstone, ‘The Spatial politics of the pas unbound: transnational networks and the making of political identities’, *Global networks* 2007 7 (4), p.430-452.
- S. Merry, ‘Transnational Human Rights and Local Activism: Mapping the Middle’, *American Anthropologist* 2006 108 (1), p.38-51.
- K. Nadvi, ‘Global standards, global governance and the organization of global value chains’, *Journal of Economic Geography*, 2008 8 (3), p.323-343.
- C. Pool, *Migratie van Polen naar Nederland in een tijd van versoepeling van migratieregels*, Den Haag: Boom Juridische Uitgevers 2011.
- R. Schwitters, *Recht en samenleving in verandering. Inleiding in de rechtssociologie*, Deventer: Kluwer 2008 (2nd ed).