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RETHINKING RECOGNITION: TRANSNATIONAL FAMILIES AND BELONGING IN LAW

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ACADEMIC DISSERTATION

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ABSTRACT

This dissertation consists of six thematically related articles that from different perspectives examine the ways in which transnational families, their relationships, and their practices of family formation are recognised and regulated in law. The dissertation traverses three fields of law: family law, private international law and migration law.

The dissertation investigates how transnational family relationships come to assume legal character, how and for what purposes ‘legality’ is invoked and what meanings it bears. It analyses the ways in which the recognition of transnational family relationships generate belonging or non-belonging and how these belongings are constructed in legal practice and argumentation.

The methodological approach adopted is described as “multi-sited”. The study examines the research subject at four different sites: Muslim marriage practices in Finland; religion, culture and the concept of gender equality within the framework of The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly; legislation in the Nordic countries on family reunification; and selected court cases on family reunification from the Supreme instances in Finland and Sweden, and the European Court of Human Rights and the Court of Justice of the European Union. At each site, research material differs and consequently different methodologies are applied, but the overall theoretical framework of the dissertation is socio-legal, and feminist intersectionality in particular is used as an analytical approach.

Article I, *‘Between “official” and “unofficial”: Discourses and practices of Muslim marriages in Finland,’* draws on qualitative data from interviews with imams and other staff in eight Helsinki-based mosques, individuals, and bureaucrats; and cases collected from four local register offices and three district courts. It traces the ‘legality’ of Muslim marriages in mosques, practices of selected individual Muslims, and state institutions concerned with the registration and validity of marriages. It applies the method of ethnography combined with an empirical analysis of a large body of cases collected through the district courts and local register offices.

Article II, *‘CEDAW and the Riddle of Diversity: Can Culture, Traditions or Religion Justify Economic Inequalities Embedded in Family Laws?’*, focuses on the issue of culture and human rights law through a discussion of the concept of equality underpinning the Convention on Elimination of Discrimination Against Women (CEDAW) in the context of its Article 16, which addresses equality in the family, in particular the economic consequences of marriage, family relations and their dissolution, an issue on which the Committee adopted its 29th General Recommendation in 2013. The method and approach of the article is largely a review of existing feminist and family law literature, and research on the context of culture and women’s rights, against which the discussion about equality and legitimacy of the CEDAW framework is set.

Article III, '*Ruling on belonging: transnational marriages in Nordic immigration laws,*' examines the immigration regimes concerning marriage migration in the Nordic countries, all of which have introduced considerable restrictions on family reunification in their Aliens Acts in recent years. The article examines the contextual background to the regulation of transnational families in the migration law of the Nordic countries respectively, and points out how the conceptions of belonging underpin these bodies of law. It demonstrates, furthermore, that due to the current high income requirements, the right to family reunification remains unachievable for a significant number of individuals.

Both Article IV, '*The "nuclear family paradigm" as a marker of rights and belonging in transnational families,*' and Article V, '*The married child belongs to no one? Legal recognition of forced marriages and child marriages in the reuniting of families,*' argue that, by invoking the discourses of status and relationship, the tensions and intersections of different legal fields of private international law, family law and migration law are controlled and manipulated, all the while the image of unitary law is still rigidly maintained. Article VI, '*Best interests of the child in family reunification - a citizenship test disguised?*' examines how the rights of the child become paradoxical when applied as part of the proportionality assessment used for the purposes of family reunification. The article also shows how a non-belonging identity is actively constructed for a citizen-child in the argumentation of the case.

In these three articles, in terms of describing the legal problem at the centre of the case, the method pursued is dogmatic. Articles V and VI each offer a close reading of a particular case, which enables a detailed analysis of the discursive identity construction which occurs as the court constructs its argumentation. While the method of description is doctrinal, the method of analysis is not purely dogmatic.

The dissertation concludes that citizenship is a discontinuous legal artefact, which even in its legal dimensions is, more than a mere legal status, a dynamic form of social capital, a shaped and accumulated construction, determined by a plethora of identity factors marking the belonging of a person both in the family and in the national community.

Finally, the dissertation explores whether recognition theory, as developed most notably by Axel Honneth, might offer grounds for rethinking the parameters of social justice, in particular in the context of transnational family life and social exclusion. The dissertation develops the notion of intersectionality and intersectional approaches to legal research, and combines them to provide a distinctively legal method for reading the cases. Theoretically, the dissertation contributes to the on-going debates over the ways in which social justice should best be conceived of by developing a recognition-theoretical account of belonging and social relations in law. The dissertation adds to the growing body of research on transnationalism studies from the specific perspective of legal research.

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LIST OF ORIGINAL PUBLICATIONS

This thesis is based on the following publications:

- I **Sanna Mustasaari** and Mulki Al-Sharmani. ‘Between “official” and “unofficial”: Discourses and practices of Muslim marriages in Finland,’ submitted to *Oxford Journal of Law and Religion* (Special Issue guest-edited by Rajnaara Akhtar, Annelies Moors and Rebecca Probert).
- II **Sanna Mustasaari**. 2016. ‘CEDAW and the Riddle of Diversity: Can Culture, Traditions or Religion Justify Economic Inequalities Embedded in Family Laws?’ in Maarit Jänterä-Jareborg and Héléne Tigroudja (eds.) *Women’s Human Rights and the Elimination of Discrimination / Les droits des femmes et l’élimination de la discrimination*, pp. 391–420. Leiden: Brill.
- III **Sanna Mustasaari**. 2017. ‘Ruling on belonging: transnational marriages in Nordic immigration laws,’ *Migration letters*, 14:1, pp. 25–37.
- IV **Sanna Mustasaari**. 2015. ‘The “nuclear family paradigm” as a marker of rights and belonging in transnational families,’ *Social Identities*, 21:4, pp. 359–372.
- V **Sanna Mustasaari**. 2014. ‘The married child belongs to no one? Legal recognition of forced marriages and child marriages in the reuniting of families,’ *Child and Family Law Quarterly*, 26:3, pp. 261–282.
- VI **Sanna Mustasaari**. 2016. ‘Best interests of the child in family reunification - a citizenship test disguised?’ in Anne Griffiths, Sanna Mustasaari and Anna Mäki-Petäjä-Leinonen (eds.) *Subjectivity, Citizenship and Belonging in Law: Identities and Intersections*, pp. 123–145. Abingdon: Routledge.

The publications are referred to in the text by their Roman numerals.

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1 INTRODUCTION

“När någon har dött, är han död i hela världen. När någon har gift sig, är han då gift i hela världen?”¹

(“When someone has died, he is dead in the whole world. When someone has married, is he then married in the whole world?” - Translation SM)

The question above is presented by *Lennart Pålsson* in the opening lines of his book on limping marriages and Swedish private international law, a classic in this field of scholarship in the Nordic countries. By posing this question, Pålsson wants to highlight the fact that marriage, contrary to the corporeal truth of life and death, is a social institution constituted by legal norms, and, hence, that the existence of this institution in another legal system depends on the norms governing its recognition.

An entirely other issue of recognition emerges if the death took place, say, in Mogadishu, and the widow (or widower) of the deceased person wanted to have the event registered in the Finnish population register. As Somali documents, such as birth or death certificates, are currently considered unreliable and cannot be legalised, the death cannot be registered. However, the widow (or widower) might in this circumstance receive ‘friendly’ advice to file for divorce in the local district court. This way at least one “death”, that of the marriage, can be verified, recognised and inserted in the population register.²

The “refugee crisis”, according to a number of scholars, is a crisis of border and imperialism, a crisis of “global apartheid”.³ It too raises issues of recognition, although issues of a very different nature than those described above. The common response to this crisis has been to redefine the relevant (legal) distinctions between

types of people on the move, in order to determine how to better *distribute access to mobility*. It is debated on which grounds, moral or economic, access to mobility should be distributed.⁴ [original italics]

¹ Lennart Pålsson. *Haltande äktenskap och skilsmässor: Komparativa studier över internationelltprivaträttsliga problem beträffande äktenskap och skilsmässor med territoriellt begränsad giltighet*. Stockholm: P. A. Nordstedt & Söners förlag, 1966, 3.

² The example above is based on the empirical material of this study and is mentioned in Article I.

³ The term coined by Jenna Lloyd. ‘Carceral Citizenship in an Age of Global Apartheid,’ *Occasion* 8 (2015), 1-15.

⁴ Imogen Tyler. ‘The Marketization of Mobility: Some thoughts on Value, Movement and Classification,’ blog post in Cemore, <http://www.lancaster.ac.uk/cemore/the-marketization-of-mobility-some-thoughts-on-value-movement-and-classification/> (accessed 11 September 2017).

The recent events in Europe highlight that not only the crisis at the borders, but the concept of border itself, brings about difficult issues of recognition.

Might these initial and intuitive observations about recognition have something in common, in spite of their obvious differences and incommensurabilities? The present study takes the view that they do. It examines how the law recognises transnational families and their family practices, and what forms of protection it offers to the members of transnational families and their family life. In particular, the focus is on how these families are recognised as members of society and the political community, and how their family relations mediate belonging; what role belonging plays in legal argumentation and how law shapes the belonging of an individual to a political community. Examining these issues, the study traverses three fields of law: family law, private international law and migration law.

1.1 TRANSNATIONAL FAMILIES AND BELONGING IN LAW: BACKGROUND AND GOALS OF THE STUDY

Families are important to individuals, just as they are important to communities. Families reproduce society symbolically, materially, socially, culturally and psychologically, and they have the capacity to reproduce, contest and reorganize definitive borders in communities. While it might be nearly impossible to accurately define what makes a family and what it is about the family or family relationships that the law should meddle in, it is clear that the most burning questions of justice are never far from relationships based on emotional bonds, needs and reciprocity. For me, the attraction of family law lies precisely here: in the power of family law as both a moral and legal project, a discourse that constructs and forms personhood and communities through the interrelationships it creates between the state, communities, and individuals – thus reshaping the material reality for individuals and families to, again, reconfigure and internalize as part of their symbolic worlds.

It is a widely accepted, though not problem-free, idea that communities adhere to certain constitutive values, a moral essence in a sense, and that the regulation of families is justified because of the common, public interest in what kinds of socializations and exercise of power takes place in families. Communities seek to control families, to define families as part of their self-determination. The super community of modern times, the nation state, is no exception. For example, *Cott*, who studied the historical development of family norms in the United States, argues that regulating marriage was essential for the process of establishing both the external and internal borders of the new state, as marriage norms defined who could be included or excluded as a citizen. Struggles over marriage norms were focal in the struggles of several

excluded groups at different periods of time: former slaves, women, Native Americans.⁵

While the liberal defence of the family⁶ takes as its starting point the idea of functional and cultural pluralism in families, stating that there is no single form or moral order of the family that can contribute to a just society and social life, the questions of multiculturalism and family law have occupied academic as well as political debates since the 1990s. As *Grillo* notes, contemporary European societies are multicultural and multi-ethnic, and have indeed been so for quite some time, but currently there is a widespread debate about cultural and religious difference and its limits.⁷ Normatively, the significance of pluralism is connected to the moral claim of due recognition of identities, reflected in the legal guarantees of minority rights. The promise of equal citizenship is central to minority rights, so the struggles over the position of minority identities happen in the arena of equal citizenship.

The contemporary debates relating to cultural and religious diversity are connected to processes of transnational, and often family-related, migration, but the phenomenon or debates concerning it are hardly historical novelties.⁸ According to *Portes, Guarnizo* and *Landolt*, compared to earlier histories of transnationalism, “contemporary transnationalism corresponds to a different phase in the world economy and to a different set of responses and strategies by people in a condition of disadvantage to its dominant logic”.⁹ As a field of research, transnationalism studies emerged from the need to grasp and approach analytically the diverse processes of decentralization of the nation state, in which fields of social action divert from the area governed solely by the nation state.¹⁰ Family is a location where diverse social relations and normative frameworks intersect and intertwine and where, in the words of *Goulbourne et al.*, “ordinary people lead lives that transcend the boundaries

⁵ Nancy Cott. *Public Vows: A History of Marriage and the Nation*. Cambridge: Harvard University Press, 2000.

⁶ David Archard. *Family: A Liberal Defence*. Basingstoke: Palgrave Macmillan, 2010.

⁷ Ralph Grillo, *Muslim Families, Politics and the Law: A Legal Industry in Multicultural Britain*. Farnham; Burlington, VT: Ashgate, 2015.

⁸ *Charsley* offers several examples spanning marriage migration to and from British colonies, “war brides” of World War II, and Japanese “picture brides”. Maynes and Waltner note that during the Imperialist era, partly the incentive to establish colonies sprang from the need to relocate the surplus population, and often enough, to find suitable spouses for the unmarried. Colonial rule was justified by family metaphors, where the indigenous peoples were likened to children and colonial rulers to parents, and management of the relationship between the settlers and the indigenous people required state intervention and involvement in all aspects of family life. Katharine Charsley, 'Transnational Marriage,' in Katharine Charsley (ed.) *Transnational Marriage: New Perspectives from Europe and Beyond*. New York: Routledge, 2012, 1; Mary Jo Maynes and Ann Waltner. *The Family: A World History*. Oxford: Oxford University Press, 2012; Sarah Katherine van Walsum. *The Family and the Nation: Dutch Family Migration Policies in the Context of Changing Family Norms*. Newcastle upon Tyne: Cambridge Scholars Publishing, 2008.

⁹ Alejandro Portes, Luis E. Guarnizo and Patricia Landolt. 'The study of transnationalism: pitfalls and promise of an emergent research field,' *Ethnic and Racial Studies* 22:2 (1999), 227.

¹⁰ Nina Glick Schiller and Peggy Levitt, 'Conceptualizing Simultaneity: A Transnational Social Field Perspective on Society,' *International Migration Review* 38:3 (2004), 1002; Steven Vertovec, *Transnationalism*. London: Routledge, 2009.

of nation-state, and potentially threaten other social and cultural boundaries set by race, ethnicity, and so forth.”¹¹

In this context it is worth noting that not only the families in the focus of this study are transnational but also that law is increasingly transnational. Histories of knowledge embodied in legal norms and doctrines travel and become intertwined with national norms, each with their own histories. For example, while colonial dynamics might be of little importance in the Finnish context, the human rights law concerning migrants’ rights to family life is largely based on the racialized exclusion of colonial subjects during the drafting of the European Convention on Human Rights (ECHR).¹² Furthermore, to a large extent they are developed in the case law as responses to the applications filed against former colonial settler states, such as the UK and the Netherlands.

The three fields of law in the focus of this study, family law, private international law and migration law, are intertwined in a number of ways, although in the doctrinal logic of the legal system they are strictly separate. Examples of their interconnections are many, but a few can be mentioned to illustrate: In the case of *Cojan* (C–673/16), currently pending before the Court of Justice of the European Union (CJEU), the court is called to rule whether it follows from the free movement rights of EU citizens that a marriage of two people of the same sex will have to be recognised in a state that does not provide for legal recognition of same sex relationships.

Another example concerns the practical interface between child law and migration law: when an on-going and affective parent-child relationship is a condition for the renewal of the parent’s residence permit, it can *de facto* be the reason why custody or access arrangements are officially recorded in agreements or court orders in specific ways so that the agreement would bear witness to such relationship.¹³ In her study on divorce in transnational families, Sportel discovered that law enables members of transnational families differently and that marital power relations explain how law becomes mobilised.¹⁴ There is reason to believe that power relations are significant also in the context custody and access, especially if the residence status of the parent depends on the legal formulation of these rights and obligations.

Yet another example concerns intersections of the system providing international protection of refugees and the system designed to prevent child abductions: in a recent case the Finnish Supreme Court was called to evaluate whether the Hague Convention on Child Abduction should be applied in a situation where the child had been granted asylum and refugee status. Both parents were guardians of the child, but the father had fled Belarus and taken the child with him to Finland without the mother’s permission. Both father

¹¹ Harry Goulbourne, Tracey Reynolds, John Solomos, and Elisabetta Zontini. *Transnational Families: Ethnicities, Identities and Social Capital*. Abingdon: Routledge, 2010, 11.

¹² Marie-Bénédicte Dembour. *When Humans Become Migrants: Study of the European Courts of Human Rights with an Inter-American Counterpoint*. Oxford: Oxford University Press, 2015.

¹³ This point has frequently come up in my ongoing research, especially in the interviews and informal discussions with professionals in the field of legal aid and child welfare.

¹⁴ Iris Sportel. *Divorce in Transnational Families: Marriage, Migration and Family Law*. London: Palgrave Macmillan, 2016, 248.

and child were granted asylum and refugee status. The mother of the child requested that the child be returned to her in Belarus, which was what eventually happened.¹⁵

However, while the three examples above are about intersecting legal fields and regimes, this study approaches the interconnections between the legal fields from a slightly different perspective. By looking at how transnational families are regulated at different ‘sites’, it attempts to move beyond merely looking at law as a doctrinal practice. To view the regulation and control of families and the questions of social justice from the perspective of transnational families and transnational social and normative spheres means looking at local phenomena, for example religious family law, as something that takes place in a transnational space, where local cultures, policies and authorities expand beyond the remit of the nation state in complex ways. This means that an investigation into transnationalism and law is an investigation into legality and the process in which it is constructed, as well as into the legal borders of and within the nation state. The myriad ways in which these borders are erected and maintained, are also key to understanding how they can be contested and belongings to communities renegotiated. The goal of this study is to rethink grounds for contemporary solidarity – to rethink “us”, the political and legal community, as a community of responsibility where the precariousness of all lives could be recognised.

This synthesis of the study is divided into four chapters. The present chapter introduces the research questions and research design, research materials, methods and ethical considerations, and the second chapter establishes the theoretical framework adopted as well as the theoretical tools used in the analysis. The third chapter examines, first, the three fields of law and their doctrinal foundations in relation to themes of the present study and then moves on to present the findings made in the study by examining how different aspects of intersectionality show at different sites of the study and which techniques of government it renders visible in the analyses. The fourth chapter concludes the synthesis with a reflection on the research questions and new avenues for research that the study brings.

1.2 RESEARCH QUESTIONS AND RESEARCH DESIGN

1.2.1 RESEARCH QUESTIONS

Ever since the famous essay by *Marshall*, it has been clear that formal citizenship, and legal rights attached to citizenship status, do not rule out the inequalities prevailing in capitalist society, but that they are “necessary to the maintenance of that particular form of inequality”.¹⁶ Citizenship studies have broadened the notion of citizenship from the narrow understanding of citizenship as a formal legal status into a broader, socio-cultural definition of

¹⁵ KKO:2016:65, the Supreme Court of Finland, 14 October 2016.

¹⁶ T.H. Marshall. *Citizenship and Social Class and other essays*. Cambridge: Cambridge University Press, 1950, 33.

membership in order to include various axes of exclusion and inclusion that shape the substance of citizenship.¹⁷ 'Belonging' is constitutive of citizenship in the sense that it encompasses the various factors and processes that denote membership in a community. In this work, by 'belonging' I refer to, firstly, the material conditions such as formal status norms that define who is considered a member of the community, the "authorized 'we'",¹⁸ and secondly, the subjective element of identity included in that relationship.¹⁹

The subjective element of 'belonging' includes identities and subjectivities that are institutionally accepted as entitled insiders, and often it emerges as authorised knowledge produced in the legal process about the individual and about whether their personal identity merits the benefit of belonging. Belonging can, thus, find expression in the level of legal norms that define the recognition of family relationships (e.g. recognition of relationships in private international law and recognition of relationships in immigration law), or the accessibility into legally recognised family institutions such as marriage, or in the legal norms that place different families in hierarchical order, for example, on the basis of family form or the conditions under which the family was formed (e.g. the distinction between new and old families in immigration law). Furthermore, belonging is interrogated and sometimes contested in the legal practice as a way of distinguishing between just and unjust, or legitimate and illegitimate, based on the individual merits of the case, for example, as a part of the proportionality analysis.

The present study examines the recognition of transnational family relationships and the ways in which this recognition generates belonging or non-belonging by investigating the following research questions:

1. In the six thematically related studies included in this research,

¹⁷ In particular feminist inquiries on citizenship, research on children's citizenship, multicultural citizenship, intimate citizenship and global citizenship as well as the emerging inquiries into religious citizenship have contributed to the intersectional understanding of citizenship as a layered position marked by discontinuities and contradictions. See for example Antonella Invernizzi and Jane Williams. *Children and Citizenship*. Los Angeles: SAGE Publications, 2008; Ruth Lister. *Citizenship: Feminist Perspectives*. Basingstoke: Palgrave Macmillan, 2003. Seyla Benhabib. *Another Cosmopolitanism*. Oxford: Oxford University Press, 2006; and *The Rights of Others*. Cambridge: Cambridge University Press, 2004; Sasha Roseneil. 'Intimate Citizenship: A Pragmatic, Yet Radical, Proposal for a Politics of Personal Life,' *European Journal of Women's Studies* 17:1 (2010) 77-82; and Cecilie Thun., 'Norwegians as Lived Citizenship: Religious Women Doing Identity Work at the Intersections of Nationality, Gender and Religion,' *Nordic Journal of Religion and Society* 25:1 (2012): 1-25.

¹⁸ Anna Bohlin, 'The Politics of Locality: Memories of District Six in Cape Town,' in Nadia Lovell (ed.) *Locality and Belonging*, 168-188. New York: Routledge, 1998, 163.

¹⁹ In sociological literature 'belonging' is depicted as incorporating both the personal, intimate feelings of "being 'at home' in a place (place-belongingness) and as a discursive resource that constructs, claims, justifies, or resists forms of socio-spatial inclusion / exclusion (politics of belonging)". Marco Antonsich. Marco. 'Searching for Belonging – An analytical Frame,' *Geography Compass* 4:6 (2010), 644. See also: Floya Anthias. 'Identity and Belonging: conceptualisations and political framings,' Working Paper No. 8 (2013) *KLA Working Paper Series. Research Network for Latin America*; Nira Yuval-Davis. 'Power, Intersectionality and the Politics of Belonging,' *FREIA Working Paper* No. 75 (2011). Aalborg Denmark.

- a. how do transnational family relationships come to assume legal character;
 - b. how and for what purposes is 'legality' invoked and what meanings does it bear?
2. How does the regulation and recognition of transnational family relationships
 - a. contribute to the production of belonging and non-belonging, and thus create or reproduce social postionality and axes of inclusion and exclusion; and
 - b. how are these belongings constructed in legal practice and legal argumentation, especially at the intersections of different legal fields?
 3. What new avenues might a recognition theoretical framework open for
 - a. understanding the role of law in the struggles for social justice, especially through the logic of distinctions made in legal practice concerning belonging; and
 - b. immanent critique and rethinking of law in relation to social inclusion and exclusion?

The study comprises six thematically related studies (Articles I to VI), that all approach the first and the second research question from slightly different angles. The final research question concerns the overarching theme of the research project, and will be addressed in this synthesis. In the following section, I will discuss the design of this research, which rests on the idea of multiple sites, in order to explain what ties these six studies together and why I chose these particular 'sites' of research, as well as discuss some of the consequences of the choices made (1.2.2). I will then present the research materials and methods used (1.3.1) and conclude the chapter with a brief reflection on research ethics (1.3.2).

1.2.2 RESEARCH DESIGN: COMPOSING MULTI-SITED RESEARCH

My initial plan was to study the concept of the family in a multicultural and religiously diverse society, from a legal dogmatic perspective of family law and private international law. Related to migration, Islamic family practices emerged in western courts as cross-border family law cases, which by and large meant that the discussion over religious family law happened in the arena of private international law. Academics have provided rich analyses concerning the recognition and consequences of foreign Islamic marriage,²⁰

²⁰ Mathias Rohe. 'Islamic Law in German Courts,' *Hawwa: Journal of Women in the Middle East and and the Islamic World* 1:1 (2003), 46-59; Maarit Jänterä-Jareborg. 'On the Cooperation between Religious and State Institutions in Family Matters: Nordic Experiences,' in Prakash Shah, Marie-Claire Foblets and Mathias Rohe (eds.) *Family, Religion and Law: Cultural Encounters in Europe*, 79-114. Farnham and Burlington: Ashgate, 2014.

divorce²¹ and even questions of inheritance.²² However, as the study proceeded it became clear that the recognition and regulation of family happens in other legal arenas as well. In fact, for the migrating families, the control of family life imposed by migration law can bear just as much or even more significance than the civil law aspects of the recognition of marriage and divorce. Moreover, while the doctrinally oriented analytical legal thinking tends to keep these different fields of law strictly apart, initial research into the case law seemed to suggest that they are in many respects intertwined.

In the spring of 2012 I came across a case from the Swedish Migration Court of Appeal (*migrationsöverdomstolen*), which is the supreme instance in migration issues in Sweden.²³ The case, which concerned recognition of a child marriage and a (claimed) forced marriage in the migration context, invoked many questions that, while being substantially about migration law, also concerned the research questions I had sketched out for my project. The marriage was eventually considered valid (in the context and for the purposes of the Swedish Aliens Act) despite strong indications that the applicant, a child herself, had been forced into marriage. The argument of private international law about the recognition of the marriage emerged as an incidental question and effectually determined the end-result of the case. This case is included in this study and analysed in Article V.

Trying to figure out why, despite all the doctrinal and analytical clarity of its argumentation, the case was so disturbing, I initially suspected that something significant yet only partially articulated was underpinning the way in which law seemed to work with the intersecting and overlapping general doctrines. This important issue was one of 'belonging', of being regarded either as an insider or an outsider. The position of belonging seemed to depend on multiple affiliations and subjectivities formed at the intersections of family law, private international law and migration law. As a result of this initial finding, as well as my affiliation with an interdisciplinary research project on transnational Muslim families,²⁴ the focus of this study shifted from minority families and religious family law towards transnationalism and its impact on families, as well as towards questions such as how the state governs its population by regulating the transnational family.

The previous research has convincingly argued that the relationship between family norms and social control in other fields, such as immigration and integration, are mutually constitutive.²⁵ *Van Walsum*, for example, examined the history of Dutch nationality and immigration law in the period from 1945 to 2000 in the context of changes that took place during the same

²¹ Rubya Mehdi, Werner Menski and Jorgen Nielsen (eds.) *Interpreting Divorce Laws in Islam*. Copenhagen: DJOF Publishing, 2012; Pascale Fournier. *Muslim Marriage in Western Courts: Lost in Transplantation*. Farnham: Ashgate, 2010.

²² Mosa Sayed. *Islam och arvsrätt i det mångkulturella Sverige: En internationellt privaträttslig och jämförande studie*. Uppsala: Iustus Förlag, 2009.

²³ Case MIG 2012:4, Kammarrätten i Stockholm, Migrationsöverdomstolen, 5 March 2012.

²⁴ Academy of Finland research project entitled 'Transnational Muslim Marriages in Finland: Wellbeing, Law, and Gender'. The project is led by Dr. *Marja Tiilikainen* at the Department of Social Research, University of Helsinki.

²⁵ Saara Pellander. *Gatekeepers of the Family - Regulating Family Migration to Finland*. (Doctoral dissertation, 2016). Department of Political and Economic Studies, University of Helsinki; Cott 2000; Van Walsum 2008.

time in Dutch family norms. She found continuities between the present restrictive family migration policies in the Netherlands and the earlier dynamic between family norms and racist modes of exclusion in the Dutch East Indies.²⁶ Instead of sketching a racist conspiracy underlying the legal system, van Walsum drew on the idea, originally expressed by *Sassen*,²⁷ that a shift is taking place “from a nationally oriented order of the post-war Welfare State to a more globally oriented neo-liberal one”, in which capabilities and rationalities developed within a previous order are re-constituted as part of a new organising logic. In the process, new “foundational realignments” are generated.²⁸

These observations led me to approach the topic of my research by looking at the different sites in which the recognition (and regulation) of transnational family life and family relationships takes place, how the ‘legality’ of relationships is constructed on these sites, who are the actors in the process, and what kind of “foundational realignments” are generated by the process. The term ‘site’ is used here to describe the different perspectives from which I approach my research questions, the different research designs of the studies, and the ways in which these are connected. In this descriptive use the term lacks any clear conceptual definition. However, adopting the idea of “multi-sited” research design is inspired by the methodological debates in the field of ethnography and the notion of multi-sited ethnography.²⁹

Multi-sitedness, in essence, means following the thread of a process in which cultural meanings circulate instead of seeking to offer a holistic representation of the research subject.³⁰ The matter traced does not have to be a people or an entity; it can exist within the realm of discourse and modes of thought.³¹ It can be, for example, a conflict or a logic of regulation or the idea of ‘legality’ in the context of family relationships. At the same time, however, it is crucial to keep in mind the fact that the paths that the researcher “follows” or the field of the inquiry are not “natural” but actively constructed in the research design as the outcome of choices made.³² The research subjects are “nodes in distributed knowledge systems”,³³ constantly in motion and “ungraspable in any definitive sense”.³⁴ Constructing the field of research within distributed knowledge systems also means that it can be approached from various positions of expertise and, consequently, practise different

²⁶ Van Walsum 2000, 20.

²⁷ Saskia Sassen. *Territory, authority and rights*. Princeton: Princeton University Press, 2006.

²⁸ Van Walsum 2008, 42.

²⁹ See for example: George E. Marcus. ‘Ethnography in/of the world system: The emergence of multi-sited ethnography,’ *Annual review of anthropology* (1995), 95; Simon Coleman and Pauline Von Hellermann (eds.) *Multi-sited Ethnography: Problems and Possibilities in the Translocation of Research Methods*. New York: Routledge, 2011.

³⁰ Marcus 1995, 97 and 98.

³¹ Marcus 1995, 108.

³² Simon Coleman and Pauline Von Hellerman. ‘Introduction: Queries, Collaborations, Calibrations,’ in Coleman, Simon, and Pauline Von Hellermann (eds). *Multi-sited Ethnography: Problems and Possibilities in the Translocation of Research Methods*, 1-15. New York: Routledge, 2011.

³³ Coleman and Hellerman, 2011, ‘Introduction’, 5.

³⁴ Coleman and Hellerman, 2011, ‘Introduction’, 7.

methods of analysis.³⁵ In the following, I will briefly discuss some of the consequences of the methodological choices made in this study, especially with regard to the multi-sited approach adopted.

This study seeks to shed light on the various interconnections between the fields of family law, private international law and migration law, as well as the recognition orders these fields embody, in order to analyse how the ways in which transnational families are regulated in law generate and maintain social hierarchies and exclusion. As explained above, the study analyses these processes at various sites. The downside of this way of framing the research project is the lack of coherence and coverage of the findings when viewed from the perspective of the systematic order of a particular legal field.³⁶ For the purposes of this study adopting the starting point of systematic legal analysis would mean losing sight of the interactions and processes in which systematic logic takes part in reproducing hegemonies and hierarchies. However, the starting point that law intertwines with politics and takes an active part in reproducing our social order by legitimising it is not taken to mean that the doctrinal logic of law would be unimportant or uninteresting for the study.

‘Transnational families’ are anything but a “natural” group or a monolithic group of people.³⁷ The sites of inquiry in the study, likewise, are not “natural” but constructed as part of and for the purposes of the analysis. This bears relevance to how the transnational families at the centre of the analysis are constructed. The research site and the research subject are mutually constitutive; the construction of the research site constitutes which aspects of transnationalism are investigated and what ‘transnational family’ means in each context. *De Hart* defines her research subject, ‘mixed intimacy’, as not coming from

pre-existing racial or ethnic differences between the partners, but [as something which] depends on how race and ethnicity are socially and legally constructed. Hence, a mixed marriage is a marriage between partners of two groups that are considered to be distinct racial or ethnic groups by society at a certain time and place.³⁸

³⁵ Marcus, George E., ‘Multi-sited Ethnography: Five or Six Things I Know About it Now,’ in Simon Coleman and Pauline Von Hellermann (eds). *Multi-sited Ethnography: Problems and Possibilities in the Translocation of Research Methods*, 16-32. New York: Routledge, 2011.

³⁶ The six articles include case analyses of law in different national and regional contexts (Sweden, Finland, EU law, and European and international human rights law). The pitfalls of selectively including such a vast array of material from various normative sources should be evident. The sites of the study are have been constructed in relation to space and geographical locations but whilst these are taken as particular features of the site that shape the power relations constitutive of the state but they are not definitive of it. Each article describes the context as well as the level of analyses for the purposes and scope of that article. Observations and arguments presented in this synthesis move on a general European level, unless a particular local context is specifically mentioned.

³⁷ See the discussion in Sportel 2016, 257-258.

³⁸ Betty de Hart. *Unlikely couples: Regulating mixed sex and marriage from the Dutch colonies to European Migration Law*. Amsterdam: Universiteit van Amsterdam, 2015, 10.

In a similar vein, ‘transnational families’ are demarcated slightly differently in each study included in this study. For example, transnational families are not necessarily about culture or religious minorities, let alone Muslims and Islam. However, religion, in particular Islam, often intersects with transnational life trajectories due to the current migration patterns from Muslim countries to Europe. The number of Muslims living in Europe has increased rapidly; today Islam is the second largest religion for example in Sweden, Denmark and Norway.³⁹ Migrant Muslim families are, furthermore, in several countries at the centre of regulative family politics.⁴⁰ In the Finnish context, most Muslims have a migrant background which means that transnationalism, migration, family and Islam intersect in various ways. Furthermore, it is important to note that the impact of gender in transnational families is not reducible to women’s rights and gender ideologies reflected in debates over women’s rights and culture.⁴¹ Gender ideologies are, however, central in the regulation of relationships and intimacy and the debates over gender equality have emerged particularly in relation to Muslim identities and family practices and norms.

One could also argue that ‘transnational’ as a term exists in relation to ‘national’, which means that it only becomes visible in contrast to the “normative national”. One conclusion drawn on the basis of the analysis provided in this study is that this normatively construed ‘national’ creates social marginalisation and results in the generation of “other” identities in legal argumentation. In part, this is of course a choice; as this study is concerned with social marginality and prevailing inequalities, a conscious choice was made in designing the research to examine those instances where transnationality creates marginality and techniques through which this effect is achieved. This, however, is not to say that all transnational families were socially marginalised or precarious in the same way.

1.3 RESEARCH MATERIAL, METHODOLOGY AND RESEARCH ETHICS

1.3.1 DATA, MATERIALS AND RESEARCH METHODS

The present thesis consists of six thematically related studies located on four different sites. The first of these four sites is that of ‘legality’ of Muslim

³⁹ Maarit Jännterä-Jareborg. ‘The Legal Scope for Religious Identity in Family Matters – The Paradoxes of the Swedish Approach,’ in Jane Mair and Esin Öricü (eds.) *The Place of Religion in Family Law: A Comparative Search*, 73-96. Cambridge: Intersentia, 2011.

⁴⁰ See for example: Grillo 2015; Jessica Robyn Cadwallar and Damien W. Riggs. ‘The State of the Union: Toward a Biopolitics of Marriage’ *M/C Journal*, 15:6 (2012); Annelies Moors and Vanessa Vroom-Najem. ‘Converts, Marriage and the Dutch Nation-State: Contestations about Muslim Women’s Wellbeing,’ in Marja Tiilikainen, Mulki Al-Sharmani and Sanna Mustasaari (eds.) *Wellbeing of Transnational Muslim Families: Marriage, Law and Gender*. Routledge, forthcoming.

⁴¹ Betty de Hart, Nadia Sonneveld and Iris Sportel. ‘New Perspectives on Gender in Shari’a-Based Family Law Studies: Moving Beyond the Women’s Issue,’ *Religion & Gender* 7:1 (2017), 42-52.

marriages in Finland. This research site, in fact, consists of various sites at which the ‘legality’ of Muslim marriages is constructed and may be contested. Article I traces the ‘legality’ of Muslim marriages in mosques, practices of selected individual Muslims, and state institutions concerned with the registration and validity of marriages.⁴² It applies a different method than the other articles, that of ethnography combined with an empirical analysis of a large body of cases collected through the district courts and local register offices, and it explicitly adopts the approach of multi-sited ethnography. As the method of research adopted in Article I was different than in the other studies, the data will be described in more detail than it will be described in the context of Articles II to VI.

Article I draws on several data sets, which began to be collected after May 2016.⁴³ These data include eight tape-recorded interviews with imams and other individuals affiliated with mosques⁴⁴; four tape-recorded interviews with individual Muslim women⁴⁵; and five tape-recorded interviews I conducted with staff at local register offices (*maistraatti*).⁴⁶ In addition to the interviews that I conducted by myself or together with my colleague Dr. Al-Sharmani, the article also draws on her extensive fieldwork and previous interviews with Muslim women and men on the themes of marriage and divorce. The interview guides we used were semi-structured and delved into the marriage conclusion⁴⁷ practices (concerning both mosques and individuals) and the registration and recognition of family relationships in different contexts (local register offices). The analysis is also informed by four

⁴² This article was written last of the six articles and is still pending acceptance for publication.

⁴³ The article is written in collaboration between my on-going study on marriage practices, entitled ‘Governing plurality: Marriage practices and the law’, and two studies undertaken by my colleague and co-author Dr. Mulki Al-Sharmani. In the first one of these, Al-Sharmani studies the marriage norms and practices of Somalis in Finland; the interplay between marriage and divorce practices and the transnational family practices and ties of couples and families; and the ways in which women and men navigate multiple legal systems in processes of marriage and divorce. The project is entitled ‘Transnational Somali Muslim Families in Finland: Discourses and Realities of Marriage’, and it is undertaken together with Dr. Abdirashid Ismail. In the second one, which is entitled ‘Islamic Feminism: Tradition, Authority and Hermeneutics’, Al-Sharmani researches how contemporary Muslims in the transnational and national contexts of Egypt and Finland engage with their religious textual and legal tradition to address problematic issues pertaining to gender roles and relations, and their contestations over religious norms on marriage and divorce practices in light of their changing lived realities, and their acquiring new forms of religious knowledge.

⁴⁴ The interviews were conducted together with Dr. Al-Sharmani.

⁴⁵ The interviews were conducted together with Dr. Al-Sharmani.

⁴⁶ In addition to these interviews, the article draws on Al-Sharmani’s previous research in which she interviewed individuals and studied a mosque programme on family wellbeing through the method of participant observation. See: Mulki Al-Sharmani, ‘Striving against the ‘Nafs’ Revisiting Somali Muslim Spousal Roles and Rights in Finland,’ *Journal of Religion in Europe* 8 (2015) 101; Al-Sharmani and Abdirashid Ismail, ‘Marriage and Transnational Family Life among Somali Migrants in Finland’ *Migration Letters* 14 (2017) 38-49; and Al-Sharmani, ‘Muslim Family Wellbeing and Integration in Finland: The Role of Mosques’ in Marja Tillikainen, Mulki Al-Sharmani, and Sanna Mustasaari (eds.), *Wellbeing of Transnational Muslim Families: Marriage, Law and Gender*. Routledge, forthcoming.

⁴⁷ The term ‘marriage conclusion’ is established in scholarly discourse on religious marriages, but it is somewhat infelicitous in that it might suggest its opposite, namely ‘divorce’.

unrecorded interviews and informal discussions with lawyers at the public legal aid service, child supervisors, and NGOs. In addition to the interview data, the article draws on cases and documents I investigated in four Local register offices and three district courts. In order to examine the problems relating to the recognition of transnational family relationships in the contexts of registration of family relationships, investigation of marriage impediments and the confirmation of paternity, I went through 490 document files of cases from 2016 and 2017 in the Local register office of Uusimaa (*Uudenmaan maistraatti*);⁴⁸ 563 document files from 2016 in the Local register office of Itä-Suomi (*Itä-Suomen maistraatti*);⁴⁹ and 527 document files from 2017 in the Local register office of Länsi-Suomi (*Länsi-Suomen maistraatti*).⁵⁰ In addition, I read through a total of 64 cases of annulment of paternity during 2014–2015 in three district courts.⁵¹

The second site of the research is that of international law and the discourse of women's rights in relation to culture, traditions and religion. This study, Article II, was written at the 2014 Centre of Studies and Research of the Hague Academy of International Law. The topic of the article was assigned to deal with the issue of whether culture, tradition or religion can justify treating women differently from men within family law. The article focuses on the issue of culture and human rights law through a discussion of the concept of equality underpinning the Convention on Elimination of Discrimination Against Women (CEDAW) in the context of its Article 16, which addresses equality in the family and covers a wide range of issues from equal reproductive rights to equal parental rights and responsibilities, and in particular the economic consequences of marriage, family relations and their dissolution, an issue on which the Committee adopted its 29th General recommendation in 2013. The method and approach of the article is largely a review of existing feminist and family law literature and research on the context of culture and women's rights, against which the discussion about equality and legitimacy of the CEDAW framework is set. Through its consideration of the CEDAW and the work of the Committee, the article analyses the hegemonic structures of human rights discourse, in particular

⁴⁸ These documents were about the registration of family relationships. The files included correspondence between the Local register office and the customer in cases in which the registration applied for could not, for one reason or another, be carried out. In these cases a formal decision is very rarely made, but the correspondence is recorded in archives. The files may, for example, contain a request to provide further documents, or an announcement that the provided documentation is not considered reliable, for example because the person has not mentioned the relationship when interviewed by migration authorities at the time of first entry.

⁴⁹ These cases concerned the investigation of marriage impediments. The Local register office of Itä-Suomi is in charge of developing practices concerning the investigation of marriage impediments, which is why the study was undertaken there.

⁵⁰ These cases concerned the confirmation of paternity. There are approximately 10 000 cases annually and majority of them is concentrated in the Local register office of Länsi-Suomi.

⁵¹ The cases make up 40 per cent of the total 160 cases in the whole country. The courts that formed the basis for the study were located in the Finnish cities of Helsinki, Tampere and Turku, which all have large immigrant populations relative to the rest of the country. The Helsinki District court is the largest of the 27 Finnish district courts, and its jurisdiction has the largest Muslim and immigrant populations.

tendencies to frame religion as irreconcilable with equality, and the recognition of “counterhegemonic” identities.

The third site in the set of studies is that of the migration laws of the Nordic countries concerning family reunification. Article III adopts an approach of descriptively reviewing the immigration regimes concerning marriage migration in the Nordic countries, all of which have introduced considerable restrictions in their Aliens Acts in recent years. The case also includes a note on the case of *Biao v. Denmark*, which was decided in the Grand Chamber of the European Court of Human Rights (ECtHR) in 2016. The purpose of this article as part of this study is to offer a contextual background on the regulation of transnational families in migration laws of the Nordic countries and point out how the conceptions of belonging underpin these laws, as well as point to the struggles for recognition that were fought in the judgment of the ECtHR, particularly in the dissenting opinions. The article demonstrates, furthermore, that due to the current high expectations for income requirements, the right to family reunification remains unachievable for a significant number of third country nationals.

The fourth site of the study is that of “court”, and particularly legal argumentation practised in the courts. Rather than understanding “court” here as a particular institution, the site of the court is constructed as a forum of argumentation in which legal norms are interpreted and the doctrine is enacted and re-enacted. At this site, Articles IV and V examine how, by invoking the discourses of status and relationship (or *conduct*, the word used for essentially the same phenomenon in Article IV), the tensions and intersections of different legal fields of private international law, family law and migration law are controlled and manipulated, while at the same time the image of unitary law is still rigidly maintained. Like articles IV and V, article VI too examines a case of family reunification, but this time the rights of the child and EU citizenship are central to the argument.

In these three articles, the method is dogmatic in terms of describing the legal problem at the centre of the case. Articles V and VI each offer a close reading of a particular case, which was selected because it represented a theoretically fascinating problem and was decided at a normatively high level (national supreme instances and the EU Court of Justice). In order to situate these cases and describe the legal norms adequately, other case law and legal sources have been brought to bear. However, while the method of description is doctrinal, the method of analysis is not purely dogmatic.

In the above I have described the data and methods of each study. The way in which this study combines methodologies of qualitative multi-sited ethnography and legal analyses of norms, doctrines and discourses in courts is also intrinsic to its overall methodology, which could generally be described as *socio-legal*. What ‘socio-legal’ means in this study refers beyond the methods adopted in each individual study, to the theoretical framework connecting these choices and ultimately to the way in which ‘law’ is understood in this study. The theoretical framework is important in explaining the connections between the legal fields and research sites as well as in connecting the findings to a larger socio-theoretical framework. In this work the theoretical framework is constructed around the question of the meaning and place of recognition relations and belonging in law, as well as the meaning and place of law in these relations. This theoretical framework

and the analytical sensibilities adopted in this study will be explained in chapter 2.

1.3.2 RESEARCH ETHICS AND POSITIONALITY

The study is conducted at four different sites and comprises different sets of material. The interviews, in particular, and also the cases and documents, include sensitive material and thus invoke the need to reflect research ethics and the positionality of the researcher.

The interviews were conducted as part of an ongoing research project on transnational Muslim marriages.⁵² Ethical questions were raised when designing the research project and the ethical reflection is part of the research plan (composed in 2012). From the outset, the research team committed to following the guidelines laid out by the National Advisory Board on Research Ethics (2002) and the Academy of Finland (2003), and it was agreed that ethical issues were to be accorded the highest consideration since the focus is on marriage, which is an intimate and personal issue. The highly politicized nature of the topic of migration – in particular that of Muslim and Somali migration – was noted in the research plan.

During the interviews, it was clearly stated that the research had no government involvement, and the background, aims, and nature of the research were disclosed to the interlocutors so that they were able to give their informed consent. Interlocutors were made aware of their right to withdraw from the research at any time, their consent was asked for when recording the interviews and at times taping was paused if the interlocutors so wished. The original names of the interlocutors were not attached to tapes or written data, and the data was anonymised. In the publications, pseudonyms were used where necessary and detailed background information was blurred to ensure anonymity. The draft version of Article I was sent to some of the interlocutors for review so that they were able to check that they agreed that the article could be published as part of this thesis.

The results of the project have been and will be disseminated to the informants both individually and in seminars and meetings. In planning publications, we have been aware that the outcomes of a research project on Muslim marriage might be used in public discourse to “pathologize” the religious and cultural communities being studied. Therefore we have considered the form and forum for reporting the findings in a way that should enhance understanding of the interlocutors’ viewpoints.

Research permits were applied for and obtained from four local register offices (*Itä-Suomen maistraatti*, *Lounais-Suomen maistraatti*, *Länsi-Suomen maistraatti* and *Uudenmaan maistraatti*). They include permission to record the interviews but it was agreed that if the interviews were to be cited directly, the interlocutors would be consulted first. The research permits also grant me access to archives and documents. In writing my research notes and

⁵² Academy of Finland research project entitled “Transnational Muslim Marriages in Finland: Wellbeing, Law, and Gender”. The project is led by Dr. Marja Tiilikainen at the Department of Social Research, University of Helsinki.

publication I have committed to securing full anonymity of the individuals whose cases I examine. I also studied paternity annulment cases in three district courts (*Helsingin käräjäoikeus* in Helsinki, *Pirkanmaan käräjäoikeus* in Tampere and *Varsinais-Suomen käräjäoikeus* in Turku), for which research permits were not required. In local register offices and district courts I read the documents and took notes in the premises of the institutions, but I did not copy the material. For discretionary reasons, I also chose to anonymise the two cases subject to close reading in Articles V and VI.

Another issue has to do with my own positionality and how it may have affected the interview situations, composition of the research, interview situations, and reflection on research. In Article I, we conducted the interviews with imams and four individual Muslim women together, but having much more experience on qualitative ethnography and trained as anthropologist, Dr. Al-Sharmani led the research and took the primary role in designing the interview guides. Furthermore, these interlocutors were found through her previous research contacts and networks. Together we were able to use Finnish, English, Somali and Arabic during the interviews, which enriched the interview material. Being accompanied by my senior colleague also helped remove the stigma of the stranger, both for the interlocutors and for myself. Thus, my positionality in these interviews was, to a large extent, determined by collaboration with my senior colleague. As these interviews only are a small, although important, component of the whole study, my positionality was not a cause for substantive reflection.

The interviews conducted at local register offices were with officials and as such did not deal with sensitive issues, and thus my position as researcher was rather unproblematic. From the outset, I attended the virtual meetings (i.e. via a video link) of the steering group and the attitude towards my research was positive, as it was thought to have potential for developing better practices. With my legal training and interest in private international law and the everyday work done in the local register offices, there was an atmosphere of mutual trust and I felt welcome. Here too then, there was no cause for substantive reflection on my positionality.

Since 2012 I have conducted interviews, participated in events and had numerous informal discussions with people. Much of these data and material are left outside the scope of the present study, although this material has obviously been informative in many ways as well as helping me to understand the processes that this study focuses on. For example, since April 2015 I have been conducting research on the experiences of individuals facing the process of family reunification and have interviewed individuals who are currently in the process or have experience of it. This ongoing research has required, and will require, plenty of reflection regarding my own positionality and power relations in the interaction with the interlocutors. For the purposes of the present study, however, these reflections have little if any relevance. Presumably, as my ongoing research and our joint research proceeds and I conduct more interviews independently, questions of positionality will become more urgent and will need more reflection.

2 THEORETICAL FRAMEWORK

2.1 RECOGNITION, LAW, AND PRECARIOUS LIFE: THE PROBLEM OF BELONGING IN LAW

The term *recognition* in this study refers to two different phenomena.⁵³ Firstly, it refers to the pre-interpretative phase of classification, in which legal language is invoked to define the issue in question in legal terms. It is about meaning-making in the legal sphere. Secondly, the term as used in this study draws on the normative theory of ethical relations in society, in particular as developed by *Axel Honneth*. Recognition in both of these senses of the word has been impacted by globalisation and the intensification of transnational processes. As *Hellum, Ali and Griffiths* note, “transnationalization of personal, economic, communicative and religious relations has profoundly affected the role of state law and international law”, leading to diverse processes for the reconfiguration of regulatory domains.⁵⁴

2.1.1 RECOGNITION AND THE CONCEPT OF LAW: FROM “THE RULE OF RECOGNITION” TO INTERSECTING LEGALITIES AND REGIME COLLISIONS

The move from non-legal to legal assumes the identification and invocation of a legal norm. In other words, phenomena assume existence in the legal sphere through recognition, either as autonomous legal concepts constituted by norms, relatively independent of ordinary language, or as facts that contextualise the invoked legal concept. In this respect, recognition concerns questions such as whether there is a marriage or whether family life exists. This transition into the legal sphere, and to a specific jurisdiction, also happens when the rules of private international law are invoked. In this case recognition has to do with whether the “foreign” institution, an individual’s formal status, for example is given legal significance and if it is, how and which rules are applied to situations that may arise in relations to that “foreign” institution. Within the context of migration, the question of recognition of relationships is similarly a question of identifying something as something and deciding what are the legal implications that follow from that identification. Recognition in

⁵³ This is, of course, a simple way to express the different senses in which the term can be used and the way in which it is understood in this study. More differentiated accounts of recognition have been developed. Ricoeur for example speaks of three dimensions of recognition: recognition as reidentification, relation-to-self and reciprocal recognition, which is mediated by social norms. Paul Ricoeur. *The Course of Recognition*. Cambridge, MA: Harvard University Press, 2007.

⁵⁴ Anne Hellum, Shaheen Sardar Ali and Anne Griffiths, 'Introduction: Transnational Law in the Making,' in Anne Hellum, Shaheen Sardar Ali and Anne Griffiths (eds.) *From Transnational Relations to Transnational Laws: Northern European Laws at the Crossroads*, 1-26. Farnham: Ashgate, 2011, 1.

this first sense is a question of identifying the rules that apply to the case in question and interpreting them.

Recognition in this sense of identification and definition – the process in which the conditions according to which something has legal significance are set – has been a central concern in analytical jurisprudence, perhaps most famously formulated by *H.L.A. Hart* in *The Concept of Law*.⁵⁵ According to Hart,

in the day-to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule;...For the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers.⁵⁶

Rule of recognition, as determined by Hart, is a social fact concerning how the normative matrix is constructed with respect to the merits of a particular case. In applying the rule of recognition the legal actor identifies not only the applicable legal norms but also the facts and elements of the event which are argued to have legal relevance. As understood by Hart, while the rule of recognition as applied in legal practice is often a social fact rather than a formal rule, it is nevertheless connected to the criteria of validity, which is specific to the particular legal order and jurisdiction. Unsurprisingly, then, this concept of law and legal recognition has been challenged by global legal pluralism as too narrow and state-centric.

Increasing mobility over state borders and the transnational kinship networks emphasise the fact that instead of belonging to one normative system, both as legal subjects and culturally, religiously and ideologically, people and their families belong to various ‘normative orders’, both in terms of jurisdictions as well as in terms of ‘lived law’. Transnational family lives involve family practices and lives that are shaped by multiple localities, socio-political contexts, policies, and laws. Individuals embedded in transnational family networks face the challenges of negotiating and navigating policies and laws of different countries and supranational legislative institutions, as well as their religiously and culturally based family practices, including marriage and divorce.⁵⁷

Indeed, globalisation and legal pluralism highlight the inadequacy of traditional legal distinctions and contest the adequacy of the state-centric conceptual framework of law regarding phenomena that cross jurisdictions, traditions and cultures.⁵⁸ As *Tuori* points out, legal hybrids, by which he means legal concepts and instruments or even whole branches of law that elude the traditional legal systematics, including the distinction between municipal and international law, are characteristic of globalisation and

⁵⁵ H.L.A. Hart. *The Concept of Law*. Oxford: Clarendon Press, 1961.

⁵⁶ Hart, 1961, 98.

⁵⁷ Mulki Al-Sharmani, Marja Tiilikainen and Sanna Mustasaari. 'Editorial - Transnational Migrant Families: Navigating Marriage, Generation and Gender in Multiple Spheres,' *Migration Letters* 14:1 (2017), 1-10.

⁵⁸ William Twining. *General Jurisprudence: Understanding Law from a Global Perspective*. Cambridge: Cambridge University Press, 2009.

transnational law.⁵⁹ As the normative sources and foundations of these hybrids do not necessarily exist in any predetermined relation, they invoke complex forms of interlegalities. For example, even though states have a wide margin of appreciation in deciding what are the constitutive normative requirements of a legally valid marriage, they may well be under an obligation to recognise non-registered religious marriages on the basis of the right of the individual to equal treatment compared to married couples, in the context of pension provisions; the protection of family life; freedom of religion; or rights related to the position of being socially tied to an informal marriage, to mention just several examples.⁶⁰ The legality arising from human rights law thus effectively transcends the border between the spheres of law and non-law and public and private.

The same problematics of interlegality in a situation of intersecting and discrepant legal doctrines were also present in the case that first directed my attention to the issue of the recognition of family relationships in migration law – the recognition of forced and child marriage in family reunification. However, the contradiction in the case was not merely about the complexity of identifying legal norms applicable to the phenomenon of child or forced marriage in the context of multiple state legal systems, cultures, and lived realities. Additionally, and perhaps even more significantly, at issue was the norm collision educing from the drastic political conflict between the regulatory regimes of private law and human rights law, on the one hand, and migration law on the other hand.

According to *Fischer-Lescano* and *Teubner*, globalisation has led to a functional differentiation of global social sectors and, consequently, to a drastic fragmentation of global law.⁶¹ Conflicting laws and norm collisions in contemporary world are no longer adequately understood merely as conflicts between (national or international) legal orders but should be understood as conflicts between regulatory regimes and their rationalities arising from the different social sectors. Fragmentation, according to *Fischer-Lescano* and *Teubner*, “has its origin in contradictions between society-wide institutionalized rationalities, which law cannot solve, but which demand a new legal approach to colliding norms”.⁶² Consequently, attempts to find unity in the legal system, whether through doctrinal logic or norm hierarchies, can only offer limited means to handle such conflicts. In order to understand what conflicts really are about, we need to understand the colliding social realities from which they spring.⁶³

In practice, of course, the challenges cast by legal pluralism and “regime collisions”⁶⁴ overlap. However, the problem of regime collisions poses

⁵⁹ Kaarlo Tuori. "Transnational Law: On Legal Hybrids and Perspectivism," in Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds.) *Transnational Law: Rethinking European Law and Legal Thinking*, 11-47. Cambridge: Cambridge University Press, 2014.

⁶⁰ Susan Rutten. 'Protection of Spouses in Informal Marriages by Human Rights,' *Utrecht Law Review* 6:2 (2010), 77-92.

⁶¹ Andreas Fischer-Lescano and Gunther Teubner. 'Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law,' *Michigan Journal of International Law* 25:4 (2004), 999-1046.

⁶² *Ibid.* 1004.

⁶³ *Ibid.* 1031.

⁶⁴ *Ibid.*

challenges for recognition and belonging of a completely different type compared to the norm collisions resulting from pluralism or difficulties in defining legal concepts in cross-culturally salient terms. Consequently, they call for different approaches. In the first case, one might find practical and theoretically sound responses by developing and reworking legal concepts by means of analytical jurisprudence. Indeed, the challenge of globalisation has been picked up in the field of jurisprudence by authors such as *Tamanaha*,⁶⁵ *von Daniels*,⁶⁶ and *Twining*,⁶⁷ who have sought to develop legal concepts better placed to respond to the challenges of globalisation. For Twining, the contemporary challenge for general analytical jurisprudence is to develop a conceptual framework in which terms and concepts could retain usability in cross-cultural and transnational legal discourses.⁶⁸

However, in the second case, what is needed is an identification of standards for immanent critique which would constitute a justified and rational claim within the critiqued relations themselves. It is for this purpose that the second sense of the word *recognition* is invoked in this study, that is, recognition as ethical relations that constitute social and legal relations and practices of law.⁶⁹

2.1.2 RECOGNITION RELATIONS AS ESTABLISHED ETHICAL RELATIONS IN SOCIETY

In the second sense of the term, as used in this study, 'recognition' refers to the practical self-relation of subjects in society as well as to their reciprocal recognition.⁷⁰ Recognition in this sense relates, on the one hand, to the theory of social justice, wellbeing, human rights, and legal pluralism and, on the other hand, to the social integration in the sphere of legal relations. Recognition theory became central in political theories in the 1990s at the same time with increased focus on multiculturalism. An influential essay by *Taylor*, 'Multiculturalism and the Politics of Recognition',⁷¹ brought to the fore the vitality of the human need for recognition and thus misrecognition as a specific

⁶⁵ Brian Z. Tamanaha. *A General Jurisprudence of Law and Society*. Oxford; New York: Oxford University Press, 2001.

⁶⁶ Detlef Von Daniels. *The Concept of Law from a Transnational Perspective*. Farnham; Burlington, VT: Ashgate, 2010.

⁶⁷ Twining 2009.

⁶⁸ *Ibid.*, 60.

⁶⁹ Axel Honneth. *The 'I' in 'we': Studies in the Theory of Recognition*. Cambridge: Polity Press, 2012, 62-63.

⁷⁰ According to Italo, who follows Ricoeur on this, reciprocal recognition means "[r]elation between two or more agents who coordinate their action by reciprocally identifying one another, attesting their identity and referring themselves to variously codified norms of behaviour (functional, implicit, informal, formal). The reciprocity of the relation has to be kept distinct from symmetry and from equality: symmetrical relations and relations between equals are simply two subsets of relations of reciprocal recognition." Italo Testa. 'Social Space and the Ontology of Recognition,' in Heikki Ikäheimo and Arto Laitinen (eds.), *Recognition and Social Ontology*, 287-308. Leiden and Boston: Brill, 2011, 288.

⁷¹ Charles Taylor. 'The Politics of Recognition,' in Amy Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition*, 25-73. Princeton: Princeton University Press, 1994.

form of 'harm', and since then a vast amount of research has focused on the themes of recognising, accommodating and respecting difference.

The body of literature and number of theoretical exchanges relating to how the role of recognition should be perceived in theories of social justice is enormous and covers complex issues, such as how we should conceptualise contemporary capitalism. The most famous exchange concerning the paradigms of redistribution and recognition and their role in critical theory of social justice is the one between *Axel Honneth* and *Nancy Fraser*.⁷² While both authors agree that recognition and redistribution are central in addressing injustices, Fraser argues that redistribution and recognition are irreducible as elements of justice, whereas Honneth argues that a sufficiently differentiated theory of recognition is able to address injustices in distribution; issues of distribution are thus derivative to recognition.⁷³

In order to go deeper into the issue of which theory of social justice, in the abstract, is most salient and to the relation of redistribution and recognition in such theory, we would need to be able to analyse, for example, how culture and economy interact and what role cultural patterns play in the organisation of contemporary capitalism. While such analysis is not within the scope of this study, it should be mentioned that, in my view, both Fraser and Honneth fail to offer a convincing account of the processes of neoliberal capitalism and the role of cultural patterns in these processes. While Honneth's approach might be accused of cultural determinism, Fraser's approach, which claims that 'cultural' and 'economic' need to be analytically separated, has likewise faced criticism.⁷⁴ However, in my view, the most crucial shortcoming regarding the depiction of capitalism in their exchange has to do with the neglect of viewing neoliberal capitalism as complex and interlinked processes and realignments that have to do with knowledge production. If neoliberalism is approached as a form of governmentality, as for example Byrne has recently suggested, processes such as subjectivation become central in analyses of capitalism.⁷⁵ When analysed in the framework of governmentality and subject-production, the role of 'culture' in economic processes will assume an entirely different meaning. In this context, Fischer-Lescano and Teubner's account of fragmentation of global law as taking place due to the differentiation of global social sectors and their distinct rationalities is informative, as it speaks to the issue of selective networking between different rationalities. It is thus unlikely that any pre-defined relation could be identified between cultural and economic processes.⁷⁶

⁷² Nancy Fraser and Axel Honneth. *Redistribution or Recognition: A Political-Philosophical Exchange*. London and New York: Verso, 2003.

⁷³ For a summary of their approaches and analysis of the exchange, see Simon Thompson. 'Is redistribution a form of recognition? Comments on the Fraser–Honneth debate,' *Critical Review of International Social and Political Philosophy* 8:1 (2005), 85-102.

⁷⁴ See, for example: Judith Butler. 'Merely cultural', *New Left Review*, 227 (1998), 33–44. Butler's article is reprinted in an interesting collection in which Fraser debates her critics. See Fraser. *Adding Insult to Injury: Nancy Fraser debates her critics*. Edited by Kevin Olson. London and New York: Verso, 2008.

⁷⁵ Christopher Byrne. 'Neoliberalism as an object of political analysis: an ideology, a mode of regulation or a governmentality,' *Policy & Politics* 45:3 (2017), 343-360.

⁷⁶ Fischer-Lescano and Teubner, 1017.

In this study, recognition theory is invoked to study the conflicts between regimes and their foundations in relation to the question of how axes of inclusion and exclusion are drawn, how the community, the ‘we’, is defined and what are the institutional discourses and rationalities that constitute the relationship of belonging (or non-belonging) between the individual and the community. In her theory of social justice and globalisation, Fraser has discussed this matter of ‘who’ should count as a member and ‘which’ is the relevant community, noting “it is not only the substance of justice, but also the frame, which is in dispute”.⁷⁷ In her theory of “post-Westphalian democratic justice”, Fraser suggests that in this context the most crucial issue has to do with relations of representation. She divides the issue of unjust relations of representation into two forms of misrepresentation: the ordinary political form and the boundary-setting form, which she calls the problem of misframing.⁷⁸ In the boundary-setting aspect of representation, various politics of framing are at play, and the aim of critical theory is to democratise these processes of frame-setting.⁷⁹ Fraser’s theory renders social movements central for resisting injustices, also in the transnational public sphere. Honneth, on the contrary, does not explicitly address the issue of society’s boundaries. One significant difference between Fraser and Honneth, however, has to do with their takes on how the experience of injustice can be articulated in the public space. Honneth holds it necessary that institutionally caused suffering is examined “prior to and independently of political articulation by social movements”.⁸⁰ The issue of inclusion and exclusion are thus implicit in his account of intersubjective recognition, which is why I find Honneth’s approach more suitable for the purposes of addressing the questions at the centre of this study. This, however, is not to say that redistribution or participatory parity would be unimportant aspects of social justice or that practical solutions to injustices should always be found through focusing on recognition alone, quite the contrary.

In *The Struggle for Recognition*,⁸¹ Honneth draws on Hegel in arguing that a solid theory of ethical life ought to be grounded on understanding that the struggle for intersubjective recognition lies at the core of social conflicts. The moral order of society, according to Honneth, is a historically established, fragile structure of graduated relations of recognition. Honneth notes that Hegel’s attempt to ground social theory on the struggle for recognition marked a significant shift in classical political philosophy which, in the historical development from the Middle Ages to Renaissance, had come to assume a

⁷⁷ Nancy Fraser. ‘Reframing justice in a globalizing world,’ in Terry Lovell (ed.), *(Mis)recognition, Social Inequality and Social Justice: Nancy Fraser and Pierre Bourdieu*, 17–35. London and New York: Routledge, 2007, 19.

⁷⁸ Ibid. 22.

⁷⁹ Ibid. 25.

⁸⁰ In this context it also needs to be pointed out that recognition theory has been subjected to feminist critique for example from the position that it fails to facilitate true connection between subjects whose registers of knowledge and ways of articulating experience are radically different. One of the most convincing critiques is presented by Kelly Oliver, who argues that for example survivors’ accounts from genocide and slavery are testimonials to a pathos that is “beyond recognition”. Kelly Oliver. *Witnessing beyond recognition*. Minneapolis and London: University of Minnesota Press, 2001.

⁸¹ Axel Honneth. *The Struggle for Recognition: The Moral Grammar of Social Conflicts*. Cambridge: Polity Press, 2005 [1995].

permanent state of hostile competition between subjects (Machiavelli, Hobbes) as natural order of things. In this conception, the central struggle was self-preservation in the conditions of the war of all against all, and the purpose of the law was to solve this ever-enduring conflict by means of social contract.⁸²

Instead of grounding the theory of society on social contract necessary for the purposes of self-interest and self-preservation, the Hegelian basis of Honneth's theory bases the theory of society on reciprocal relations between subjects. For Hegel, "the emergence of social contract – and, thereby of legal relations – represents a practical event that necessarily follows from the initial social situation of the state of nature itself".⁸³ Honneth cites Hegel:

Law [*Recht*] is the *relation* of persons, in their conduct, to others, the universal element of their free being or the determination, the limitation of their empty freedom. It is not up to me to think up or bring about this relation or limitation for myself; rather, the subject matter [*Gegenstand*] is itself this creation of law in general, that is, the *recognizing relation*.⁸⁴

According to Honneth's interpretation, for Hegel, the subject's self-consciousness is pre-moral in nature: the only way for a subject to realize him- or herself is in interaction with another subject, through which the acceptance of limited selfhood is necessary for the self to be born. Recognition thus refers to the "reciprocal limitation of one's own, egocentric desires for the benefit of the other" – even if this recognition is reactive at this point.⁸⁵ In this initial stage of struggle for recognition, the subject comes to realize recognition as a constitutive element of love, as the independence of the subjected is guided and supported by care and affective relations. These primary struggles for recognition never extend beyond primary relationships, but they remain the foundational core of all ethical life, as in these primary struggles the subject is born as autonomous and individual. The nature of this individuality and autonomy, however, is profoundly relational. This primary sphere of affect forms the basic conditions of subjective agency and thus the core of ethical subjectivity.

The struggle for recognition proceeds from the primary personal sphere of love to other areas of life. The role of conflict is central to an understanding of how ethical relations evolve. Through mutual recognition, subjects continuously learn new dimensions of themselves, which causes a need to "leave, by means of conflict, the stage of ethical life they had reached, in order to achieve the recognition of a more demanding form of their individuality".⁸⁶ The cause for conflict is the struggle for recognition, and is not merely a matter of self-preservation. A contract can thus never definitively solve and end these struggles. Law, according to this line of thinking, is a means of moving beyond established ethical relations.

⁸² Ibid. p 10.

⁸³ Ibid. p. 41.

⁸⁴ Ibid. p. 42, citation from Hegel's Jena Lectures on the Philosophy of Spirit.

⁸⁵ Honneth, *The 'I' in 'we'*.

⁸⁶ Honneth, *The Struggle for Recognition*, 17.

Ethical recognition relations, according to Honneth, are differentiated into three interlinked spheres of recognition, each of which has a differentiated social basis and role in the maintenance of personhood as self-relation (Figure 1): love and intimate relationships, in which the central ethical principle is responsiveness to the needs of the other; respect, in which the central ethical principle is legal equality; and esteem, in which the central ethical principle is achievement and contribution to the good of society.

Mode of recognition	Love Emotional support (and care)	Respect Cognitive respect	Esteem Social esteem
Dimension of personality	needs and emotions	moral responsibility	traits and abilities, achievement
Forms of recognition	primary relationships	legal relations (rights)	community of value (solidarity)
Potential for moral development	-----	generalisation, de-formalization	individualization, equalization
Practical relation-to-self	basic self-confidence	self-respect	self-esteem
Forms of disrespect	abuse, rape (neglect)	denial of rights, exclusion	denigration, insult
Threatened component of personality	physical (and psychological) integrity	social integrity	“honour”, dignity

Figure 1.⁸⁷

Moral progress in the established ethical relations is possible through two types of recognition struggles: The subject can claim that aspects of her or his personality should be recognised (expansion in the substance of recognition, what it means to be a fully-fledged citizen), or opportunities for social inclusion can increase so that more people are included in society as fully-fledged citizens.

With the introduction of the modern notion of legal equality, the place of status in defining the scope of legal subjectivity was radically changed. A differential status system as the basis of rights was replaced by the single

⁸⁷ Honneth, *The Struggle for Recognition*, 129. (Parenthetical additions by SM.)

uniform status of citizenship.⁸⁸ In the earlier “feudal” system⁸⁹ of status differentiation, equal rights depended on status associated with for example class, role and family, allowing, for example, political participation “only to those who could demonstrate a certain measure of income or property”.⁹⁰ Importantly, however, inequality in the form of different degrees of social value and appreciation was not eliminated from the social system. Instead, recognition in the sphere of social esteem is mediated by achievement, the ability to contribute, for example by profession and labour, to the value community of society.

Struggles for recognition in the legal sphere are about what it means to be equal in legal relations, i.e. what differences in opportunities and identities are included in the definition of what it means to be equal. But they are also about who is included in the sphere of legal relations. According to Honneth,

In legal recognition, two operations of consciousness flow together, so to speak, since, on the one hand, it presupposes moral knowledge of the legal obligations that we must keep vis-à-vis autonomous persons, while, on the other hand, it is only an empirical interpretation of the situation that can inform us whether, in the case of a given concrete other, we are dealing with an entity possessed of the quality that makes these obligations applicable.⁹¹

Moral development in the sphere of legal relations is about gradual extension as to who may claim to be treated as an equal legal subject and what it means to be one. This however, tells us little about why or how we could contest the border of the community. Recognition, in the sense of ethical relations, is the act that gives birth to reciprocal subjectivity, to the “I” in the “We”, but this recognition inevitably includes a negation, as it invokes the border inherent in the definition of community.

2.1.3 TRANSNATIONAL FAMILIES, PRECARIOUS LIFE AND THE QUESTION OF LEGAL RECOGNITION

As was noted above with regard to different forms of norm collision and intersecting legalities, the two senses of ‘recognition’ are interlinked in this study. Transnational families often lead lives that within the social hierarchies of our societies become understood as precarious or unworthy of protection provided by law. All life is precarious, as Butler notes, and should be apprehended as such, by which she means that in order to be sustained as life, certain social and economic conditions need to be met. Life beyond the recognition framework, however, is difficult to recognise as life and as worthy of protection. She argues that “there ought to be a more inclusive and

⁸⁸ T.H. Marshall, *Citizenship and Social Class and other essays*. Cambridge: Cambridge University Press, 1950.

⁸⁹ I am not using this term as referring to a specific period in history, but rather in order to highlight the fundamental shift in paradigm for legal relations that the idea of equal citizenship marked.

⁹⁰ Honneth, *The Struggle for Recognition*, 116.

⁹¹ *Ibid.*, 112-113.

egalitarian way of recognising precariousness, and that this should take form as concrete social policy regarding such issues as shelter, work, food, medical care, and legal status.”⁹²

Inclusions within the ethical relations of recognition may at times mean being regulated and recognised by legal norms, while at other times such regulation may mark exclusion and recognition as non-belonging. All three legal fields of this study refer to different foundations as their basic moral recognition relations. However, in none of these fields is law a unitary, coherent system, but rather an internally plural construct, which includes various legalities. These different legalities, and the recognition relations they reflect, also construct subjectivity and personhood differently, locate the border of the community differently, and thus produce different forms of belonging. These intersectional “belongings” provide the focus for this study. In the operations of the law, unity is produced between these legalities through a process referred to as *interlegality*.⁹³ The relations between these legalities and intersecting subjectivities are constructed in legal decision-making as being in fixed relations within a pre-existing and objective normative matrix, against which the merits of an individual case are evaluated.

Recognition relations, which law institutionalises through its operations are constructed both at the level of codified norms and at the level of practice. Like recognition, then, belonging refers to two different operations of exclusion and inclusion. It refers, firstly, to identification – the process by which phenomena of our social world are defined and located within social relations as belonging to this instead of that category or unit of analysis. Secondly, belonging refers to the more fundamental issue of whether one is considered belonging in the sphere of solidarity, in the ‘we’ that is the precondition for legal existence. As the analyses provided in the six articles of this study demonstrate, often these two senses of belonging and recognition are inseparable. Belonging in both of these senses legitimizes legal operations, e.g. legislation or decision-making in an individual case.

According to *Yuval-Davis et al*, “it is impossible to understand the ways individual people and groupings relate to and are being treated by both state and society these days just by being related to as either citizens and/or having specific ethnic, national or racial identities. The politics of belonging encompass and relate both citizenship and identity, adding an emotional dimension which is central to notions of belonging.”⁹⁴ By studying how belonging and non-belonging become articulated, anticipated and produced in and by legal discourses and practices, this study analyses the politics of belonging as they emerge in legal struggles.

Recognition theory is a normative theory of society. For transnational families the core question is how society is defined and what are the conditions of being recognised as a member of the authorised “we”.⁹⁵ Citizenship can be approached from an internal or endogenous perspective where it designates a

⁹² Judith Butler. *Frames of War: When is Life Grievable?* London; New York: Verso, 2009.

⁹³ Tuori 2014; Fischer-Legano and Teubner 2004.

⁹⁴ Nira Yuval-Davis, Kalpana Kannabiran and Ulrike M Vieten, ‘Introduction,’ in Nira Yuval-Davis, Kalpana Kannabiran and Ulrike M. Vieten (eds.) *The Situated Politics of Belonging*, 1-14. London: SAGE Publications, 2006.

⁹⁵ Bohlin 1998, 175.

universal subject position. But it can also be approached with a focus on its purpose as erecting and maintaining the boundaries of the communities, both internally and externally. In essence, then, what is at stake is not only transnational families or the precariousness attached to the diverse situations connected to transnational life. Rather, what is at stake is how “we” are defined as a community, in relation to transnational families and the precariousness of life.

In the following two sections (2.2 and 2.3), the theoretical and analytical sensibilities necessary for analysing recognition relations and belonging are introduced. The way in which ‘legality’ and the presence of law in society are understood and approached in this study will be addressed first. After that the theoretical approach of feminist intersectionality will be introduced as means of interrogating the discrepancies of law in in everyday life and legal doctrine.

2.2 INQUIRIES INTO ‘LEGALITY’ AND THE ANALYTIC OF STRUGGLE

Law recognises and regulates family life and relationships in myriad and sometimes contradictory ways. However, this incoherence, the “normal chaos of family law”,⁹⁶ is not necessarily a weakness of law or indication of biases within it. Rather, discontinuities and incoherence make law viable and open to different interpretations as well as capable of adapting to new circumstances.⁹⁷ Accordingly, the mere lack of coherence in political and legal approaches to family is not a focal point of analysis in this study because the prevailing social inequalities and marginalisation could be explained by incoherence. Instead, the crucial question is how the diversity and internal contradictions in the ways in which the legality of family relationships is constructed enable or constrain agency, and how these constructions play out to produce social marginalisation and direct control on some families and individuals more than others. It is thus necessary to reflect on the theoretical approaches to ‘law’ and ‘legality’ adopted in this study. There are three main points that I want to raise. Firstly, legality is a socially constructed resource for meaning making, which derives from several sources. Secondly, the normative unity and universalism of law, while illusory from certain perspectives and often capable of legitimising hegemonic power relations, are necessary for the law as a discourse of justification but also crucial for understanding law as a social practice. Thirdly, while legal recognition alone is unable to guarantee substantive equality, it is nevertheless the gate to a position from which law and for example its lacks of legitimacy can be challenged, and as such it is a necessary condition of resistance to law.

Article I analyses the legality of marriage as socially constructed within processes where different actors (religious actors, individuals and state officials) draw on religious, moral and legal discourses. The article examines the ways in which these actors understand legality and legal authority and how they become involved in legal processes. According to Moore, law is internally

⁹⁶ John Dewar. ‘The Normal Chaos of Family Law,’ *Modern Law Review* 61 (1998) 467.

⁹⁷ Ewick and Silbey 51.

plural and depends on other normative systems as well as dynamic interactions between the fields and actors in them; it is a process in which the relationship between the individual and the legal structure is mutually constitutive.⁹⁸ Like Moore, Ewick and Silbey understand the relationship between the individual and social structure, such as 'law', as one that is mutually defining rather than oppositional.⁹⁹ Different thresholds as to which legal means are practically available to people also strongly shape the ways in which arrangements, obligations or entitlements can become legally contested. The analysis provided in the article concludes, in line with many previous contributions in the scholarship,¹⁰⁰ that nuanced and empirically grounded research is needed for understanding the role and function of legality in discourses of law and religion. Article II continues with the theme by exploring the intersections of international law, women's rights, equality and religious family law.

Article II offers a reading of the scholarship that seeks to reclaim the universalism of human rights and introduces some of the criticism put forward by feminist scholars of prevailing understandings of gender equality, which operate in complex ways and cannot be caught in binaries such as religion vs. rights. From a different perspective than the one offered in Article I, it draws on the idea that legality is not bound to institutions and then simply inserted in social situations. Rather, legality is socially constituted through actions and practices connected to systems of meaning-making.¹⁰¹ Empirical studies, such as Bano's theoretically ambitious analyses,¹⁰² have highlighted that without knowing how normative practices actually impact individuals' lives and how the various hierarchies of power actually operate, we simply lack the basis for making principled decisions about how the relationship between different normative orders should be organized. Liberal legal instruments, such as the human rights of women, may potentially hinder emancipation and even contribute to reproducing prevailing hierarchies. As Ewick and Silbey note:

⁹⁸ Sally F Moore. *Law as Process: An Anthropological Approach*. London: Routledge and Kegan Paul, 1978.

⁹⁹ Ewick, Patricia and Silbey, Susan. *The Common Place of Law: Stories from the Everyday Life*. Chicago and London: Chicago University Press, 1998. For an excellent description of the development of law in everyday life and legal consciousness scholarship within law in society movement, see Rosie Harding. *Regulating Sexuality: Legal Consciousness in Lesbian and Gay Lives*. Abingdon: Routledge, 2011, 8–10 and 17–22.

¹⁰⁰ See for example: Samia Bano (ed). *Gender and Justice in Family Law Disputes: Women, Mediation, and Religious Arbitration*. Waltham, MA: Brandeis University Press, 2017; Bano, Samia and Pierce, Jennifer, eds. (2013) 'Personal Narratives, Social Justice and the Law.' *Feminist Legal Studies* Volume 21, Issue 3. Springer; Al-Sharmani et al. 2017; Lecoyer, *Marriage Conclusion in Belgian Muslim Families: Navigating Transnational Social Spaces of Normativity*, p. 11.

¹⁰¹ Ewick and Silbey p.39, 43.

¹⁰² See for example: Samia Bano. *Muslim Women and Shari'ah Councils, Transcending the Boundaries of Community and Law*. London: Palgrave MacMillan, 2012; 'In the Name of God? Religion and Feminist Legal Theory,' in Margaret Davies and Vanessa Munro (eds.) *The Ashgate Research Companion to Feminist Legal Theory*, 157-177. England: Ashgate Publishing, 2013; 'Standpoint, Difference and Feminist Research,' in Reza Banakar and Max Travers (eds.), *Theory and Method in Socio-Legal Research*, 91-112. Oxford: Hart Publishing, 2005.

By effacing the connections between the concrete/particular and the transcendent/general, hegemonic ideologies conceal social organization. As a consequence, power and privilege are preserved through what appears to be the irreconcilability of the particular and the general.¹⁰³

Legal pluralism¹⁰⁴ has at times been criticised for a lack of conceptual clarity with respect to distinguishing “law” from other forms of social life. In this study, legal authority and legality are understood as coming about through practical engagement with the multiple sources of law, rather than existing as pre-defined in institutions; in other words the approach adopted to legal pluralism is constitutive.¹⁰⁵ As Banakar notes regarding globalisation, “the understanding of law as a nationally based body of legal rules, sources and institutions has come to be contested by forms of law and legality originating from multiple sources inside and outside nation states”.¹⁰⁶ Analyses in Articles I and II, in particular, demonstrate that the legality of relationship is not a question of separate systems of law but rather complex structures that intertwine to produce legality.

However, the need to distinguish between ‘law’ and other spheres depends on the construction of the research site and the focus of the examination. Articles III to VI focus on the legal sphere as constituted in specific legal institutions and ‘legality’ within these analyses stands for distinctly positive norms of state law. These articles too, however, approach legality from a perspective that recognises the importance of practices as grounding the law in society and the struggles prevailing in it. Hence, at the same time as legality shapes social relations, it “must also be continually produced and worked on (i.e. invoked and deployed) by individual and group actors”.¹⁰⁷ The changes in legality result from the variation in its local enactment.¹⁰⁸ The logic of the juridical field has been explained by Bourdieu as

determined by two factors: on the one hand, by the specific power relations which give it its structure and which order the competitive struggles (or, more precisely, the conflicts over competence) that occur within it; and on the other hand, by the internal logic of juridical functioning which constantly constrains

¹⁰³ Ewick and Silbey, p. 226. Others too, Koskenniemi for example, have pointed out that one technique for producing hegemony is to claim one’s own historical and socially situated experience and interest as universal. Koskenniemi, Martti. “International Law in Europe: Between Tradition and Renewal,” *The European Journal of International Law* 16:1 (2005), 113–124.

¹⁰⁴ Legal pluralism treats as law also other normative systems than “official” law. See for example Merry, Sally Engle. ‘Legal Pluralism’, *Law & Society Review* 22:5 (1988), pp.869-896.

¹⁰⁵ Harding 2011.

¹⁰⁶ Reza Banakar. *Normativity in Legal Sociology: Methodological Reflections on Law and Regulation in Late Modernity*. Cham: Springer, 2015, 9.

¹⁰⁷ Ewick and Silbey 46.

¹⁰⁸ Ibid..

the range of possible actions and, thereby, limits the realm of specifically juridical solutions.¹⁰⁹

Central to the theoretical approach adopted in this study is that there are different, albeit equally important and “true” ways of understanding legality and the processes generating and reproducing it. The classification provided by Ewick and Silbey is used here as a “trptych” to describe the relevance of these different positions to this study, although I wish to make no definitive claim as to what forms of legal consciousness actually can be found in social relations. Ewick and Silbey introduce three ways of participating in the construction of legality, that each invoke “a particular cluster of cultural schemas and resources that position the law and the individual in relation to one another”.¹¹⁰ The first of these positions, “before the law”, depicts law as an autonomous field separated from ordinary life. This reflects the self-understanding of liberal law as universal and capable of subsuming the particularities of who, when, and where to general norms and thus maintaining the legitimacy of power.¹¹¹

Legitimacy of the law is produced by distinctions irreducible to mere general recognition of the universality of these distinctions, which the professional ideology presents as the expression of universal and eternal values, transcending individual interests and particular circumstances. But neither is juridical legitimacy a mere product of power relations. Law, in the sense of pre-determined doctrine, is neither reducible to power relations nor independent of them.¹¹² As *García-Villegas* points out,

the legal field in its majesty, its rites, and its shrines is not amenable to being reduced merely to existing economic forces... Neither is law pure erudition that can be detached from the social conditions in which it is found. These extremes ignore the existence of law understood as a social field that is relatively independent of external demands.¹¹³

Hurri's views legal practice as critical for law's very existence - *both* in its normative dimension *and* within society. His approach is relevant for the present study, as this perspective opens a venue for analysing legal argumentation as a process in which the pre-existing doctrine is invoked and pragmatically deployed. By adopting this analytical approach the pivotal points in the process, in which novel meanings are attached to the “omni-

¹⁰⁹ Pierre Bourdieu, 'Force of Law: Toward a Sociology of the Juridical Field,' *The Hastings Law Journal* 38 (1986-1987), 814.

¹¹⁰ Ewick and Silbey, p. 47.

¹¹¹ *Ibid.*, p. 106.

¹¹² Banakar points out that the “disembeddedness of modern law is never total and the legal system's autonomy from other social domains and processes is always a question of degrees rather than an either or issue”. Banakar 2015, 15.

¹¹³ Mauricio García-Villegas, 'Comparative Sociology of Law: Legal Fields, Legal Scholarships, and Social Sciences in Europe and the United States,' *Law & Social Inquiry* 31 (2006), p. 343.

historical”¹¹⁴ body of law and legal doctrine, can be detected. In Hurri’s account of legal practice, the battles taking place in the legal field are what grounds the law in the reality of society.¹¹⁵ In this process, the antagonism between law understood as a universal system of rights and law understood as state power is overcome. As Hurri states,

rights are no longer presuppositions of lawyers who act in the field of their own practice, but crucial elements in the mechanisms of that field, something without which the whole apparatus would not only not function, but also not exist in the reality of society.¹¹⁶

The second form of legal consciousness described by Ewick and Silbey, namely that of “with the law” consciousness, depicts the strategic element of law, which is less concerned with the legitimacy and more concerned with strategic opportunities that legal argumentation opens up for different actors to pursue their own ends.¹¹⁷ This aspect of the law is crucial also to Hurri’s depiction of law. Hurri sees legal practice as a space of struggles where the juridical field operates as the action-structuring media.¹¹⁸ These struggles are interconnected to a variety of social and individual struggles, both internal and external to legal means and ends. Without adopting a purely external perspective on law, this approach seeks to make visible how the conflicts of value prevailing in other fields of society enter the legal system through the legal practice. In the present study, the tensions between different recognition orders that the different regimes underlying for example liberal family law and immigration control are a focal concern of the analysis.

The struggle perspective on law renders visible how these regimes intersect and how the tensions between them are governed through the legal practice. Through a close reading of legal argumentation in one particular case, articles V and VI draw on the account of practice as developed by Hurri in that they seek to interrogate how legal subjectivities are formed in the legal argumentation in of the court and which regimes and extra-legal political goals are mobilised in the discursive practice of legal argumentation. Sameness and difference, and universal and particular, play out in the legal argumentation not necessarily according to an objective and impartial rationality of “law”, but often in ways that reproduce social hierarchies prevailing in society. The art of the legal profession is in performing the acts of constructing the normative framework in a seemingly objective manner and interpreting it from a similarly performed objective position.

The third form of legal consciousness, “against the law” consciousness¹¹⁹, is about resistance. For the purposes of this study, interesting in against the law-

¹¹⁴ Hurri 2014 *Birth of the European Individual: Law, Security, Economy*. Farnham: Routledge, 2014, 238.

¹¹⁵ Ibid.

¹¹⁶ Ibid. 87.

¹¹⁷ Ewick and Silbey, 48.

¹¹⁸ Hurri 2014 *Birth of the European Individual*. In the ‘analytic of struggle’, Hurri distinguishes three interdependent dimensions of struggles striven for in the juridical field. These are the struggle of individuals, the struggle of regimes and the struggle of lawyers. Samuli Hurri, ‘Akhilleuksen kilpi: ensimmäiset käräjät’, *Tiede & Edistys* 2:2014, 142.

¹¹⁹ Ewick and Silbey 48.

consciousness is the way in which it is related to recognition. This link between power, resistance and recognition has been developed by Harding in her influential work on the regulation of sexuality.¹²⁰ Drawing on a Foucauldian analysis of power as creative and productive and Butler's understanding of recognition as a necessary condition for resistance in this particular type of power relationship, Harding emphasises the link between being recognised by power and being able to resist it:

Resistance can only happen from within normative frameworks not from outside. When positioned outside law, when formal equality is denied, resistance to the power of law has to be focused on gaining entry to law, otherwise resistance to (hetero)normative structures such as marriage has little potential to significantly impact on or transform the institution.

These interconnections between recognition and the production of legality, hegemony and counterhegemony demonstrate the urgency of taking into account the structural constraints on individual action and invoking a counterhegemonic consciousness in legal thought.¹²¹ Intersectionality, especially as developed in feminist theory, is an approach that seeks to render visible the myriad ways in which individuals are situated within various nexuses of power and how these different locations constitute privilege and disadvantage in various ways. In the next section, the concept of intersectionality will be explained briefly in order to provide some background for how intersectionality is applied in the articles and the analysis in chapter 3.

2.3 FEMINIST INTERSECTIONALITY

Since 'legality' is approached in this study as something socially constructed in diverse discourses both within the sphere of official law and in the consciousness of different legal actors, an intersectional approach is needed to map the ways in which different people encounter law and how and why their (transnational) family relationships come to assume a legal character at different sites. This is important as law has both emancipatory and constraining effects, which due to diverse structural constraints impact individuals differently. As de Hart, van Rossum and Sportel note, this is not merely about constraints on mobility or strategic action such as forum shopping, but about the position of individuals in the family and the extent to which they are subject to particular forms of power and control, depending on their various positionalities.¹²²

The concept of intersectionality was first coined by Kimberlé Williams Crenshaw in 1989 in the context of the struggles of African American women

¹²⁰ Harding 2011, 53–57.

¹²¹ Ibid., 27.

¹²² Betty de Hart, Wibo van Rossum and Iris Sportel. 'Law in the Everyday Lives of Transnational Families: An Introduction,' *Oñati Socio-Legal Series*, 3:6 (2013), 991-1003.

against discriminatory recruitment practices. While anti-discrimination law of the time could only deal with the categories of gender and race separately, Crenshaw sought to address overlapping or intersecting social identities and related systems of oppression that reciprocally constructed the difference of treatment.¹²³ Crenshaw's point, initially, was to address the issue of intersectional invisibility; that experiences of disadvantage were "the product of both [gender and race] and equivalence of neither".¹²⁴ Since the early 1990s, intersectional approaches have become central in contemporary feminist (legal) scholarship.¹²⁵

In this study, intersectionality is applied as an "analytic sensibility",¹²⁶ which seeks to address the dynamics of difference and sameness and expose how single-axis thinking in terms of categories of difference "undermine legal thinking, disciplinary knowledge production, and struggles for social justice."¹²⁷ I understand intersectionality as "a deconstructive move" through which "challenging the sameness/difference paradigms in law" becomes possible.¹²⁸ Intersectionality as an approach focuses on the interplay of social structures and hierarchically organized categories, such as those created by legal practice.¹²⁹

With a focus on how difference and sameness play out in legal argumentation, the question of which categories to include or whether to focus on categories at all, loses some of its significance.¹³⁰ Rather, intersectionality denotes relationality and fluidity of identity and experience.¹³¹ For example, as explained in Article I, 'legality' of Muslim marriages is intersected by identity and experience, but also by transnationalism, which may place the marriages in intersecting registers and nexus of power relations that cannot be explained merely by reference to religious or secular law. Neither are these experiences reducible to an understanding of disadvantage as produced by multiple categories simply being added to one another. Intersectionality is needed to

¹²³ Kimberlé Williams Crenshaw. 'Demarginalising the Intersection of Race and Sex; A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,' *University of Chicago Legal Forum* (1989) 139-167; 'Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color,' *Stanford Law Review* 43:6 (1991) 1241-1299.

¹²⁴ Joanna Conaghan. 'Intersectionality and the feminist project in law,' in Emily Grabham, Davina Cooper, Jane Krishnadas, and Didi Herman (eds.) *Intersectionality and Beyond: Law, Power and the Politics of Location*, 21-48, Abingdon, Oxon; New York, NY: Routledge-Cavendish, 2009, 23.

¹²⁵ Emily Grabham with Didi Herman, Davina Cooper and Jane Krishnadas. 'Introduction,' in Emily Grabham, Davina Cooper, Jane Krishnadas, and Didi Herman (eds.) *Intersectionality and Beyond: Law, Power and the Politics of Location*, 1-17, Abingdon, Oxon; New York, NY: Routledge-Cavendish, 2009.

¹²⁶ Sumi Cho, Kimberlé Williams Crenshaw, and Leslie McCall. 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis.' *Signs* 38:4 (2013) 785-810, 795.

¹²⁷ *Ibid.* 787.

¹²⁸ Cho et al. 2013, 800.

¹²⁹ Johanna Kantola and Kevät Nousiainen, 'Institutionalising Intersectionality in Europe: Introducing the theme,' *International Feminist Journal of Politics* 11:4 (2009), 462.

¹³⁰ This question has puzzled scholars working on intersectional theory. See Grabham *et al.*, 2009.

¹³¹ Floya Anthias. 'Thinking through the lens of translocational positionality: an intersectionality frame for understanding identity and belonging,' *Translocations* 4:1 (2008), 5-20.

render visible the techniques and tactics through which hierarchies are generated and maintained in law. These processes, such as “moral gatekeeping” in the field of immigration control,¹³² produce intersectional advantage and disadvantage based on the mutual and co-constitutive effect of gender, perceived roles in the family, economic position, and cultural “otherness”.¹³³

Intersectional approaches highlight the need to examine academic and disciplinary conventions critically, as these are part of the processes of knowledge production that institutionalise and reify existing hierarchies. The exclusive focus on state-centred legal processes as well as institutions and abstractions over lived experiences epitomise the excluding of other forms of knowledge from that which is considered the proper domain of the legal. Both transnationalism studies and the intersectional approach emphasise the need to shift the focus from institutions to forms of agency, and from a doctrinal level onto people, experiences and practices. Levitt and Jaworsky emphasise the centrality of simultaneity and embeddedness to transnationalism studies and highlight that there are variations in the consequences of transnationalism.¹³⁴ Intersectionality is thus relevant also to the meta-methodological choice of studying transnational family relationships, belonging and law at different ‘sites’ and with different methodologies.

Due to the dialogical nature of their operations, categories of social difference produce unique forms of advantage and disadvantage. This point relates to the concept of equality. For example, within the framework of the CEDAW, there have been theorisations that incorporate intersectionality into the concept of substantive equality as well as to the means of promoting it. These will be discussed further in the following chapter.

Intersectional approaches seek to address the anti-essentialist critique that for any form of social life to meet a category means that this order of categories is first imposed on social agents.¹³⁵ In this process, the experiences of people who are situated at the intersections of various hierarchies are excluded and rendered invisible. This problem of “inadequate recognition of complexly situated subject” is visible throughout the study.¹³⁶

A critical point in intersectional approaches is to acknowledge that intersectionality operates within the same field of power it seeks to criticise. There are disciplining aspects within intersectionality discourses, and thereby a risk that intersectionality becomes the “product of the regime in which it operates and which it was conceived to contest”.¹³⁷ This study documents this

¹³² Helena Wray, ‘An Ideal Husband? Marriages of Convenience, Moral Gate-Keeping and Immigration to the UK,’ *European Journal of Migration and Law* 8:3-4 (2006), 303; Saara Pellander, “An Acceptable Marriage”: Marriage Migration and Moral Gatekeeping in Finland,’ *Journal of Family Issues* 36:11 (2014), 1427; Pellander 2016.

¹³³ See for example, Betty de Hart, ‘The Right to Domicile of Women with a Migrant Partner in European Immigration Law,’ in *Women and Immigration Law*, edited by Sarah van Walsum and Thomas Spijkerboer. Abingdon: Routledge-Cavendish, 2007, 156.

¹³⁴ Peggy Levitt and B. Nadya Jaworsky, ‘Transnational Migration Studies: Past Developments and Future Trends,’ *Annual Review of Sociology* 33 (2007), 129.

¹³⁵ Leslie McCall, “The complexity of intersectionality,” in *Intersectionality and beyond: Law power and the politics of location* (New York: Routledge-Cavendish, 2009), 53.

¹³⁶ Grabham et al. 2009, 2.

¹³⁷ Emily Grabham, “Intersectionality: Traumatic impressions,” in *Intersectionality and beyond: Law power and the politics of location* (New York: Routledge-Cavendish, 2009), 199.

effect, for example, in the rights discourse. It is shown that intersectional methods – such as the principle of the best interests of the child – when constructed in specific fields, become part of the power relations of that field.¹³⁸ The study thus critically engages with the possibility to use intersectionality as a tool for better recognition of identities, as often the identities are pre-determined in law, and the legal discourse merely produces and imposes this identity on the subject.

Intersectionality has also been criticised for inherent limitations as to explaining wider structural contexts. This study takes this critique into account and seeks to, through the construction of its methodological and theoretical framework, reach beyond the “occasions” in which inequalities are produced. Connecting intersectionality to the recognition theoretical framework of the study is an attempt towards connecting intersectional, occasional emergence of inequality to wider structures and ethical relations of society.

The following chapter examines how intersectionality manifests in the analyses of this study, and which techniques of governance an intersectional inquiry renders visible.

¹³⁸ Cho et al. 2013.

3 FAMILIES AND BELONGING: INTERSECTIONAL INQUIRIES

It was noted in the introduction (1.1.1) that despite being treated as strictly separated fields of law, family law, private international law and migration law are intertwined in a number of ways. Applying the analytic sensibility of intersectionality, the present study examines some of these interconnections.

This chapter begins by examining the framework of recognition relations in each of the three legal fields. It studies the images of community and individuals that the theoretical and legal doctrinal foundations of the fields rest upon. The focus is on how the relationship of belonging between the individual and the community are constructed by these foundations, particularly in the discourses of status and relationship within which family relations are recognised and regulated in law (3.1). The following sections examine how intersectionality manifests itself and which techniques of government it renders visible in the analyses of the study.

Section 3.2 draws on Articles I and II in examining how the fact that individuals are intersectionally positioned directs legal control, how it may affect the ways in which the legality of relationships, marriage in particular, is constructed, and how individuals may access 'legality'. Section 3.3 then focuses on intersecting legal fields in the light of analyses provided in Articles IV and V and studies the techniques through which fundamental conflicts between these fields are effaced, and unity and coherence of the law is secured. The final section 3.4 draws on Articles III and VI in looking at how the structural starting point of rights as exceptions in migration law produces the "alien" family. It examines, in particular, the principle of the best interests of the child as a technique of legal inspection, in which the intersectional identity of the individual is recognised as "alien".

3.1 RECOGNITION RELATIONS IN THE THREE LEGAL FIELDS OF THE STUDY

The establishment and functioning of the capitalist order, according to Honneth, is dependent upon not only the imperative of constant realization of capital but upon a particular moral logic, gradually institutionalised as a recognition order. As was explained above, Honneth describes a modern capitalist society as an institutionalized recognition order based on three spheres of recognition (love, respect, and esteem). In the sphere of love and affective relationships, the central principle of recognition is the recognition of needs; in the sphere of legal relations, subjects gain self-respect by learning to refer to each other as equal and autonomous legal subjects; and in the sphere of achievement, subjects earn self-esteem by contributing to the common good as subjects who possess abilities and talents that are valuable for society. In different areas of life, these spheres overlap. The bourgeois

nuclear family, for example, is an institution in which the recognition principle of love has been gradually complemented by the legal regulation of intrafamilial interactions, the principle of equality.¹³⁹ Legal recognition of kinship and regulation of the family, at least ideally, protects the equality of the members of the family.¹⁴⁰

Just as no single unitary ‘concept of family’ can be identified in law, no single rationality or mind of law can be traced as underlying the legal regulation of family relationships. For different purposes and aims, different elements of ‘familyhood’ are constitutive of legally recognisable family relationships. The main lines of thinking around the concept of family, however, can be identified in legal thought. These are status, a discourse in which family relationships are recognised and registered according to pre-existing norms that define the outer limits of family, and relationship, a discourse that focuses on the quality of the relationship and seeks to evaluate real-life dependencies and affective ties between individuals together with the intensity of these ties. These discourses addressing status and relationship are intertwined and in various ways bound up with moral criteria of acceptability and normality.

This section examines recognition relations underlying liberal family law, private international law and migration law by looking at how the discourses of status and relationship emerge in the constitution of personhood, subjectivity and community in these fields. By examining the normative expectation of ‘nation’ inherent in thinking about law through the paradigm of society as nation-state, the section seeks to make sense of the ways in which belonging is understood in these three fields of law.

3.1.1 RECOGNITION RELATIONS IN LIBERAL FAMILY LAW

The past decades in the development of family law manifest a particular kind of ethical progress in which legal equality within the family sphere has gradually expanded. In most Western capitalist societies the wellbeing of the individual has replaced other justifications of family law, such as upholding certain social structures or maintaining the doctrinal purity of an enclosed normative system.¹⁴¹ This ‘wellbeing rationale’ in legal governance in capitalist welfare states is an expression of intermeshing recognition principles that find articulation in several different contexts. Examples are many and include at least the following broad trends. The nuclear family is being deinstitutionalised, and marriage and divorce deregulated; and simultaneously with the decreasing of the focus on the sexual relationship between adults, the position and rights of the child has become central in the

¹³⁹ Nancy Fraser and Axel Honneth. *Redistribution or Recognition? A Political-philosophical Exchange*. London and New York: Verso, 2003, 146.

¹⁴⁰ Jonathan Herring. ‘Relational autonomy and family law,’ in Julie Wallbank, Shazia Choudhry and Jonathan Herring (eds.) *Rights, Gender and Family Law*, 257-275. London: Routledge, 2010.

¹⁴¹ Eekelaar, John. ‘Law and Community Practices,’ in Mavis Maclean and John Eekelaar (eds.) *Managing Family Justice in Diverse Societies*, 15-31. Oxford and Portland, OR: Hart Publishing, 2013.

regulation of the family.¹⁴² All in all, discrimination based on categories such as sexual orientation or the origin of the child born in or out of wedlock is increasingly considered unacceptable, and past years have witnessed the expansion of rights within the family.¹⁴³ Herring has described contemporary legal culture as a “human rights era with an emphasis on private life”.¹⁴⁴

As the coercive impact of social roles imposed by the state has gradually diminished and more opportunities have emerged for authentic experiences of selfhood through increased individualization, a call for individually tailored legal solutions and new forms of conflict management emerged. Furthermore, the contemporary cultural diversity invoked the need for reasonable accommodation and value-neutral approaches to the regulation of the family, following the principle that “the laws of a multicultural, multi-faith society should be mandatory only to the extent that fundamental values are at stake.”¹⁴⁵ Smart describes the processes of regulating and recognising relationships in family law as “a practice of kin making or ‘kinning’”, by which she means that “in various ways law operates to create recognised and recognisable forms of kinship. While once these practices of ‘kinning’ may have been largely imposed, in late modern times they are more likely to be attempts to keep abreast of changing social and cultural practices.”¹⁴⁶

Admittedly, the course of development has not been straightforward or without controversy, and surely we are far from the ideal of having completely abolished structures that reproduce diverse forms of inequalities. It is also true that the shift from prohibition to other forms of legal regulation has occurred alongside changing conceptions of state and statehood as the means of control developed towards facilitation and productive forms of governance.¹⁴⁷ Yet most commentators agree that the liberalisation of family laws has generally decreased inequality and social stratification and increased the autonomy of individuals, and that more or less this has been the course of development in a number of countries around the globe.¹⁴⁸ Following Honneth, I argue that this progress is largely due to the struggles for recognition, albeit those struggles are made structurally possible by various and sometimes contingent historical conditions, material and cultural.

The established recognition relations enable the subjects to claim recognition for their individuality and authentic experiences; enforce the modern legal order’s idea of equality; assert claims based on the value of their contribution which has not been adequately recognised; and call attention to the needs or wishes that the institutional practice of intimate relationships has

¹⁴² Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law*, Oxford and Portland, OR: Hart Publishing, 2010; Alison Diduck, ‘Public norms and private lives: Rights, fairness and family law,’ in Julie Wallbank, Shazia Choudhry and Jonathan Herring (eds.) *Rights, Gender and Family Law*, 199-218, Milton Park, Abingdon, Oxon; New York, NY: Routledge, 2010; Jänterä-Jareborg, Maarit (ed.), *Child’s interests in conflict*. Cambridge: Intersentia, 2016.

¹⁴³ Honneth, *The ‘I’ in ‘we’*, 173.

¹⁴⁴ Herring, 2010, 260.

¹⁴⁵ Jänterä-Jareborg, ‘On the Cooperation between Religious and State Institutions’, 79.

¹⁴⁶ Carol Smart, ‘Making Kin: Relationality and Law’ in Anne Bottomley and Simone Wong (eds.), *Changing Contours of Domestic Life, Family and Law: Caring and Sharing*, 7-23. Oxford and Portland Oregon: Hart Publishing, 2009, 12.

¹⁴⁷ De Hart. *Unlikely couples*, 7.

¹⁴⁸ Eekelaar 2013, Herring, 2011.

failed to meet.¹⁴⁹ A community of recognition relations, then, is a community of solidarity and shared responsibility, in which structural conditions beyond one's own control, that shape one's opportunities as well as one's contributions in the sphere of esteem, are taken into account in the distribution of welfare as well in the sphere of private obligations. Within the liberal framework of family law, the feminist struggles over valuing care and child-bearing as a contribution to society offer examples of a struggle for recognition entailing claiming legal rights both in relation to the partner in the form of claims to fairer distribution of family assets and to society in the form of social rights. The basis of the legal claims lie in the structural aspects of women's life (the gender-specific capacity to bear children) as well as in the claim for the value of their contribution to both the family and society.

The legal recognition and regulation of family life and family relationships is undertaken not only by formal legal norms that directly define, for example, the legal concept of the family. Rather, the recognition of familyhood and kinship takes place at several sites and for various purposes; law includes various, and sometimes contradictory rationalities. Following a Foucauldian line of thought, *van Walsum* suggested that the discourses that serve to regulate status (alliance and descent) and discourses that serve to discipline by regulating behaviour (sexuality, moral obligations, quality of relationships and affect, quality of care, adequacy of meeting the needs in this sphere) "merge in the family, the site where state power has penetrated into the most intimate domains of modern life, producing a society in which the population is governed by the individual governing the self".¹⁵⁰ The point made by *van Walsum* is focal for analysing the regulation of family relationships, but this study takes the view that instead of the discourses of status and discipline, intimacy is regulated through the paradigm of status and the paradigm of relationality, which have both empowering and disciplinary potential. While the disciplinary potential in the former focuses on its outer limits, in the latter the disciplinary potential is located in the process of evaluating the quality and essence of the relationship.

The regulatory potential of law can manifest as a normalising power, but the emergence of the paradigm of relationality¹⁵¹ in anthropology and sociology in the wake of the 'new' kinship studies indicates that law also seeks to recognise relationships and reflect social reality of kinship practices.¹⁵² The changes in statehood¹⁵³ and modes of governing, such as the rise of rights, are obviously significant as to how and why the paradigm of relationality emerged. Nevertheless, relationality combines the significance of blood ties to "new kinship" practices where kin is formed around people "who occupy the same

¹⁴⁹ Honneth and Haartman, Honneth 2012, p. 171.

¹⁵⁰ Van Walsum 2008 p. 21.

¹⁵¹ In anthropology, relationality and new kinship has been studied and conceptually developed by for example by Janet Carsten, see 'Substance and Relationality: Blood in Contexts,' *Annual Review of Anthropology* 40 (2011), 19–35; in sociology by Finch and Mason, see Janet Finch and Jennifer Mason. *Passing On: kinship and inheritance in England*. London: Routledge, 2000.

¹⁵² Smart, 'Making Kin'; and 'Relationality and Socio-Cultural Theories of Family Life' in Jallinoja, Riitta, and Eric Widmer (eds.), *Families and Kinship in Contemporary Europe: Rules and Practices of Relatedness*, 13-28. Basingstoke: Palgrave Macmillan, 2011.

¹⁵³ De Hart, *Unlikely couples*, 7.

place in emotional, cultural, locational and personal senses”,¹⁵⁴ which is important as it makes the inclusion of for example families of choice possible.¹⁵⁵

The goal of establishing fairer terms of inclusion in the ethical relations of recognition demands different legal responses depending on the context. Two points are worth highlighting here. Firstly, affirmative legal recognition also means regulation – that something is brought under the rule and regulation of legal norms. Just recognition, in the sense of ethical relations, may at times mean being regulated and recognised by legal norms, while at other times such regulation may mark the exclusion of the individual, or maintain discriminatory structures that produce misrecognition for some individuals. From a specifically recognition theoretical position, Zurn has argued for a “derecognition of marriage”, as the notion of marriage is inherently restrictive regarding acceptable forms of family life, partnership, care, as well as sexual relations, and the normalising effect that marriage has in producing a particular heteronormative way of life as a cultural ideal.¹⁵⁶

Secondly, as was noted above, recognition spheres intertwine, which means that more than one principle of recognition usually applies at any one time. Furthermore, most elements of social life, such as a marriage, are complex and involve several aspects of social life. Marriage, for example, is a particularly complex social institution both socially and legally, and it “interacts across a multiplicity of social domains”.¹⁵⁷ The relevance of this cultural, legal and social complexity regarding the norm of equality in family law is analysed in Article II and will be discussed below (3.2). Here, however, it is important to emphasise, again, that as there are not only one but several ‘legalities’ of marriage. This “legal complexity of a socially complex institution” can mean that the regulatory problem of (affirmative) legal recognition will remain even if the institution of marriage were to become derecognised or replaced with another regulatory concept seeking to recognise and regulate some aspects of intimacy and family life.¹⁵⁸ Even if we did away with ‘marriage’, we would still need to recognise ‘family life’, ‘the household’ or ‘the family unit’ for various purposes; not to mention that the social institution of marriage would most likely still continue to figure in the day-to-day lives of ordinary folk.

Recognition practices prevalent in law have both emancipatory and regulatory implications, but these implications do not affect everyone in the same way. The new, “liberal” forms of recognition bring about new forms of control and governance: family life becomes recognised and regulated for example through the (moral) discourses of gender equality and best interests

¹⁵⁴ Smart, ‘Making Kin’, 9.

¹⁵⁵ Studying the concept of the family in the European Court of Human Rights, Hart too observed a historical shift from approaches emphasising status towards placing more weight on individual identities in the recognition of family relationships. See Linda Hart. *Relational Subjects: Family Relations, Law and Gender in the European Court of Human Rights* (Doctoral dissertation, 2016). Faculty of Social Sciences, University of Helsinki.

¹⁵⁶ Zurn, Christopher F. ‘Misrecognition, Marriage, and Derecognition,’ in *Recognition Theory as Social Research: Investigating the Dynamics of Social Conflict*, edited by Shane O’Neill and Nicholas H. Smith, 63–86. Basingstoke: Palgrave Macmillan, 2012, 74.

¹⁵⁷ Zurn, 67.

¹⁵⁸ In the Finnish context Pylkkänen suggested legal recognition of “household” as an alternative to marriage. Pylkkänen, Anu. *Vaihtoehto avioliitolle*. Tampere: Vastapaino, 2012.

of the child. Grillo, for example, has argued that the moral order of the minority family is generally believed to be at odds with the one embodied by the ethnically European family.¹⁵⁹ Studying the biopolitics of marriage in the Australian context, Cadwaller and Riggs note, similarly, that much of the anxiety over the Muslim population is channelled to the governance of family, marriage and reproduction.¹⁶⁰

While the emancipatory potential that these “soft” forms of regulation carry is obvious compared to previous, more coercive forms of regulation, new challenges arise following these changes in how families are governed.¹⁶¹ One of these challenges has to do with “normalisation”, which refers to the ways in which the “norm” is intertwined with biopolitics and disciplinary power. The “norm” privileges some ways of life and make them seem natural, liberal and desired by the individual, as being something he or she has chosen freely, thus producing normalised desire as individual and rational.¹⁶² At the same time this renders legitimate policies that, in the name of enhancing the wellbeing and life of the population, favour the normalised way of life. The risk is that some families and some ways of life become recognised and regulated only in the negative sense as problematic or suspect families.

In the context of this study, a liberal framework of legal recognition is important, as it makes explicit the various conditions that have a bearing on the kind of subjects that are considered as belonging within the liberal regime of family law, as well as what kind of identities or relationships are marginalised in the process. One of these conditions concerns religion; religion is intertwined with the social institution of marriage and it plays a role in the recognition of individual and collective identities. The classical multiculturalist position is that the issue of family law and rights should not be framed merely as one about authority and enforcement, as such an approach is limited both regarding contemporary conceptualisations of rights

¹⁵⁹ Grillo 2015, 39.

¹⁶⁰ Cadwaller and Riggs 2012. Similarly van Walsum traced resemblances between modern Dutch immigration and integration laws and the racist modes of exclusion in the previous order of the Dutch Colonial State: “In the Dutch East Indies, the concept of race was mobilised to introduce an extra layer of exclusion that disqualified people from membership in the nation and denied them access to state care, the claim to national belonging and the liberal regime of Dutch law...In taking on responsibility for the regeneration of the dominant race, the colonial state protects its own by expelling the colonised other. Thus a positive relation is established between a right to kill or expel, and the assurance of life.” Van Walsum 2008, 14.

¹⁶¹ Yesilova studied the formation of the nuclear family in Finnish family politics and welfare policies. She observed that a shift in the governance of families from formal rules that seek to control the “outer” limits of the marriage institution towards rules that seek to control the “inner” substance of the relationship. Marriage, divorce and extra-marital relationships were deregulated, but at the same time soft forms of governance emerged with a focus on the quality of the relationships and therapeutic interventions. In the Dutch context, van Walsum observed a decrease in the state control of sexuality and emergence new forms of state control which focus on the ethics of life within families. Mapping the historical development of the regulation of the family in the United States, Cott noted that as the role of the state grew stronger, the need to control the outer borders of the family decreased, and the focus of the control shifted to those fragments of the population who still represented a threat to the nation: the poor and the precariat. See Katja Yesilova. *Ydinperheen politiikka*. Helsinki: Gaudeamus, 2009; Cott 2000; Van Walsum 2008.

¹⁶² Cadwaller and Riggs 2012.

as well as the descriptive analysis of how people negotiate state law and religious family norms in their day-to-day life.

3.1.2 RECOGNITION RELATIONS AND BELONGING IN PRIVATE INTERNATIONAL LAW

In the classical view, private international law is perceived of as a procedural and technical body of conflict-of-laws rules, which addresses legal conflicts, statuses or processes that have connections to the jurisdiction of more than one state. It exists for the purpose of bridging the legal systems of two states by co-ordinating, through choice of law rules, competence rules and recognition rules, the individual legal question back to the level of material law.¹⁶³ In other words, private international law functions as a means of allocating the case to the correct jurisdiction by determining the right forum and identifying the law applicable to the case. Furthermore, recognition rules guarantee that decisions, judgements and statuses are also recognised beyond the jurisdictions in which they were formed. In Corneloup's words, private international law "provides co-ordination methods in order to resolve conflicting legal pluralism. It does not aim to harmonize substantial rules but to co-ordinate legal diversity on an international level".¹⁶⁴

The classical view, which distinguishes between procedural norms of private international law and norms of substantial law, has been called the neutrality approach. While it is often pointed out that this neutrality has its limits,¹⁶⁵ it still underpins the doctrines and analyses of the field. The principle of neutrality stands for two things. Firstly, it requires that a clear and rigid boundary is erected and maintained between law and non-law. 'Law', even when understood as including for example customary law, legal concepts and principles or doctrines of interpretation, is strictly speaking state law.¹⁶⁶ It was noted above that family life is governed through two discourses, the discourse of status and the discourse of relationship. In inscribing a rigid boundary between law and non-law, the classical understanding of private international law prioritises the discourse of status, as status is constituted by legal rules rather than social facts, such as relational reality. Secondly, private international law does not address the justifications or legitimacy of foreign (or municipal) legal norms. Exceptions to this main principle exist but are limited to the narrow interpretation and application of the *ordre public* doctrine, which rejects the recognition of norms that would lead to outcomes

¹⁶³ Katja Karjalainen, *Ikääntyminen, liikkuvuus ja kansainvälinen yksityisoikeus Euroopassa*, Helsinki: Suomalainen Lakimiesyhdistys, 2016, 5.

¹⁶⁴ Sabine Corneloup. 'Can Private International Law Contribute to Global Migration Governance?' in Horatia Muir Watt and Diego P. Fernández Arroyo (eds.) *Private international law and global governance*, 301-317. Oxford: Oxford University Press, 2014, 308.

¹⁶⁵ Andrea Büchler. *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Laws*. Farnham: Ashgate, 2011.

¹⁶⁶ Religious law, for example, is translated into state law and recognised as such. For an analysis of how this distinction has recently emerged in Dutch public debates over Islamic family law, see Iris Sportel. 'Who's Afraid of Islamic Family Law? Dealing with *Shari'a*-based Family Law Systems in the Netherlands,' *Religion & Gender* 7:1 (2017), 53-69.

that might jeopardize the fundamentals of *lex fori*.¹⁶⁷ These two aspects, central to the principle of neutrality, also define the concepts of ‘society’ and ‘border’ that underpin legal thought in the field, prescribing a state-centralist understanding of law, society and nation-state.¹⁶⁸

Through the identification of state with society, the nation-state came to represent the community of cultural and moral order – the recognition relations historically established in a society – to which an individual or a legal relation was perceived as belonging to.¹⁶⁹ The starting point in private international law, generally speaking, is that for each legal relation (including status such as marriage or divorce; conflicts such as dispute over custody; or instruments such as a provision about Islamic *mahr* in a marriage contract), a “home” can be determined. Usually this is done through defining the relevant *connections*, i.e. those legally relevant facts that link the legal issue in question to the legal order of a particular state. Connections are determined in each country’s conflict of laws rules and include, for example, the law of nationality (*lex patriae*), or the law of the country where the person is habitually resident (*lex domicilii*).

Consistent with the thought that society and nation-state are one and the same, issues having societal significance, including those central to personal identity, such as marriage, were linked to the personal law of the individual, which by definition was the law of nationality or domicile.¹⁷⁰ According to Shakargy:

The consistent application of national (or domiciliary) law to marital issues reflects an assumption regarding the special importance of these matters: it implies that the connection between person and a legal ‘home’ is real and substantial to the extent that it justifies the states’ interest in, and indeed involvement, in that person’s relationships.¹⁷¹

The classical view depicted private international law as part of a system based on national legal orders, which were divided into systematically

¹⁶⁷ Michael Bogdan, ‘Some Reflections on Multiculturalism, Application of Islamic Law, Legal Pluralism and the New EU Succession Regulation,’ in *A commitment to private international law: Essays in honour of Hans van Loon - Un engagement au service du droit international privé: mélanges en l’honneur de Hans van Loon*, 59-68. Cambridge: Intersentia, 2013; Maarit Jänterä-Jareborg, ‘Women’s Human Rights: International Law in the Intersections between Socioeconomic Conditions, Culture, Tradition and Religion,’ in in Maarit Jänterä-Jareborg and Hélène Tigroudja (eds.) *Women’s Human Rights and the Elimination of Discrimination / Les droits des femmes et l’élimination de la discrimination*, 391–420. Leiden: Brill, 73.

¹⁶⁸ The distinction between *ordre public* and the concept of ‘mandatory rule’ (also known as internationally mandatory rules, *lois de police*, *lois d’application immédiate*, or *Eingriffsnormen*) should, however, be noticed. The mandatory rule refers to the hierarchically higher norm than the norm applicable to the case at hand, while *ordre public* refers to the moral evaluation of the outcome of the application of a norm. See, for example: Louwrens Kiestra. *The Impact of the European Convention On Human Rights On Private International Law*. Den Haag: T.M.C. Asser Press, 2014, 23.

¹⁶⁹ Karjalainen 2016, 23; von Savigny, Karl F. *Private International Law: A Treatise on the Conflict of Laws and the Limits of Their Operation*. London: Forgotten Books, 2012.

¹⁷⁰ Sharon Shakargy, ‘Marriage by the State or Married to the State? On Choice of Law in Marriage and Divorce,’ *Journal of Private International Law* 9:3 (2013) 499-533.

¹⁷¹ *Ibid.*

organized branches of law, in which the purpose of international law, both public and private, was to regulate relations between states and their legal orders.¹⁷² Neutrality was not only desirable because of this system based on equal nation-states and their national legal systems, but indeed possible only within such a system. However, recent trends and processes of materialisation and harmonisation have challenged the classical view of private international law.¹⁷³ These trends are in part a manifestation of the ongoing processes of transnationalisation of law, and they also mark a fracture as to how the concepts of “border” and society are constructed in private international law.¹⁷⁴

Fischer-Lescano and Teubner highlight the polycentric forms of globalisation processes, which lead to the fragmentation of global law. This fragmentation, according to authors, “has its origin in contradictions between society-wide institutionalized rationalities, which law cannot solve, but which demand a legal approach to colliding norms”.¹⁷⁵ As part of this normative reorientation, they argue that the idea of systemic unity is to be abandoned as outdated and instead the focus should be on the emerging decentralised modes of coping with conflicts. Materialisation of private international law is thus part of globalisation; as different sectoral regimes lead to different principles of conflicts law, a reorientation from collision norms to substantive rules takes place.¹⁷⁶ At the same time, however, materialisation in the form of recourse to fundamental norms and values may assume ideological character and emerge as an attempt to promote specific political goals, as Sportel has recently demonstrated.¹⁷⁷

In contemporary international family law *habitual residence* as a connecting factor has gained ground as a key connection and largely replaced connection doctrines based on nationality, especially in European family law.¹⁷⁸ According to Article 3(1a) of the Brussels II bis Regulation (2201/2003), for example, the jurisdiction in divorce matters falls to the court in whose territory the spouses are habitually resident; or were last habitually resident, insofar as one of them still resides there; or the respondent is

¹⁷² Tuori 2014, 12.

¹⁷³ Karjalainen 2016, 24.

¹⁷⁴ The increased role of fundamental rights has enhanced the process of materialisation. Marzal Yetano, for example, speaks of ‘constitutionalisation’ of party autonomy, see Toni Marzal Yetano, ‘The constitutionalisation of party autonomy in European family law,’ *Journal of Private International Law* 6 (2010) 168; and also the term ‘europeanisation’ is used broadly. See for example the study by Louwres Kiestra, in which the author analyses the impact of the European Convention on Human Rights private international law. Kiestra 2014. Fischer-Lescano and Teubner, however, refer to constitutional pluralism and “auto-constitutional regimes as part of material and conceptual changes that define contemporary fragmentation of law and emphasise the need rethink conflicts laws. Fischer-Lescano and Teubner, 1015.

¹⁷⁵ Fischer-Lescano and Teubner, 1004.

¹⁷⁶ *Ibid.* 1021.

¹⁷⁷ Sportel 2017.

¹⁷⁸ Karjalainen 2016; Sharon Shakargy. ‘Marriage by the State or Married to the State?’ 2013. However, Shakargy sees habitual residence as merely a new formulation of classical nationality and domicile connections with the same purpose of locating people and relations to one (and only) legal home state. She argues for choice-of-law rules which would reflect the principles in the core of modern marriage law, namely the principles of autonomy and private interests.

habitually resident, or in the event of a joint application, either of the spouses is habitually resident, or the applicant is habitually resident if he or she resided there for at least a year immediately prior to the application. The regulation applies even to cases where one of the spouses has never resided within the territory of the EU. The concept of habitual residence can not be exclusively defined, but the idea is that habitual residence is in the country in which the centre of the person's social life is: the place to which he or she has most attachment, where he or she mostly lives, and where the person's most important social ties such as family and friends are.¹⁷⁹ The elements that constitute habitual residence are interpreted in the praxis of both national courts and the EU Court of Justice. Importantly, this interpretation is closely connected to the goals of the legal norms in question.¹⁸⁰ Evaluation of habitual residence is evaluation of 'belonging' of the individual, and connected to the goals of legal norms, this evaluation includes a political element.

Karjalainen speaks of the recent practical turn regarding legal norms on connections, especially in international family law; instead of relating to the choice of law, connections these days mostly relate to identifying the competent authority.¹⁸¹ The increasing mobility across national borders rendered personal statute theory impractical, and slowly a shift took place towards the principle of closest connection.¹⁸² Connections define the relationship of belonging between the individual (or the legal relationship attached to that individual) and the jurisdiction, understood here as embodying the system of recognition relations.¹⁸³ In addition to the practical purposes of allocating the case to the correct jurisdiction, connections serve the purpose of defining the scope and relevance of *ordre public* consideration. Connections, thus, define the place of the 'border' in terms of jurisdiction in two senses: first, as a question of competences and applicable law, and second, as boundaries of acceptability. The scope of *ordre public* consideration is determined in relation to the recognition relations considered fundamental to the issue in question.¹⁸⁴ A brief examination of the interrelationship between connections, recognition rules and *ordre public* in the contexts of marriage will serve to illustrate the point.

¹⁷⁹ Karjalainen 2016.

¹⁸⁰ See also: Case C-523/07 A [2009] ECR I-2805 [35]. See Ibid.

¹⁸¹ Karjalainen 2016.

¹⁸² Ibid. 23.

¹⁸³ When the question is about identifying the competent forum or the applicable law, parties sometimes enjoy contractual freedom which allows them to contractually locate their legal relations in a certain court or legal order. They may, for example, make contractual arrangements about the choice of law in matrimonial matters. But even when choice-of law norms cannot be freely governed by private contracts, they do include a subjective element: what was meant by the parties; what conclusions can be drawn based on their choices and actions, and what interests are at stake. Thus belonging, here too, includes a subjective element attached to identity, although often it is not a matter of mere subjective will or choice.

¹⁸⁴ Isailovic has analysed private international law from a recognition theoretical perspective, which is quite different than the one adopted in this study. She uses recognition theory to examine how private international law may provide for the recognition of 'otherness'. Ivana Isailovic. 'Political Recognition and Transnational Law: Gender Equality and Cultural Diversification in French Courts,' in Horatia Muir Watt and Diego P. Fernández Arroyo (eds.) *Private international law and global governance*, 318-343. Oxford: Oxford University Press, 2014

The first example concerns the right to marry. The question as to whether a person has the right to marry before a Finnish authority is about the rules defining the applicable law to the statutory impediments to marriage. According to Section 108 of the Finnish Marriage Act, if neither of the intended spouses is a Finnish citizen and if neither is habitually resident in Finland, they have the right to marry before a Finnish authority only if the marriage is permissible, firstly, under the law of Finland, and secondly, if each of them has the right to marry according either to the law of the state whose citizen he or she is or where he or she is habitually resident. The intended spouses are required to present a credible account of their right to marry under the applicable foreign law, but if such information is not available, owing to a state of war or other comparable unstable conditions prevailing in that state, the right to marry may be examined under Finnish law, given that the intended spouses have relevant connections to Finland.¹⁸⁵ Connections are in this context understood as social links to Finland, material facts such as intentions to live or work in Finland, Finnish nationality or family relations in Finland.

If foreign law is applied to the right to marry and its provisions regarding the right to marry go against *ordre public*, such provisions can be rejected. The discretion concerning the *ordre public* principle, however, is defined again with a reference to belonging: the connections of the marriage define whether it is practical to reject the requirements of foreign law.

As an example, *Helin* mentions Malaysian law, according to which religious affiliation may form an impediment to marry to people who come from different religious backgrounds. Such an impediment would clearly be in breach of the fundamental values of several European legal orders, Finland included. However, if the intended spouses have little or no connections to Finland and for example plan to live in a state that will not recognise their marriage if it was concluded against an impediment, which in that legal system might be important, rejecting the foreign norm on the grounds of *ordre public* makes little sense.¹⁸⁶

Belonging of the individual to society, and to the established ethical relations of that society (i.e. recognition relations as values considered fundamental in society), is defined by the extent to which the matter at hand has to do with identity and personhood of the parties. Thus the scope of private autonomy regarding whether the parties may contractually arrange which law applies to their relationship is generally speaking broader in matters of economic consequences of marriage than in matters regarding the personal consequences of marriage.¹⁸⁷ Similarly, while the Rome III Regulation¹⁸⁸ allows spouses autonomy in choosing the applicable law to divorce, Finland and Sweden chose to remain outside the Regulation because they considered

¹⁸⁵ Markku Helin, *Suomen kansainvälinen perhe- ja perintöoikeus*. Helsinki: Talentum, 2013. Helin notes that due to the increase in so-called marriage tourism, cases have emerged where the spouses have no intention to ever live in a country, despite concluding their marriage in that country. In these cases it would create problems if the marriage would only be valid according to the rules of the country where the conclusion of the marriage took place.

¹⁸⁶ Helin 2013, 162.

¹⁸⁷ Helin 2013, 220.

¹⁸⁸ Council Regulation (EU) No 1259/2010 of 20 December 2010, implementing enhanced co-operation in the area of the law applicable to divorce and legal separation.

certain rights regarding divorce so fundamental that providing scope for private autonomy concerning these rights could not be tolerated.¹⁸⁹

The recognition of marriages serves as another illustrative example of the relationship between *ordre public* and connections, i.e. belonging and recognition relations. Despite remaining unratified in most countries, in many of them the Hague Marriage Convention¹⁹⁰ nevertheless modelled national norms on the recognition of marriages in Finland.¹⁹¹ Following this convention, in Finland too the issue of recognition of foreign marriages is governed by recognition norms, not choice of law rules.¹⁹² According to Finnish law, a marriage concluded by a woman and a man in a foreign state before an authority of that state shall be valid in Finland, if it is valid in the state where it was concluded or in a state whose citizen either spouse was or where either spouse was habitually resident at the conclusion of the marriage. The general rule thus follows the internationally widely accepted principle that the formal validity of a marriage is governed by the law of the country where the marriage was celebrated (*lex loci celebrationis*). English law, for example, deems marriages by proxy valid solely on the grounds of *lex loci celebrationis*.¹⁹³ Perceptions about belonging are inherent in recognition norms.

Often the *lex loci celebrationis* norm is completed by additive criteria, which determine whether the marriage is acceptable in the sense that it can be recognised. Finnish law, for example, sets special conditions for the recognition of a marriage that has been concluded in a foreign state after the death of one of the intended spouses, or without one of the intended spouses being present in person at the conclusion of the marriage, or that has been concluded merely informally, without a ceremony or other formality.¹⁹⁴ The requirement is that the marriage is, firstly, valid according to the *lex loci celebrationis*, and secondly, when there is a special reason why the marriage

¹⁸⁹ Rome III Regulation has invoked interesting questions about the required standard of institutional 'legality' of foreign divorces. In the *Sahyoni* case currently pending before CJEU (C-372/16) the Court is called to decide whether a "private" divorce (i.e. a divorce in which the role of a foreign court or other official authority has not been constitutive but merely declarative), in this case a divorce by repudiation, falls within the scope of application of the Rome III Regulation. Attorney General is of the view that the Regulation does not apply to the case. However, should Rome III apply, the Court would have to decide whether the divorce should be left unrecognised following Article 10 of the Regulation, which holds that men and women should be placed in equal position with respect to divorce. On the same issue in the municipal private international law, see for example Sportel 2017 and Kruijer. Pauline Kruijer. *Islamic Divorces in Europe: Bridging the Gap between European and Islamic Legal Orders*. Den Haag: Eleven International Publishing, 2015.

¹⁹⁰ Convention signed on 14 March 1978 in The Hague on Celebration and Recognition of the Validity of Marriages.

¹⁹¹ Helin 2013, 169.

¹⁹² Ibid.

¹⁹³ See the case of *Awuku v Secretary of State for the Home Department* [2017] EWCA Civ 178 (23 March 2017). The case is important as it marked a precedent in relation to previous case law (mainly the Kareem case from 2014).

¹⁹⁴ These stem from the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1962. According to Article 1 of the Convention, no marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.

should be deemed valid in Finland. In the discretion, special attention is again given to the ties manifesting the belonging of the person to the foreign jurisdiction as well as to the duration of the cohabitation of the spouses.¹⁹⁵ Furthermore, according to the *ordre public* principle, marriage can be rejected if recognising it would violate the fundamental values of the Finnish legal order.

Recognition of marriages also serves as a prime example of how the general trend of materialisation of private international law changes the way belonging is understood. Sweden, for example, amended the norms on the recognition of foreign marriages in 2004, and is currently in the process of evaluating how these norms function.¹⁹⁶ The primary goal of the amendment was to enhance the protection of vulnerable individuals – mainly immigrant girls – against forced or early marriages.¹⁹⁷ After the amendment, a marriage concluded abroad is not recognised if the person had been forced to marry, unless special reasons could be identified to support recognition. The *travaux préparatoires* to the amendment state that if the jurisdiction in question does not provide both spouses with the right to decide over the marriage, the duress should be considered serious if the marriage was established against the person's will.¹⁹⁸ As for the *ordre public* reservation, the *travaux préparatoires* take the view that a situation where the reservation may be applied might be at hand, for example, when a person has entered into marriage at a very young age or has been forced to marry. Studying the criminalisation of forced marriages in Dutch, English and international criminal law, Haenen notes that according to the Dutch private international law, withholding the recognition of a forced or child marriage will be determined in each case.¹⁹⁹ In general, the European consensus seems to be developing towards non-recognition of forced and child marriages; they should only be recognised if such recognition is in the interests of the victim.²⁰⁰

The criteria restricting the recognisability of 'unacceptable' marriages reflects changes in how belonging and recognition relations are understood in the field; instead of the self-evident reference point to a nation-state and its legal system as the recognition order, individuals are considered as belonging to global recognition order established by rights.²⁰¹ In Fischer-Lescano and

¹⁹⁵ Helin 2013, 174-175; HE 44/2001 51.

¹⁹⁶ The Government has given Justice of the Supreme Court Mari Heidenborg the task of reviewing how protection against child marriage, forced marriage and 'honour' crimes can be strengthened. The part of the remit concerning the recognition of child marriages contracted abroad is to be presented in an interim report by 6 December 2017. The final report is to be submitted by 1 September 2018.

¹⁹⁷ Göran Lambertz. 'Child marriages and the law – with special reference to Swedish developments,' in Maarit Jänträ-Jareborg (ed.) *The Child's Interests in Conflict: The Intersections Between Society, Family, Faith and Culture* Cambridge: Intersentia, 85.

¹⁹⁸ Regeringens Prop2003/04:48, 56.

¹⁹⁹ Iris Haenen. *Force & Marriage: The criminalisation of forced marriages in Dutch, English and European criminal law*. Cambridge: Intersentia, 2014.

²⁰⁰ Assembly of the European Council Resolution 1468 (2005); In Finland, however, Helin has suggested that the conceptual framework of contract law should be used for defining the concept of 'illegal coercion', i.e. for defining when coercion has been severe to the extent that the marriage should be considered non-existent. Helin 2013 178, footnote 98.

²⁰¹ Sportel, however, has identified a form of 'sexual nationalism' in the connection between the 'weak' position of women and *ordre public*. According to her, "the concept of public policy is strongly influenced by a discourse on sexual nationalism, where gender

Teubner's theoretical framework of globalisation and conflicts law, the conflict here has to do with the conflicting rationalities and policies of the regulatory regime of private international law in the traditional sense, defined by neutrality, and the regulatory regime of rights.²⁰² However, as the victim-centred argumentation demonstrates, instead of referring to fixed and hierarchical solutions, law is increasingly seeking to concern itself with the underlying social conflicts themselves.²⁰³

3.1.3 RECOGNITION RELATIONS IN MIGRATION LAW: A "FEUDAL" SYSTEM OF STATUS-DIFFERENTIATION

In the earlier "feudal" system²⁰⁴ of legal equality attached to status differentiation, which preceded the modern legal system based on universal legal equality, the scope of rights depended on status: the legal equality was intertwined with social worth, social role or class. While this status differentiation was largely abolished in modern law, including family law and private international law, it clearly prevails as the foundations of legal relations in migration law. The legal regime of migration law is one based on the goal and purpose of maintaining the foundational border of the population and of the state, which often finds expression in the rule that the foundational sovereignty of the state mandates it to define the borders of its community. This starting point is unconditionally legitimated, for example, within the framework of the European Convention on Human Rights.²⁰⁵

In migration law, the "feudal" system of status is built on the two foundational classes of citizens and non-citizens. It is hardly the case that non-citizens would be granted no rights at all; most of the states respect the rights of the residents to form relationships with foreigners and adhere to some form of territorial principle, i.e. territorial presence in the state grants a person some rights.²⁰⁶ Nevertheless, it is widely accepted that states may treat citizens and non-citizens differently and categories, restrictions and privileges provided in migration law are usually based on this foundational status differentiation. Even advocates of extensive state obligations based on the principle of ethical territoriality usually accept the basic distinction between the citizen and the non-citizen.²⁰⁷ In addition to the "feudal" differentiation

equality and sexual diversity are of great symbolic importance for Dutch national identity". Sportel 2017, 61 and 66.

²⁰² Furthermore, these regulatory regimes are auto-constitutional and refer to different constitutional rules and principles. Fischer-Lescano and Teubner, 1015.

²⁰³ Ibid. 1021 and 1024.

²⁰⁴ The term "feudal" is used here to highlight the fundamental differences between a system, which bases legal equality on equality within status groups and a system, which bases legal equality on everyone's equal citizenship status. The term does not refer here to 'feudalism'.

²⁰⁵ Dembour 2015.

²⁰⁶ Betty de Hart. 2009. 'Love thy neighbour: family reunification and the rights of insiders,' *European Journal of Migration and Law* 11:3, 235-252, 236; Joseph Carens 2003. 'Who should get in? The ethics of immigration admissions,' *Ethics & International Affairs* 17, 96.

²⁰⁷ Hamsa M. Murthy. 'Sovereignty and Its Alternatives: On the Terms of (Illegal) Alienage in U.S. Law,' in Austin Sarat (ed.) *Special Issue: Who Belongs? Immigration, Citizenship, and*

between classes of citizens and non-citizens, the process of subjectivation in migration law, which rests on the foundational pair of subjectivities, the “citizen” and the “alien”, enables the differentiation not only between but also within formally equal status groups. “Territorialism” seeks to produce the subjectivity of the “citizen” within the class of non-citizen, but several mechanisms are also at play when the subjectivity of the “alien” is produced in the class of citizen.²⁰⁸ Family relationships, as de Hart observes, may lead to the inclusion of non-citizens but also to the exclusion of citizens.²⁰⁹

The justification behind the state’s right to restrict migration derives from the state’s interest in protecting public order and security, which, according to the contemporary doctrine, may include both economic interests and integration goals. The status of the sponsor (i.e. the person residing in the state in which the family wishes to settle and whom a family member lacking legal residence status wishes to join) is often decisive in family migration as it determines the scope of rights and conditions of family migration. For example, the citizenship of the sponsor may be the condition for family reunification, in which case only family members of citizens of the country are eligible for family reunification. More often, however, citizenship status or the status of residency (for example whether one has gained a permanent residence permit based on refugee status, asylum, or family relation) determines which conditions apply to family reunification. When the right to family reunification is granted for third-country nationals, as for example in the Family Reunification Directive (2003/86/EC), the restrictive provisions concerning the required level of income are the most effective means of controlling and limiting family migration into most EU countries. In addition, the Directive allows for the possibility of introducing integration requirements to family members.²¹⁰ I argue that due to the fact that there are few limitations as to how high the expectation of income requirement can be set, the right of the state to restrict migration is, *de facto*, the starting point in EU law too, even though it formally provides the right to family reunification (which

the Constitution of Legality (Studies in Law, Politics and Society, Volume 60), 1-27. Bingley: Emerald Group Publishing Limited, 2013.

²⁰⁸ The process is further complicated by the issue of so-called “reverse discrimination”, which refers to the situation in which a citizen living in his or her own country, subjected to national rules, is disadvantaged compared to a person who has exercised their mobility rights under EU law and thus become subject to the EU rules (see, for example, Staver 2013; de Hart 2007, 153). While this issue is not the main concern here, it is worth noting that the fragmentation of the rules and categories in European migration law demonstrates the increasing complexity of transnational law. See also Costello, who questions rigid binary between ‘legal’ and ‘illegal’ migration. Cathryn Costello. *The Human Rights of Migrants and Refugees in European Law*. Oxford: Oxford University Press, 2016.

²⁰⁹ De Hart. *Unlikely couples*, 59.

²¹⁰ See Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Article 7, which states that the state may require that: 1. evidence is presented that the sponsor has: a) accommodation regarded as normal for a comparable family; b) sickness insurance; and c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system; and 2. that third country nationals comply with integration measures, in accordance with national law.

international law, including the ECHR, does not).²¹¹ The income requirement in the context of EU law will be examined in more detail in section 3.4.

The restrictions are often framed either as necessary from the perspective of maintaining or promoting social cohesion or as economic necessities. Economic conditions for family migration in different forms of income requirements are the key technique for controlling and restricting family migration in contemporary European societies. In this study, the income requirements in the Nordic countries, particularly in the context of marriage migration, were examined and it was argued that these are set at such a high level that the costs make family migration virtually impossible for a large number of families, especially in the low income groups to which many migrants belong.²¹² This also means that the restriction easily becomes the essence of the norm, which, in fact, has been explicitly noted for example by the Finnish Supreme Court in cases that concerned claims for exemptions to the income requirements.²¹³

In the 1985 case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, the European Court of Human Rights accepted that it was not contrary to the Convention to give “special treatment to those whose links with a country stem from birth within it”,²¹⁴ as long as the results of this treatment were proportional. As de Hart points out, in the 1985 case, the Court “accepted an implicit standard of ethnicity, which played an important role in later case law”.²¹⁵ The ruling in *Biao*, it was argued in Article III, opened a space for a struggle for equal recognition and respect between citizens, although this potential was eventually not used by the Court. Article III argued, furthermore, that the distinctions between “new nationals” and “nationals-by-birth”,²¹⁶ accompanied by restrictive integration requirements, are underpinned by a coercive and disciplinary notion of integration, which *Kostakopoulou* has called the “thick concept of political belonging”. According to her, the concept

²¹¹ CJEU has in its case law sought to place some limitations as to how the income requirement can be used in national laws of Member States. The applications must, for example, be investigated on individual basis, and the required amount of stable and regular resources which are sufficient to maintain the family must be set at the level of the standard of “social assistance”. See for example: *Chakroun* C-578/08, 4 March 2010; and *Khachab*, C-558/14, 21 April 2016.

²¹² A similar observation has been made by several scholars previously, see for example Staver 2014 and Pellander 2016.

²¹³ See, for example: KHO:2013:97.

²¹⁴ European Court of Human Rights, the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, para 88.

²¹⁵ De Hart 2009, 239.

²¹⁶ It is worth noting here that serious doubts have been raised as to whether the objectives of treating “new nationals” differently from “nationals-by-birth” can convincingly be argued to have an objective and reasonable justification in the context of family migration. For example, the European Commission against Racism and Intolerance (ECRI) has on several occasions expressed its concerns over Danish family migration policies. Not only did it consider the attachment rule and its exception to be discriminatory, but also other provisions such as the required age of 24 for spousal migration, which it noted is disproportionate to the aim sought and has a discriminatory effect on minority groups. Moreover, the restrictive amendments of 2011 to family reunification rules, which require proof of integration as a condition of family reunification (such as proof of effort to integrate and success in an A1 level language course), were noted with concern by ECRI. See ECRI, fourth report on Denmark (ECRI (2012) 25), paragraphs 124-126, 129.

of integration functions as a disciplinary mechanism and a process of certification for those persons deemed not morally qualified as full members of community and worthy of citizenship.²¹⁷ As opposed to the classic paradigm of social democratic welfare, which views integration as something that stems from the desire for social equality and investment in people, this paradigm of integration seeks to distinguish between different classes of citizens, and discipline those individuals who are considered in some way deviant.²¹⁸

Characteristic of a “feudal” legal system based on status differentiation was that the recognition spheres of esteem (honour, dignity, achievement) and respect (legal equality) were not deemed distinguishable. The same observation can be made about legal equality in migration law: universal legal equality of individuals is not the starting point, but rather follows from recognition principles derived in complex ways from the recognition principles in the spheres of esteem and love. According to Cox, legal immigration categories reflect the tripartite recognition order of modern societies. Despite the differences in details and standards of migration laws between countries, general categories of family migration, labour migration with privileges for highly skilled migrants and humanitarian migration can be found in most jurisdictions.²¹⁹ As Cox notes, distinctions within the different categories (as well as between them) reflect spheres of recognition: it is much easier for a highly-skilled migrant to bring his or her family into the host state, as he or she is considered to make a valuable contribution to the host society. Likewise, the family relationships considered eligible in family migration reflect the recognition relations of the sphere of love and intimate relationships embodied in the institution of the nuclear family, prioritizing spousal relations and minor dependants.

Legitimising the high standard of income requirements, the discourse of economic security, aligned with ideas of non-belonging, replaces the principle of solidarity with the norm of private responsibility. The high costs of family migration are visited on the individual, and the individual alone. Pellander refers to this selection of migrants on economic grounds as “economic gatekeeping”,²²⁰ whereas in this study the economic processes and goals of gatekeeping are perceived as moral struggles within the “feudal” system of distinct spheres of recognition. Instead of being integrated with the struggles in other recognition spheres, the boundary between what is considered public vs. individual responsibility is drawn primarily within the sphere of achievement.

Having spelt out the different foundations of the three legal fields in the focus of this study, as well as their reference points to recognition relations, it

²¹⁷ Dora Kostakopoulou, 2010. 'Matters of Control: Integration Tests, Naturalisation Reform and Probationary Citizenship in the United Kingdom,' *Journal of Ethnic and Migration Studies* 36:5 (2010), 829; see also Betty de Hart 'The End of Multiculturalism: The End of Dual Citizenship? Political and Public Debates on Dual Citizenship in The Netherlands (1980-2004),' in *Dual Citizenship in Europe: From Nationhood to Societal Integration*, edited by Thomas Faist, 77-102, Farnham: Ashgate, 2007.

²¹⁸ Garbi Schmidt, 'Law and Identity: Transnational Arranged Marriages and the Boundaries of Danishness,' *Journal of Ethnic and Migration Studies* 37, no. 2 (2011), 257.

²¹⁹ Cox 197.

²²⁰ Pellander 2016, 28.

is now time to proceed to the analysis provided in the articles concerning the techniques through which their intersections and tensions are governed.

3.2 INTERSECTING LEGALITIES: GOVERNING FAMILIES THROUGH ACCESS AND CONTROL

This section focuses on how intersectionality of subject positions both direct the regulative impact of law as well as affect recognition and access to the 'law' in its different forms. Drawing on the notion of governmentality,²²¹ the section investigates how both the individual and the population are being governed through the discourses of status and relationship, and what disciplinary and emancipatory effects are attached to the techniques of government. The analysis in this section is mainly based on Articles I and II.

Article I examines the conclusion, registration and legality of marriage amongst Finnish Muslims from three related angles: mosque discourses on and role in marriage conclusion; practices of selected individual Muslims; and the policies and work of state institutions that are concerned with registration and validity of marriages. While the main focus of the article is in the legality of Muslim marriages, rather than cross-border or transnational family relationships, transnationality in the context of the article results from the fact that most Muslims residing in Finland today either have migrated to Finland themselves or belong to the second generation, i.e. their parents have migrant histories. They have transnational family connections more often than average, or their status as migrants may limit their possibilities to access legal institutions such as marriage. Furthermore, marriage as an institution is often a site where transnational processes of kinship are manifested²²² and observations about the marriage patterns among Muslim migrants suggest that they often marry transnationally.²²³

Our findings in Article I indicate that religious legality and state legality intersect in multiple ways, and that these intersections are shaped, in turn, by other positionalities, such as those that have to do with identity documents, residence status and transnational family relationships. Firstly, all our interlocutors referred to situations where couples face difficulties in obtaining the required documents for registering marriages either because their home countries lack the institutional structures that would facilitate this process (e.g. Afghanistan because of the war and multiple movements of Afghani refugees) or because these individuals lack legal residence status in Finland, which makes it harder for them to access state institutions. In these cases,

²²¹ Michel Foucault. 'Governmentality,' in Graham Burchell, Colin Gordon, Peter Miller, and Michel Foucault. *The Foucault Effect: Studies in Governmentality: With Two Lectures By and an Interview With Michel Foucault*, 87-104, Chicago: University of Chicago Press, 1991; Harding 2014, 38; Christopher Byrne. 'Neoliberalism as an object of political analysis: an ideology, a mode of regulation or a governmentality,' *Policy & Politics* 45:3 (2017), 343-360.

²²² Katharine Charsley. 'Risk, Trust, Gender and Transnational Cousin Marriage among British Pakistanis,' *Ethnic and Racial Studies*, 30:6 (2007).

²²³ See for example Elisabeth Beck-Gernsheim. 'Transnational lives, transnational marriages: a review of the evidence from migrant communities in Europe,' *Global Networks*. 7:3 (2007), 271-288; Al-Sharmani and Ismail 2017.

religious marriages are sometimes the only form of marriages available for these people. The mosques thus served individuals who were intersectionally most disadvantaged and secured not only their right to marry but provided them with intimate and religious citizenship that they otherwise would have been effectually excluded from. Intimate citizenship, which includes the freedom and ability to live selfhood in a wide range of close relationships with respect and recognition from state and community, is shaped by the laws, policies and cultures that prescribe and regulate intimate life, in ways that are impacted by other hierarchies and social norms.²²⁴ Religious and intimate citizenships proved intertwined in this respect.

Problems relating to availability and reliability of foreign documents on personal identity and relationship status were evident also in the document material of the study. We noted in the article that the 'legality' of marriage is related to other systems within which and through which the individual becomes 'legally' recognisable. In this process, the role of the publicly reliable register system and its operations of verification of personal identity and relationships is crucial. Marriage as a question of legally recognised status is connected to the existence of individuals through statuses. Foucault's notion of governmentality is essentially about the ways in which governance is made to reach each and all, both the individual and the population.²²⁵ The register system serves to connect the individual to the population; it designates each and everyone one, and only one, calculable and verifiable place in the register, and thus in the population. The verification is necessary in order to secure that the knowledge of the individual is adequately inserted into the system. However, the goal of absolute completeness of the register system is difficult to achieve, and depending on the country to which the individual has ties, obtaining the necessary foreign documents can be either easy and relatively inexpensive, or difficult, dangerous and costly, or even practically impossible.

Another example of how state legality and religious legality are interconnected emerged in the interviews with imams and other people affiliated with mosques. While they did not consider religious-only marriages as religiously invalid, they did articulate a hierarchy of Islamic marriages, in which marriages that meet the state's requirement of registration were favoured in comparison to religious-only marriages. Some mosques did not conclude religious-only marriages at all, or they concluded religious marriages only after the couple had presented a state certificate verifying that they have no legal impediments for marriage. In our analysis, we suggested that these attitudes to the legality of marriage reflect governmentality as a form of power where the desired modified behavior is produced by self-governance instead of repressive forms of state power.²²⁶ Another important finding had to do with the mutual constitutiveness of religious and state legality and, accordingly,

²²⁴ Sasha Roseneil. 'Intimate Citizenship: A Pragmatic, Yet Radical, Proposal for a Politics of Personal Life,' *European Journal of Women's Studies* 17:1 (2010), 77-82.

²²⁵ Michel Foucault. 'Governmentality,' in Graham Burchell, Colin Gordon, Peter Miller, and Michel Foucault. *The Foucault Effect: Studies in Governmentality: With Two Lectures By and an Interview With Michel Foucault*, 87-104, Chicago: University of Chicago Press, 1991; Harding 2014, 38.

²²⁶ Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France 1975-1976* (Picador 2003); Simon Purdy, "Surveillance, Knowledge and Inequality: Understanding Power Through Foucault and Beyond" (2015) *The Hilltop Review* 8.

religious authority of the mosque. However, again mosques turned out to be differently able to access a productive and authority-increasing power relationship vis-a-vis the state, depending on the particular socio-economic profile of the people they cater to.

However, while it clearly is a disadvantage caused by intersectional positionality that some people lack the access to marriage or cannot have their marital status or other family relationships legally recognised, not everyone desires to have their marriage recognised by the state. In line with previous research,²²⁷ our interviews with individuals indicate that opting for a *nikah*, a religious-only marriage, can signal agency. It can, for example, serve as a form of halal relationship or “engagement” before the couple are officially legally married. Choices about marriage conclusion are made primarily on the basis of the needs and priorities of individuals at the time of the marriage.

The possibility to opt for a religious-only marriage may enhance agency and provide scope for choices and autonomy. Due to the various purposes that recognising and regulating relationships may serve, however, the issue of the legality of religious marriages emerged also when we looked at different ways in which the marital status of the individual became defined as problem in state legal discourses. The analysed paternity cases demonstrate that the *pater est* -assumption continues to be a powerful legal mechanism of “kin-making”.²²⁸ Furthermore, the impact of the assumption seems to be particularly pervasive in the context of transnational family relationships. This points to the fact that the merging of the discourses of relationship and status direct state legal control on transnational families in specific ways.

In the discourse of relationship, disciplinary power embedded in the legal recognition of relationships emerges as a question of the acceptability and quality of the relationship. In article I, we noted that, contrary to some other European countries, religious-only marriages or divorces have not been framed as a public concern or debated in Finnish media or politics. Such public concern might, however, be emerging. In the liberal discourse of freedom of choice and rights to privacy, the regulative pressure is often articulated in terms of women’s human rights.

In Article II, human rights discourse dwelling on culture, religion and family law and claims made to universality within these debates were analysed in the framework of the CEDAW convention. Article II argues that by effectively promoting the non-recognition of religious family norms, the CEDAW Committee risks presenting gender equality as inherently linked to secularism. The paradigm of secularism is connected not only to the institutional design or ideas about what counts as law or legally relevant but carries implications also to the theorizing of both gender and religion.²²⁹

²²⁷ Annelies Moors, ‘Unregistered Islamic Marriages: Anxieties About Sexuality and Islam in the Netherlands’ in Maurits Berger (ed.) *The Application of Sharia in the West*, 141-164, Leiden: Leiden University Press, 2013; Anika Liversage, ‘Secrets and Lies: When Ethnic Minority Youth Have a Nikah’ in Prakash Shah with Marie-Claire Foblets and Mathias Rohe (eds.) *Family, Religion and Law: Cultural Encounters*, 171-180, Farnham and Burlington: Ashgate, 2014.

²²⁸ Smart, ‘Making Kin’.

²²⁹ Post-secular feminists such as Braidotti and Mahmood have sought to challenge the liberal notions of secularism, which tend to frame secularism as a normative ideal that would automatically deliver gender justice. See Rosi Braidotti. ‘In Spite of the Times. The

Feminist legal analyses have sometimes failed to fully understand the significance of feminist theologies, which seek to contest religious patriarchies by active participation and reinterpretation of the tradition.²³⁰ This can take place either within religious scholarship or by individuals. For instance, writing about Muslim couples in Finland, Al-Sharmani traces mixed approaches to the issue of marriage between state and religious institutions.²³¹ Arguing for a multidimensional understanding of religious transformations of Muslim immigrants in Europe, she highlights the ways in which “these transformations are also part of an internal process of modern Muslims engaging with their discursive religious tradition with the aim of reinterpreting and reclaiming the core Islamic values that would guide their daily lives.” The renegotiations of cultural and religious norms have offered women means to resist practices they experience as harmful, such as polygynous marriages, which first wives often find offending.²³²

Two examples of financial consequences of marriage are examined in Article II, that of the distribution of matrimonial assets in Finland and that of the mahr provisions and their legal recognition. Even though these examples are very different they suggest the importance of understanding law in context and law in every day practices. In the Finnish case, it is highlighted that there are various procedural thresholds as to whether couples can actually access the law in case of dispute. In the case of mahr, the point is made that it is the varied ways in which mahr is part of marriage practices and the diverse ways in which it is used by women that constitute its real and layered meanings, not the reductionist notion that it objectifies women. As Bano notes, Muslim engagement with sharia in matters of family law is a complex process that cannot be understood in simple oppositional terms (e.g. sharia v. state law, Muslim v. non-Muslims, or insiders of communities v. outsiders), or through rethinking legal rights and obligations in order to better accommodate religious family law. Instead she emphasised the urgency of understanding the specific ways in which religious norms and legal orders emerge in the local context.²³³ Cowan, Dembour and Wilson too point out that no “single model of the relationship between culture and rights, or between minority and

Post-Secular Turn in Feminism,’ *Theory, Culture, Society* 25:6 (2008), 1-24; Saba Mahmood. *Religious Difference in a Secular Age: A Minority Report*. Princeton, NJ: Princeton University Press, 2015.

²³⁰ See for example *Men in Charge? Rethinking Authority in Muslim Legal Tradition*, edited by Ziba Mir-Hosseini, Mulki Al-Sharmani and Jana Rumminger. London: Oneworld Publications, 2015.

²³¹ Mulki Al-Sharmani, 'Striving Against the 'Nafs', *Journal of Religion in Europe* 8:1 (2015), 101-120.

²³² Al-Sharmani, Mulki. 'Divorce among Transnational Finnish Somalis: Gender, Religion, and Agency,' *Gender and Religion* 7:1 (2017), 210-227.

²³³ Bano, Samia. 2008. “In Pursuit of Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the ‘Sharia Debate’ in Britain,” *Ecclesiastical Law Journal* 10:3, 283-309. Bano’s contribution was a response to the debate launched by the statements of Archbishop of Canterbury Rowan Williams and the Lord Chief Justice Nicholas Phillips who argued for a pluralistic stance towards religion and its accommodation with state law, and suggested that Islamic identities need not pose a threat on the human rights of Muslim women or children, or the wider society. The debate has become a canonical starting point of analyses focusing on religious diversity and family law, especially the presence of Islamic family law in Western societies.

majority rights, is going to be adequate for all cases, either normatively or analytically”.²³⁴

Focusing on the tension between inserting a regulatory rule of equality and yet staying sensitive to the variety of experiences, Article II examines the epistemic problems attached to the concept of equality. Following *Fredman*, it argues that the concept of equality underpinning CEDAW should be understood as substantive and multidimensional. It thus prescribes an intersectional approach to equality, which refuses to view equality merely as an institutional norm. This concept of substantive equality is four-dimensional: Firstly, in its redistributive dimension, substantive equality aims to remedy disadvantage through redressing it. Secondly, in the recognition dimension, substantive equality seeks to address social stigmas and stereotypes and to promote respect and dignity. As Fredman notes, the recognition dimension of equality ensures that equality may not be fulfilled by treating everyone equally badly.²³⁵ Recognition alone, however, is not sufficient, as it may lead to displacement of distributive policies and reification of static group identities.²³⁶ The third dimension of substantive equality is the transformative dimension, which seeks to change the underlying cultural codes normalising discriminative practices and traditions. The fourth dimension stresses the importance participation, i.e. that those affected by the policies can have their voices heard.²³⁷ Hence, substantive equality requires that the diversity in women’s voices be taken into account.

The point made in Article II is that gender equality should be approached within frameworks that, in dynamic and interconnected ways, ground the question of gender equality and social justice in multiple systems of meanings and norms, such as religious traditions, state law, international human rights and most of all the lived realities of people. In other words, equality should be universal on the one hand, but also culturally meaningful on the other hand. The notion of substantive equality underlying CEDAW also suggests that it is possible to adopt a nuanced approach that recognises the linkages between the private and the public and the importance of the contexts where hindering or enabling factors to equality take shape.

3.3 INTERSECTING LEGAL FIELDS: TECHNIQUES OF GOVERNING REGIME COLLISIONS

It was noted earlier that the regulation and recognition of family life in law is based on two mutually constitutive, yet distinct, discourses: the discourse of status and the discourse of relationship. The fact that one may always choose to refer to either one was argued to cause indeterminacy, as two opposite

²³⁴ Jane K. Cowan, Marie-Benedicte Dembour and Richard A. Wilson. ‘Introduction,’ in Jane K. Cowan, Marie-Benedicte Dembour and Richard A. Wilson (eds.), *Culture and Rights: Anthropological Perspectives*, 1-26. Cambridge: Cambridge University Press 2001.

²³⁵ Sandra Fredman. ‘Engendering Socio-Economic Rights,’ in Anne Hellum and Henrietta Aasen (eds.) *Women’s Human Rights: CEDAW in International, Regional and National Law*, 217-241. Cambridge: Cambridge University Press, 2013.

²³⁶ *Ibid.* 227-228.

²³⁷ *Ibid.*

outcomes can be argued for with equal validity, depending on whether reference is made to the discourse on status or the discourse of relationship. This section focuses on means of controlling or governing the tension created by the intersection of two legal fields, private international law and migration law. Both discourses enable manoeuvres that allow for the “stronger” regime to prevail and force the other to adjust to its goals.

When the decision is made within the discourse of relationship, the technique of manipulation is the limitation or restriction of legal consequences based on doubts about the genuineness of the relationship. This technique has been referred to as “moral gatekeeping”.²³⁸ However, when the decision is made within the discourse of status, the technique of manipulation is the analytical dismantling of constitutive status norms, for example, consent and coercion, and their application in what could be described a contextual vacuum, i.e. isolated from the context in which the norm typically operates.

The analytical technique which enables these manoeuvres is dividing the issue at hand into preliminary and main issues. Characteristic for these cases is that any decision regarding the preliminary issue remains limited to that situation, the decision is binding on neither on the decision-maker in other cases or any other authorities.²³⁹ The recognition of a marriage, for example, will be assessed independently by each competent authority in each specific context.

As demonstrated above, European migration laws include various mechanisms through which individuals are located in hierarchies of entitlement, for example based on the duration of the stay or the reason for the entry.²⁴⁰ These reflect the degree to which the individual is considered as belonging in society, as well as ideas constitutive of the concept of community, which underpins migration law. One such constitutive element is the notion of territory and territorial presence. Territoriality is based on the idea that the mere presence of an individual in the territory of a state raises rights that to some extent revoke the exclusiveness of citizenship.²⁴¹ Ethical territoriality, which “treats membership as a matter of social fact rather than as legal formality”,²⁴² is accepted in most legal systems, albeit to varying degrees. Constitutions, for example, often guarantee fundamental rights to “everyone” instead of only “citizens”.

²³⁸ Wray 2006.

²³⁹ Jänterä-Jareborg, Maarit. ‘The Incidental Question of Private International Law, Formalised Same-Sex Relationships and Muslim Marriages,’ in Patrik Lindskoug, Ulf Maunsbach and Göran Millqvist (eds.) *Essays in Honour of Michael Bogdan*, Lund: Juristförlaget, 2013, 149-164., 151. However, it needs to be pointed out that this study does not examine the question of the preliminary issue, i.e. the incidental question properly defined, as this is a distinct phenomenon in the doctrine of private international law. The basic logic, however, is similar to the problem described here.

²⁴⁰ The European Court of Human Rights, for example, has developed a notion of a “settled migrant”, who has legally resided in the country for a sufficient period of time and whose interests and connections to the country have evolved so that they must be taken into account as part of proportionality analysis.

²⁴¹ Linda Bosniak. *The Citizen and the Alien: Dilemmas of Contemporary Membership*. Princeton, N.J.: Princeton University Press, 2006.

²⁴² Linda Bosniak. ‘Ethical Territoriality and the Rights of Immigrants,’ *Amsterdam Law Forum* 1:1 (2008) 3.

Another constitutive element in the idea of community is that of the family. Belonging to a family mediates belonging to community – a state or a broader supranational community such as the EU. However, both family and territory prescribe a border, which is not merely marginal to the concept but central to how these concepts operate in mediating exclusion and inclusion. Article IV examines how the construction of the family as a “fundamental group unit of society”, formed by spouses and their children, is paradigmatic in that the exclusive understanding of relationships and belonging is both the justification of the legal rules that define the family and the result of those rules.

Both Articles IV and V examine the recognition of family relationships in the context of migration law. In this context, what is at stake is the claim of the individual to a legal right to reside in a state together with his or her family members. As states are generally regarded as having a strong interest and sovereign right to control entry and residence of non-citizens, the question of recognition of the family relationship emerges as a preliminary question after which it still remains to be decided whether the relationship actually amounts to family life. In other words, in the context of migration the existence of family life is evaluated from the perspective of the right to respect for private and family life and the question of status emerges as a preliminary issue, which alone does not determine whether family life *de facto* exists between individuals. The technique of dividing the legal issue at hand to a preliminary issue and main issue enables the legal doctrine to manage the tension between competing doctrines.

Article IV addresses the logic of recognition of family relationships in migration law by examining what can be called the “nuclear family paradigm”, i.e. the limits of the concept of family which defines which relationships constitute family as a prerequisite for the recognition of family life. The article notes that the concept of the family is constitutive of family life in that in some cases the decisions about which relationships of the individual family members define the borders of the family as a unit, while in other cases the quality of the relationship is decisive. The focus on the objectively defined status thus occurs alternately with a focus on the conduct of the family members, which offers an inquiry into the quality of the relationship: whether it amounts to genuine family life or effective family ties.

The law may recognise the marriage formally but deny it any legal effect. Marriages of convenience are rejected as not amounting to family life and are thus refused the legal implications attached to ‘proper’ or ‘real’ marriages. When the immigration regime specifically carries out the work of boundary maintaining, it also undertakes several operations of “moral gatekeeping”, i.e. decides what should be considered eligible and morally worthy, what is the moral essence of, for example, a relationship.²⁴³ What makes a relationship “real” is connected to what kinds of relationships deserve protection. The moral quality of the relationship, then, is one factor in discretion about whether the relationship is *genuine*. These processes of the immigration regime thus interlink with other struggles prevailing in society, struggles for recognition of other types of families and other ways of life as well. A crucial point to notice, however, is that as long as rights of entry are made dependent

²⁴³ Pellander 2016, 50.

on the existence of family life – implying that something in the quality of the relationship, rather than its form, is the subject of recognition – the process is necessarily inscribed with an evaluation of both the moral and material conditions that make a relationship genuine.

Immigration control has been argued to give preference to individuals whose marriages comply with majority values.²⁴⁴ For example, analysing the regulation of marriage migration by the British state in the period of 1962 to 2010, Wray argued that British legal rules and practices created an informal and unarticulated hierarchy of acceptable marriages.²⁴⁵ Similarly to *Wray*, in their study on the Finnish court decisions on marriage migration *Leinonen* and *Pellander* noted that transnational relations as well as need for care could be interpreted as speaking against the genuineness of the marriage. According to the authors, the marital relationship was expected by the authorities to be the most central part of family life and applicants' references to other ties to Finland, such as other family members or relatives living in Finland, could be interpreted as weakening the credibility of the marriage.²⁴⁶

The tensions resulting from intersecting legal fields can also be manipulated within the discourse of status, as Article V demonstrates by means of close reading of a case from the Swedish Migration Court of Appeal. In this case a 16-year-old Iraqi woman, a mother of a one-year-old child, applied for a residence permit on the grounds that her father resided in Sweden. Her application was rejected as she was considered married, and thus not eligible for family reunification as an “unmarried minor child” and family member of her father's family. While the applicant accepted that her marriage was valid according to Iraqi law, she argued, however, that the marriage should not be recognised in Sweden as it was in fact, both a forced marriage and child marriage. She had not consented to the marriage, which was concluded when she was only 15 years old. According to the applicant, recognising her marriage as valid would be against the fundamental values of Swedish society and the Swedish *ordre public*. The court applied the norms provided in the Act on Certain International Legal Relationships in respect of Marriage and Guardianship (Lag om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap, 1904:26, hereafter IÄL), which govern the recognition of foreign marriages. It concluded that, for the purposes of

²⁴⁴ Helena Wray, 'An Ideal Husband? Marriages of Convenience, Moral Gate-Keeping and Immigration to the UK,' *European Journal of Migration and Law* 8, no. 3-4 (2006), 303; Saskia Bonjour and Betty de Hart, 'A Proper Wife, a Proper Marriage: Constructions of 'us' and 'them' in Dutch Family Migration Policy,' *European Journal of Women's Studies* 20:1 (2013), 61; de Hart 2007, 154; Betty de Hart, 'Introduction: The Marriage of Convenience in European Immigration Law,' *European Journal of Migration & Law* 8:3-4 (2006), 251.

²⁴⁵ Wray 2011.

²⁴⁶ Johanna Leinonen and Saara Pellander. 'Court decisions over marriage migration in Finland: a problem with transnational family ties,' *Journal of Ethnic and Migration Studies* 40:9 (2014), 1488-1506. This could also be seen as one reflection of the so-called primary or sole purpose rationale, according to which obtaining the residence permit should not be the sole or principal aim of the marriage. This rationality has entered legal documents such as the Family Reunification Directive as the principle that the residence permit should not be the sole purpose of the marriage, in compliance with the human rights and legitimacy requirements. However, as de Hart notes, whether the phrasing in the Directive should be “sole” or “sole and principle” was debated during the drafting of the Directive. See de Hart 2006.

family reunification, the recognition of the marriage was not to be rejected on *ordre public* grounds.

Had the registration of the applicant's marriage appeared as a main issue, for example in the context of the registration of her personal information in the population register, the first observation we can make is that her own opinion on the matter would most likely have mattered; had she herself suggested that the marriage should not be recognised it probably would not have been registered. The marriage of the applicant most likely would not have been recognised had the issue emerged as the main issue, given that she herself would have opposed the recognition.

Had the question of recognition of the marriage emerged as preliminary issue, for example, in the context of determining the paternity of her child, two goals would have been essential: on the one hand, the law seeks to promote the biological truth about the relationship between the man and the child, and on the other hand, to protect social ties between the child and the man. As securing the rights of the child are central in the paternity proceedings, the marriage could well be treated as recognisable in the sense of creating a *pater est* -assumption through which the husband would be considered the father of the child automatically. However, the recognition of the marriage depends on the circumstances of the case, i.e. whether it was likely that the husband was the biological father of the child and whether there were any social ties between him and child.²⁴⁷ The research material collected for Article I shows that in some cases child marriages have not been recognised in the context of paternity proceedings and the husband has not been considered the father of the child.

Furthermore, the norms of private international law can be used even against recognising minors' marriages, as happened for example in 2015 in the European Court of Human Rights. In the case of *R.H. and Z.H. v. Switzerland* the Court referred to the doctrine of *ordre public* in refusing to recognise the marriage of two Afghan cousins, who had contracted a religious marriage in Iran at the ages of 14 and 18, as a legitimate union from which family life could arise.²⁴⁸

The technique of analytically dividing the legal problem at hand into a preliminary issue and main issue thus serves to aid contextualisation, and the context is decisive as to how the issue of recognition is to be approached as well as to what precisely is the function that *ordre public* discretion is reckoned to serve. In the context of migration law, however, identifying the context of recognition is a puzzle. It matters a great deal whether we are making the decision about the recognition of the marriage in the light of the rules that, in the first place, require that family reunification has to be possible at least to

²⁴⁷ Writing about the problem of preliminary issues (i.e. incidental questions) in Swedish private international law, Jänträ-Jareborg argues in favour of a nuanced approach to the interests at stake regarding preliminary issues. This also points to the fact that private international law is increasingly conscious of the need to offer protection and respect the interests of the parties. Jänträ-Jareborg, Maarit. 'The Incidental Question of Private International Law, Formalised Same-Sex Relationships and Muslim Marriages,' in Patrik Lindskoug, Ulf Maunsbach and Göran Millqvist (eds.) *Essays in Honour of Michael Bogdan*, Lund: Juristförlaget, 2013, 149-164., 159.

²⁴⁸ European Court of Human Rights, the case of *R.H. and Z.H. v. Switzerland*, 8 December 2015.

some extent, including those fundamental rights that require that states respect family life and rights of the child; or whether we perceive the context from the point of the state's right to control immigration, in which the limits of the rights granted are decisive, including the narrow interpretation of the concept of the family. In the first case, the context within which the issue of recognition should be assessed is the context of family-related human rights and relationality.²⁴⁹ Seeing these aspects as decisive would mean citing the recognition issue as part of the rights-oriented discussion on child marriages in Europe and emphasising the consequences of the recognition for the applicant herself – that recognising the marriage would mean that oppression against her was legitimised and, furthermore, would isolate her from life securing relations of the family, in which she could receive care and protection in her obviously vulnerable situation.

In the second case, however, the decisive context would be that of immigration control as an area of policy government in which the starting point would be the sovereignty of the state and its broad powers to limit the entry of non-citizens in its territory and political community. The same binary pair of alternatives emerges regardless of whether the problem is located in the European human rights framework or in EU law. In EU law, the question would be which aspect is foundational, the essence of the right to family reunification provided by the Council Directive 2003/86/EC or the limits of the personal scope of the Directive deriving from the strict definition of the family provided in Article 4 of the Directive.

The problem is hardly a new one. Hurri, for example, describes this problem of *ordre public* and the rule of law as the indeterminacy of the “foundations of the European individual”, which complicated the “movement of European individuals from the speciality of immigration law to the normality of public law”.²⁵⁰ Drawing on the early case law of the Community, he picks up on the constitutional relevance of the different uses of the *ordre public* doctrine, and the three different operations that can be carried out with it. In private international law, *ordre public* is a legal notion, which serves to secure that exemptions can be made in order to protect “elementary values enshrined in the foundations of the legal system, values that simply may not be compromised”.²⁵¹ But *ordre public* may also be invoked as a governmental notion to justify necessary exemptions from legal rules, for example, limiting individual rights to secure other, more important rights or the general good. However, in immigration control, the field that migration law is most closely connected to, *ordre public* is not the exemption but the very foundation of the law. In this field, *ordre public* is the security regime maintaining the border and thus constitutive of all other operations within the law on migration. These dynamics stand out in the close reading of the cases included in this study.

²⁴⁹ For an account of relational subjectivity in human rights law, which does not necessarily follow preconceived structures of kinship, see Linda Hart, 'Relational Subjects: Family Relations, Law and Gender in the European Court of Human Rights' (Faculty of Social Sciences, University of Helsinki), 2016. Hart identified a historical shift from emphasising status such as marriage towards recognising identity such as sexual orientation in the case law of the European Court of Human Rights. This shift, according to Hart, enables further recognition of relations and relational subjectivity.

²⁵⁰ Hurri 2014, *Birth of the European Individual*, 139.

²⁵¹ *Ibid.*, 138.

It was noted in Article V that the difficulty of characterising cases similar to MIG 2012:4 is that all of the legal fields involved – migration law, private international law, and human rights law – construct personhood and belonging differently, drawing the boundaries of inclusion and exclusion disparately. These constructions are related to the recognition relations perceived as foundational for the issue in question. The structure of preliminary issue and doctrines of *ordre public* enable perspectivism and flexible coupling of rules of private international law as part of the material question and context at hand. In this sense, the Savignian neutrality of private international law means neutrality towards the broad range of possible contexts in which the legal question at hand might be situated. Hence, this neutrality of the law is not neutrality of justice but rather, again to borrow the vocabulary used by *Hurri*, a quality of law which enables it to become submitted to the interests and policy goals of rival regimes of government.

3.4 INTERSECTIONAL SUBJECTIVITIES: THE PARADOX OF LIBERAL RIGHTS AND THE PRODUCTION OF “ALIEN” FAMILIES

So far the starting point is fairly simple. Migration law is based on distinguishable status groups, in which legal subjectivity is different for different individuals based on their status, to begin with whether they are insiders or outsiders and continuing to more subtle forms of distinctions. However, the legality of migration law frequently runs into conflict with the legality of modern legal relations writ large, i.e. legality based on equal rights, in which legal subjectivity is derived from the idea of universally recognisable personhood.²⁵² In this section, the focus is on the techniques and realignments through which interlegality is produced in legal argumentation with reference to liberal rights, and how the very reference to rights serves to legitimize the status-based system, which initially was conceived as its opposite.

I have argued above that for a large number of individuals and families, restrictions to the right to family reunification are set at a standard where this is the case even when a right to family reunification exists in theory. For example, in EU law the Family Reunification Directive provides the states with the right to set income requirements to sponsors so that family members entering the Member State are prevented from using social assistance. The standard of the income requirements, while it has to correspond to the level of ‘social assistance’, is determined on the national level.²⁵³ In the case of

²⁵² Spijkerboer describes these collisions by referring to the tension between communitarianism and cosmopolitanism, which together with the indeterminacy argument as developed by Koskenniemi cause the structural instability of the approach adopted by the European Court of Human Rights in its case law on family migration. Thomas Spijkerboer. ‘Structural instability: Strasbourg case law on children’s family reunion,’ *European Journal of Migration and Law* 11:3 (2009), 271-293, 280-281.

²⁵³ *Chakroun* C-578/08, 4 March 2010, para 50-51. According to the opinion of the Advocate General Sharpston, the Directive does not authorise Member States to require resources greater than those necessary to maintain the whole family without recourse to social assistance (para 59 of the AG’s opinion).

Chakroun (C-578/08), the Commission stated as its opinion that the determining factor is whether the person concerned himself has sufficient resources to meet his basic needs without recourse to social assistance; and the Directive should not be interpreted as allowing Member States to total up all the social benefits which the person concerned could claim in order to fix the threshold of required income on that basis.²⁵⁴ In my view, however, the matter remains open as to what actually are the limits of how high the standard of required income can be set, as long as the Member State can make the point that it is somehow related to the minimum standard of social assistance, and as long as everyone in the status category of ‘third country national’ are treated the same.²⁵⁵

Furthermore, even though Member States may indicate a certain sum as a reference amount, the applications must be investigated on individual basis even when they do not meet that reference amount.²⁵⁶ CJEU has held that, since authorisation of family reunification is the general rule, the restrictions to this right must be interpreted strictly and the objectives and effectiveness of the directive must not be jeopardized.²⁵⁷ In addition, the Directive cannot be applied in such a manner that its application would disregard the fundamental rights set in the Charter. I argue, however, that the high income requirements and the structure of argument in which fundamental rights are presented as last resort, combined with a procedure that rests upon supreme instances’ requests for preliminary rulings of CJEU, in fact amount to making the right to family reunification an exception rather than the rule for large numbers of families.

Placing the right of the state to restrict migration as the starting point of analysis of merits of an individual case – the “Strasbourg reversal” as Dembour calls it – means that the possibility of a non-citizen claiming a right of entry or stay is an exception based on circumstances and proportionality assessment rather than a right.²⁵⁸ Previous research has demonstrated that at this stage of discretion, when individual merits are evaluated in order to determine whether they are sufficiently exceptional, the balancing is heavily influenced by stereotypes and assumptions based on gender, ethnicity or culture.²⁵⁹

²⁵⁴ *Chakroun* C-578/08, para 36.

²⁵⁵ This of course also means that the structure of the social security system matters a great deal, e.g. organising the social security through universal benefits such as basic income or financial support specific needs or services versus organising the social security system through mechanisms such as last-resource financial assistance. The correspondence of the required income and ‘social assistance’ may mean that the better the standard is generally for citizens, the more detrimental and difficult to fulfil it is for (some) transnational families, especially families with children and families who can only present documentation of the income of one adult. Furthermore, in the case of *Khachab* (C-558/14, 21 April 2016), the Court stated that the officials can make a prospective assessment of the likelihood of the sponsor retaining, or failing to retain, the necessary stable and regular resources. Such assessment can be based on the income pattern of the sponsor during the 6 months preceding the application.

²⁵⁶ *Chakroun* C-578-08, para 48.

²⁵⁷ See for example: *O and Others*, C-356/11 and C-357/11, para 74; *Parliament v Council*, C-540/03, para 69.

²⁵⁸ Dembour 2015, Chapter 4.

²⁵⁹ See for example Betty de Hart, ‘The Right to Domicile of Women with a Migrant Partner in European Immigration Law,’ in *Women and Immigration Law*, Sarah van Walsum and Thomas Spijkerboer (eds.). Abingdon: Routledge-Cavendish, 2007; Helena Wray, *Regulating Marriage Migration in the UK: A Stranger in the Home*. Farnham: Ashgate, 2011.

Article VI studies the right of the child to have its best interests considered in all decision-making and argues that when applied in the context of migration law, the best interests test becomes a paradox. The close reading of the case²⁶⁰ provided in Article VI examines how intersectionality can become part of the very power dynamics it seeks to redress. It is important to acknowledge that subjecting intersectional approaches to the disciplinary conventions of the field carries the risk of reifying existing forms of power and exclusion. *Grabham* uses the term *disciplinary identity construction* in order to address the disciplining aspects of intersectionality discourse, which risks becoming the “product of the regime in which it operates and which it was conceived to contest”.²⁶¹ The analysis in Article VI shows that the rights of the child and the case-by-case approach of the best interests doctrine remain insufficient in safeguarding equal citizenship for children in the context of immigration law. Rather than a concept seeking to maximise the rights of the child, in the immigration context the norm of best interests becomes a tool for maximising the scope of legitimate interference with the family life of the child. The method of reading the case with an intersectional approach renders visible what discursively happens in the decision, i.e. that through the best interests evaluation the court constructs the identity of the child in ways that undermine the belonging of the child in Finnish society, even when the child was formally a Finnish citizen, born and raised in Finland. “Recognition” of identity and relational reality of the child was, in fact, merely a construction made by the court – and not an innocent one. By constructing the identity of the child the court specifically sought to produce “aliennes” into the child and the family.

During the 1970s, 1980s and 1990s most family laws were reformed in order to abolish legal norms that treated children differently on the basis of origin and family background, for example, based on whether they were born in or out of wedlock. Similarly, reforms in custody laws served to introduce new child-centred norms according to which the primary consideration in disputes over children was to be what was in the best interests of the child. This shift in recognition of citizenship of the child and the rights of the child could be regarded as one of the key emancipatory struggles for recognition in recent decades.

The transformative idea behind the right of the child to have her best interests considered as a primary concern in all actions affecting children (also provided in Article 3 of the 1989 Convention on the Rights of Child) is to ensure that the circumstances of the individual child are accorded due respect in decision-making. In Article VI, it was argued that that norm is capable of accommodating intersectionality, as it aims to make use of intersectional knowledge on case-by-case basis in order to change how law affects marginalised groups, in this case children. The idea is that the judges may balance the prevailing social injustice brought about by the vulnerability of children by using the best interests test, as far as is possible within the law.

²⁶⁰ Finnish Supreme Administrative Court, KHO:2013:97, 22 May 2013, which included the preliminary ruling of the CJEU in the joined cases of *O. and S. v. Maahanmuuttovirasto* (C-356/11) and *Maahanmuuttovirasto v. L.* (C-357), 6 December 2012.

²⁶¹ Emily Grabham, ‘Intersectionality: Traumatic impressions,’ in *Intersectionality and Beyond: Law, pPower and the Politics of Location* (New York: Routledge-Cavendish, 2009), 199.

However, this means that the legal context in which the assessment is conducted is decisive as to how the principle plays out.

In principle, the guidelines concerning the best interests-evaluation apply equally to immigrant family reunification, and it was argued in Article VI that courts clearly fail to identify the relevant guidelines for the best interests-test and apply the principle incorrectly. More importantly, however, Article VI argued that the rights of the child in immigration control seem to amount to a paradox, even when applied ‘correctly’. According to Honneth, “a contradiction is paradoxical when, precisely through the attempt to realize such an intention, the probability of realizing it is decreased.”²⁶² In the context of immigration control, the rights of the child end up signalling the legitimate scope of no rights rather than securing substantive rights. In the case, by evaluating the ties of the children to Finland and Algeria in a rather impressionistic manner the court was able to construct identities for the children as non-belonging (non-integrated) to Finland but with good chances of integrating to Algeria (belonging implied by their “culture”), despite the facts that they were born in Finland, had lived their whole lives in Finland and one of them was a Finnish citizen.²⁶³

As was noted above, income requirements that seek to exclude migrant families from welfare distribution are generally considered legitimate, and these requirements are set remarkably high. As a result, the questions of children’s family rights are frequently invoked as the basis for claims exempting the family from the maintenance requirement. The structure according to which discretion in these cases proceeds thus approaches the best interests of the child as an exception to the main rule. It was noted in Article VI that the scope of the best interests assessment is often set quite narrowly so that the best interests of the child become relevant only in highly exceptional circumstances. For instance, according to the Finnish interpretation, only severe specific reasons, such as a life-threatening medical condition, may result in an exemption to the maintenance requirement. In migration cases, the best interests test serves a purpose of testing how badly a child of an alien may be treated. Article VI demonstrated how the best interests-evaluation emerged as underpinned by influential understandings of belonging and the identity of the children, thus effectively operating as a means of constructing the child’s identity as foreign and non-belonging in relation to Finnish society. Despite being formally included in the liberal realm of recognition relations, the child was cast outside as non-belonging, and this was done by using techniques of rights: the proportionality evaluation and the best interests-evaluation.²⁶⁴

Furthermore, the case raised the issue of recognition of family relationships in a reconstituted family. In the case at issue were the family rights of two children who had the same mother but different fathers. The only way to realize the rights of both children to both parents would have been to

²⁶² Honneth 2012, 176.

²⁶³ See also de Hart, 2007, at 148 and 2009, 241.

²⁶⁴ The paradoxical outcomes of rights relating to the relationship between the child and parent in the context of migration law have been noted in previous research, see for example de Hart 2007, 151.

permit everyone residence in Finland.²⁶⁵ However, by turning the recognition of the relationship into a matter of the direct relationship of dependency, divided into legal, financial and emotional forms of dependency, which were then to be evaluated analytically and individually for each member of the family in relation to another (one) member of the family, the Court was able to dismantle the relations of dependency in the family. It was not required to recognise the family relationships as bringing about multiple and simultaneous forms of dependency, which configurational approaches to families emphasise.²⁶⁶ Operating clearly within a discourse of relationship, the Court contested the truth of the relationship by dividing relationality into separate forms of dependency. This analytical dismantling the relationships within a family enabled it to strip the family of genuine familyhood and interdependence.

The challenges relating to the recognition of children's relationship rights under EU law are burning issues of the day and CJEU has recently delivered several important decisions related to the issue. While the decisions in cases *CS (C-304/14)*²⁶⁷ and *Rendón Marín (C-165/14)*²⁶⁸ concerned the effect of the criminal record of a third-country resident parent on his or her derived residence right, the new case of *Chavez-Vilchez and others (C-133/15)*²⁶⁹, is more relevant to the problem described above and in Article VI. The case concerned eight third-country resident parents who argued they were primary carers of their EU (Dutch) citizen children, and thus entitled to residence even though they had applied for social assistance.²⁷⁰ The eight applicants were each mothers of one or more Dutch citizen children. The fathers of these children were Dutch nationals and but the children lived mainly with their mothers. The Dutch government argued that they could not automatically be considered primary carers if the other parent could take care of the children.

According to CJEU, the issue of direct dependency was of particular importance in deciding whether there was a derived right of residence. This time however, the court explicitly mentioned the best interests of the child. In reaching a conclusion as to whether there is such a relationship of dependency that the child would be compelled to leave the territory of the European Union if a right of residence were refused to that third-country national:

account must be taken, in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and

²⁶⁵ De Hart has pointed out that it seems that courts (in her analysis, the European Court of Human Rights) evaluate the importance of the presence of the parent to the child differently, depending on whether the child should be separated from the father or the mother. De Hart, 2009, 245.

²⁶⁶ Yet another strategy to manipulate the border inherent in the concept of family is to divide families into deserving and non-deserving based on whether they were established before or after migration, i.e. whether the residence decision concerns family formation or family reunification. See De Hart, 2009, 242.

²⁶⁷ *CS C-304/14*, 13 September 2016.

²⁶⁸ *Rendón Marín C-165/14*, 13 September 2016.

²⁶⁹ *Chavez-Vilchez and others (C-133/15)*, 10 May 2017.

²⁷⁰ This right was established in the case of *Ruiz Zambrano, C-34/09*, 8 March 2011.

to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium.²⁷¹

However, the evaluation of the best interests of the child is to be undertaken by the competent authorities of the Member State, on the basis of the evidence provided by the third-country national, the necessary enquiries in order to be able to assess, in the light of all the specific circumstances, whether a refusal would have such consequences. It remains to be seen, how the best interests consideration will actually be undertaken by the authorities in these kind of cases.

²⁷¹ *Chavez-Vilchez and others* (C-133/15), 10 May 2017, para 71.

4 CONCLUSIONS: RETHINKING RECOGNITION, BELONGING AND TRANSNATIONAL FAMILIES

The first research question presented in this study concerned the legality of transnational family relationships. It was asked how transnational family relationships come to assume legal character; for what purposes legality is invoked and what meanings it bears. Taken as a whole, the study demonstrated the complex nature of legality. In general, at all sites of the study, legality was constructed through a practical discourse and in relation to a specific goal (or many goals). Legality was thus constructed in a process of interaction and meaning-making and, consequently, drew on multiple sources.

At the first site of the study, in the interviews with individuals and religious actors we learned that legalities of state law and religious law were intertwined in productive ways in the case of Muslim marriage practices in Finland. Both religious actors and individuals expressed ideas about marriage as a status and as a relationship, and both of these registers, that of status and that of relationship, were drawn upon in constructing legality. The tendency of the religious actors to prioritise registered and officially recognisable marriages indicates that religious and state legalities are connected to form a unitary concept of legal status and to avoid fragmentation within this discourse of legitimate status. However, the interlocutors recognised the needs arising from everyday life and individuals' various positionalities and relational realities, and mostly they accepted that religious-only marriages could be concluded for the purposes of entering religiously legitimate relationships that for whatever reason could not be registered.

The multiple sources of legality and the ways they can be used with reference to either marriage as a status or marriage as an acceptable relationship seems to provide for two things. Firstly, it allows for religious authority to draw on state authority and vice versa. This way the power and authority embedded in the idea of legality becomes productive and mutually constitutive. Secondly, the multiple sources of legality allow for creative discontinuities between legalities. For example, the unitariness of legality in the discourse of status leaves room to negotiate the legality of the relationship as religious acceptability. If these two spheres of legality, that of state and that of religion, were completely disconnected, they would both be weaker in terms of authority and have less control over how people arrange their family lives.

The diversity within the discourses of legality was also visible on the state institutional side. Hence, it is not merely something that exists within or results from the legal reality and mundane practices, in which legal norms are interpreted and enforced in everyday life in less than perfect ways. Complexity, rather, is a defining feature of 'legality' even in the normative discourses of state law itself. In the case of Muslim marriage practices in Finland it was noted that the intersectional positionality of individuals show in the ways in which some Muslim marriages become a focus of legal control. They receive legal

attention and become problematised not directly as religious marriages but as a result of the complexity of marriage regulation and its relation to registration and borders maintaining functions of the registry. Our examination of the paternity cases in Article I, in particular, indicated that paternity proceedings are a site where the discourses of civil and religious marriages become connected through the question of legitimate and recognisable descent. While the liberalisation and individualisation of family law has meant a detachment of the legal position of the child from the status of its parents' relationship, the marital status of the parents still serves to categorise relationships, to legitimise and officiate them and to direct the official gaze towards suspect forms of relationships.

At the second site of the study, that of CEDAW and the discourse of women's rights in relation to culture, traditions and religion, legality emerged as a question of what the norm of equality should be understood to entail for it to be both universal in its normative dimension and culturally meaningful and connected to lived realities of individual women with diverse identities. Discourses within the framework of CEDAW seemed to be underpinned by secular-normative thinking, according to which culture and religion, generally speaking, can only be obstacles to equality. However, the concept of equality underlying CEDAW, namely the concept of substantive equality, renders equality as a legal principle compatible with diverse identities and lived experiences. It is a concept that can be used as a 'sensitivity' for tracing not only pre-existing categories of discrimination and disadvantage but also intersectional experiences that might otherwise be invisible. Hence, while the concept of equality can be used to discipline, a successful use of the concept offers means to resist discrimination in both registers, that of status and that of relationship.

At the third and fourth sites of the study, those of legislation and the "court", the legality of transnational family relationships also drew on several resources. Here too legality was not simply a matter of pre-existing norms but was constructed in a process of subject-production. Central resources in this process were the discourses of status and relationship and the status categories of citizen and non-citizen. By establishing foundational restrictions of legal subjectivity through the category of the non-citizen, the illusion of legal equality as the foundation of legality could be maintained. At the same time, moving between discourses that derive legality either from the register of status or from the register of relationship enabled the court to creatively use legality as a resource of subject-production. In the analysis, different techniques for managing the legality of relationships were identified.

On the one hand, when the decision was made within the discourse of relationship, the technique seemed to be the limitation or restriction of legal consequences based on doubts about the genuineness of the relationship. This technique has been referred to as "moral gatekeeping".²⁷² On the other hand, when the decision is made within the discourse of status, the technique seemed to be that of an analytical dismantling of constitutive status norms, such as consent and coercion. The technique, through which such dismantling is made possible, is the structural technique of dividing the issue at hand into a preliminary issue and a main issue. This technique of dismantling and

²⁷² Wray 2006.

analytically dividing the case into smaller (isolated) units of analysis is, of course, a common technique in legal thinking. However, when it is analysed as part of the process in which legality is produced, it becomes evident that it has potential to obscure relations between the units of analysis and the ways in which these units may be mutually constitutive. The detrimental effect of this kind of “objective” analysis becomes particularly clear when the genuineness of the relationship is examined by dividing relationality into analytically distinct forms and isolated units of dependency.

These observations of the research material were made possible by the theoretical approach adopted. This approach combined the theoretical framework of legal consciousness studies and the analytic of struggle as developed by Hurri. In legal consciousness studies, legality is understood as process based, socially constructed and therefore subject to change. In this framework, the discrepancies of law are not a weakness but a resource. Similarly for Hurri, the discontinuities in law are an interpretative resource through which law can both maintain its transcendence and stay firmly grounded in society. The case analyses in this study applied the analytic of struggle, which seeks to render visible the focal points in legal argumentation in which the choices between different techniques for managing conflicts are made.

The second research question of this study concerned belonging and how the ways in which it is understood emerge in legal discourses about regulation and recognition of transnational family relationships. How do these discourses produce ideas of belonging and non-belonging, and thus create or reproduce social positionality and axes of inclusion and exclusion, especially at the intersections of different legal fields? It was noted above how the discourses of status and relationship facilitated a creative use of legality as a resource of subject-production. It was observed that courts may use various techniques to construct legality in ways that suit the goals of the particular discourse. In this process, belonging becomes constructed as an identity in relation to the dominant form of subjectivity in the discourse.

Belonging is, essentially, about whether one is included in society and within its ethical recognition relations. Taken as a whole, this study demonstrates that recognition theory offers an adequate theoretical framework for reflecting on and conceptualising the complex issues of inclusion and membership. In the analyses of this study, belonging was reflected in the foundations of the legal fields and recognition relations underpinning them. In the cases under consideration however, belonging became articulated as an identity constructed discursively. This identity construction was an essential part of the way in which pre-existing subjectivities, i.e. “disciplinary identity constructions”,²⁷³ produce belonging and axes of exclusion. This highlights the fact that even intersectionally sensitive academic and disciplinary conventions and tools should be examined critically, as these are part of the processes of knowledge production that institutionalise and reify existing hierarchies.

Citizenship, even in its legal dimensions is a dynamic form of social capital, capable of accumulation or diminution. It is determined by a plethora of identity factors marking the belonging of a person both in the family and

²⁷³ Grabham 2009, 199.

within the jurisdiction of a nation state. When belonging and identity of a person are constructed in legal practice in relation to the investigation of suspected “aliennes”, markers of ‘otherness’, such as non-typical family ties, language or ethnic origin, play an important role. These identity narratives are brought to bear on the legal reasoning as facts to be taken into account in those phases of the decision-making that require discretion and balancing by the merits of the particular case.

Given its orientation to the future, the third and final research question is arguably the most challenging: what new avenues might a recognition theoretical framework open for understanding the role of law in the struggles for social justice, especially through the logic of distinctions made in legal practice concerning belonging? Furthermore, this question set the challenge for rethinking law and the possibilities for its immanent critique in relation to social inclusion and exclusion.

At the first site of the study, that of Muslim marriages in Finland, recognition has to do with the ability to understand the ways in which religious and secular meanings of marriage are intertwined, as well as the ways in which transnationalism creates intersectional positionalities for differently situated individuals and families. The policy implications of this include, for example, the need to assess marriage regulation as a whole with a view to its intersectional implications, as well as the need to rethink issues related to representation. The latter aspect points towards a critical reflection as to whether the concepts of ‘common good’ and ‘wellbeing’ underpinning the regulation of marriage and families in general actually are inclusive and sensitive to the experiences of transnational families. This issue of representation was also central to an adequate understanding of recognition at the second site of the study, that of human rights discourse on gender equality and religion. These findings confirm what previous studies have suggested; any top-down account of equality without empirical research into local practices, structures such as the safety nets of the welfare state, everyday life and diversity of lived experiences, is likely to produce and reify stereotypes as well as institutionalise patterns of misrepresentation.

At the third and fourth sites of the study, which deal with migration law and its intersections of private international law and family law, the issue of recognition emerges as the question of ‘border’ and ‘who’ of community. While it is not possible to provide any definitive solutions to these issues, taken as a whole the study offers some thoughts as to how we might begin rethinking recognition in this respect. Firstly, some indications can be found in the way that the two senses of recognition were distinguished and linked in section 2.1. While formal logical coherence of legal norms throughout the legal system remains a fantasy – albeit, as we have seen, a practical and necessary one – coherence in the sense of principles and core values can at times be found by means of analytical conceptual analysis. However, this is possible only in classic situations of legal pluralism, on the understanding that the analysis is sufficiently informed by empirical research.

In cases of regime clash, the illusion of coherence is likely to be produced by means of “weak normative compatibility”,²⁷⁴ which in neoliberal processes

²⁷⁴ Fischer-Lescano and Teubner, 2004, 1004.

of subjectification set the conditions for intersubjective recognition. In these processes, rather than consistently reinforcing some given hegemony of power relations, subjectivities are produced by granting rights to some while withdrawing and reducing collective responsibility for all. Honneth argues that the “‘new’, ‘disorganized’, shareholder value-oriented capitalism affects in one way or another the normatively structured spheres” of recognition, “bringing about developments that lead to the reversal of these institutionalized normative achievements, decreasing solidarity and independence.”²⁷⁵ It is, however, within these normative achievements that elements of immanent critique can be identified.

Of the three legal fields addressed by this study, the question of due recognition is by far the most difficult to answer in the field of migration law. Belonging is not only about being included in a community, but about being included in a community defined by solidarity. In this sense, being cast outside the sphere of ethical relations of society is to be cast outside the “community of responsibility”.²⁷⁶ In modern legal systems, social rights crystallise the notion that civil and political participation necessitate a certain standard of living and that inequalities are connected to different starting conditions, which are not under the individuals’ control. When these rights are eroded, responsibility becomes assigned to individuals even on issues that they are not, indeed cannot, be responsible for.²⁷⁷ The discourse of individual responsibility renders invisible the structures that enable or hinder subjects from accessing conditions required before they can really be treated as responsible for their choices and decisions.

This assignment of individual responsibility is evident in several established doctrines and practices in migration law. As was noted above, those considered to be less belonging have less or no access to the welfare distribution and they are required to carry the financial burden independently.²⁷⁸ As several authors have noted, many migrants simply do not have such resources that would really enable strategic action on a large scale.²⁷⁹ But not only are they required to bear the costs privately, but also their other circumstances are framed as private choices. These “choices” include the “choice” concerning whether their “family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious”;²⁸⁰ or which country they “chose” reside in;²⁸¹ or whether they chose to stabilise their position as “settled migrants” by

²⁷⁵ Honneth 2012, 175.

²⁷⁶ The term is from Iris Marion Young: Young, Iris Marion. *Responsibility for Justice*. New York: Oxford University Press, 2011.

²⁷⁷ Honneth 2012, 182.

²⁷⁸ Anne Staver. *From Right to Earned Privilege? The Development of Stricter Family Immigration Rules in Denmark, Norway, and the United Kingdom*. (Doctoral dissertation, 2014.) Political Science, University of Toronto.

²⁷⁹ Dembour 2015; Pellander 2016; Staver 2014.

²⁸⁰ European Court of Human Rights, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, para 68; *Nunez v Norway*, 28 June 2011, para 70; *Jeunesse v The Netherlands*, 3 October 2014 (GC), para 108.

²⁸¹ European Court of Human Rights, *Gül v Switzerland*, 29 February 1996; *Rodrigues Da Silva Hoogkamer v The Netherlands*, 31 January 2006.

honouring immigration rules and not becoming irregular migrants.²⁸² In addition, children can be identified with the conduct of their parents, as otherwise there would be a risk that parents exploited the situation of their children in order to secure a residence permit for themselves (and for the children).²⁸³

Previous literature, as well as the analyses provided in this study, demonstrate that the ways in which migrant families are actively produced as non-belonging aliens is an urgent case of expulsion from rights, and severs the legitimacy of the legal relations in society. Simply put, it is ethically unbearable. But can law, through means of immanent critique, come up with more just solutions?

It seems to me that the persistent framing of the issues concerning social inclusion of transnational families as one of opposition between the rights of the sovereign state and those of the individual will get us nowhere. Perhaps the real problem is more fundamental than the idea of sovereignty would have us believe. To return to the idea presented in the beginning of this thesis, i.e. the observation that the common response to the social issues invoked by borders and migration is to debate over the principles according to which access to mobility should be distributed, it seems that the paradigm of distribution simply fails to address the real issues.²⁸⁴

In response to this prevailing problem, political and legal theory have suggested transnationally oriented definitions of society and state responsibility,²⁸⁵ as well as an open borders philosophy.²⁸⁶ Recognition theory, in breaking away from the decisive function of distribution towards the theories of justice, might offer support for rethinking communities, subjectivities and solidarity in transnational terms. The concept of a democratic state as a sovereign deciding on the borders of its population – and the concept of justice linked to this idea – is problematic not only in relation to individual rights, which always require balancing with collective interests. In Honneth's terms, it is also problematic because the principles of justice cannot be created autonomously since the material of justice – due recognition – is not a disposable good.²⁸⁷

²⁸² *Jeunesse v The Netherlands*, 3 October 2014 (GC). See also Laurens Lavrysen. *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*. Cambridge: Intersentia, 2016.

²⁸³ European Court of Human Rights, *Butt v. Norway*, 4 December 2012, para 79.

²⁸⁴ Tyler. 'The Marketization of Mobility: Some thoughts on Value, Movement and Classification,' blog post in Cemore, <http://www.lancaster.ac.uk/cemore/the-marketization-of-mobility-some-thoughts-on-value-movement-and-classification/> (accessed 11 September 2017).

²⁸⁵ Iris Marion Young 2011.

²⁸⁶ Dembour 2015; Carens, Joseph. *The Ethics of Immigration*. Oxford and New York: Oxford University Press, 2013.

²⁸⁷ Honneth, *The 'I' in 'we': Studies in the Theory of Recognition*, 42.

REFERENCES

- Al-Sharmani, Mulki. 'Muslim Family Wellbeing and Integration in Finland: The Role of Mosques' in Marja Tillikainen, Mulki Al-Sharmani, and Sanna Mustasaari (eds.), *Wellbeing of Transnational Muslim Families: Marriage, Law and Gender*. Routledge, forthcoming.
- Al-Sharmani, Mulki. "Striving Against the 'Nafs'." *Journal of Religion in Europe* 8:1 (2015), 101–120.
- Al-Sharmani and Abdirashid Ismail, 'Marriage and Transnational Family Life among Somali Migrants in Finland,' *Migration Letters* 14 (2017), 38–49.
- Al-Sharmani, Mulki. 'Divorce among Transnational Finnish Somalis: Gender, Religion, and Agency,' *Gender and Religion* 7:1 (2017), 210–227.
- Anthias, Floya. 'Identity and Belonging: conceptualisations and political framings,' Working Paper No. 8 (2013) *KLA Working Paper Series. Research Network for Latin America*.
- Anthias, Floya. 'Thinking through the lens of translocational positionality: an intersectionality frame for understanding identity and belonging,' *Translocations* 4:1 (2008), 5–20.
- Antonsich, Marco. 'Searching for Belonging – An analytical Frame,' *Geography Compass* 4:6 (2010), 644–659.
- Archard, David. *Family: A Liberal Defence*. Basingstoke: Palgrave Macmillan, 2010.
- Bano, Samia. 'In the Name of God? Religion and Feminist Legal Theory,' in Margaret Davies and Vanessa Munro (eds.), *The Ashgate Research Companion to Feminist Legal Theory*, 157–177. England: Ashgate Publishing, 2013.
- Bano, Samia. *Muslim Women and Shari'ah Councils, Transcending the Boundaries of Community and Law*. London: Palgrave MacMillan, 2012.
- Bano, Samia. 'In Pursuit of Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the 'Sharia Debate' in Britain,' *Ecclesiastical Law Journal* 10:3 (2008), 283–309.

- Bano, Samia. 'Standpoint, Difference and Feminist Research,' in Reza Banakar and Max Travers (eds.), *Theory and Method in Socio-Legal Research*, 91–112. Oxford: Hart Publishing, 2005.
- Beck-Gernsheim, Elisabeth. 'Transnational lives, transnational marriages: a review of the evidence from migrant communities in Europe,' *Global Networks* 7:3 (2007), 271–288.
- Bogdan, Michael. 'Some Reflections on Multiculturalism, Application of Islamic Law, Legal Pluralism and the New EU Succession Regulation,' in *A commitment to private international law: Essays in honour of Hans van Loon - Un engagement au service du droit international privé: mélanges en l'honneur de Hans van Loon*, 59–68. Cambridge: Intersentia, 2013.
- Bohlin, Anna. 'The Politics of Locality: Memories of District Six in Cape Town,' in Nadia Lovell (ed.), *Locality and Belonging*, 168–188. New York: Routledge, 1998.
- Bonjour, Saskia and Betty de Hart, 'A Proper Wife, a Proper Marriage: Constructions of 'us' and 'them' in Dutch Family Migration Policy,' *European Journal of Women's Studies* 20:1 (2013), 61–76.
- Bosniak, Linda. 'Ethical Territoriality and the Rights of Immigrants,' *Amsterdam Law Forum* 1:1 (2008), 1–9.
- Bosniak, Linda. *The Citizen and the Alien: Dilemmas of Contemporary Membership*. Princeton, N.J.: Princeton University Press, 2006.
- Bourdieu, Pierre. 'Force of Law: Toward a Sociology of the Juridical Field,' *The Hastings Law Journal* 38 (1986-1987), 805–853.
- Braidotti, Rosi. 'In Spite of the Times. The Post-Secular Turn in Feminism,' *Theory, Culture, Society* 25:6 (2009), 1–24.
- Büchler, Andrea. *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Laws*, Farnham: Ashgate, 2011.
- Butler, Judith. 'Merely cultural', *New Left Review*, 227 (1998), 33–44.
- Butler, Judith. *Frames of War: When is Life Grievable?* London; New York: Verso, 2009.

- Byrne, Christopher. 'Neoliberalism as an object of political analysis: an ideology, a mode of regulation or a governmentality,' *Policy & Politics* 45:3 (2017), 343-360.
- Cadwallar, Jessica Robyn and Damien W. Riggs. 'The State of the Union: Toward a Biopolitics of Marriage,' *M/C Journal*, 15:6.
- Carens, Joseph. 'Who should get in? The ethics of immigration admissions,' *Ethics & International Affairs* 17 (2003), 95-110.
- Carens, Joseph. *The Ethics of Immigration*. Oxford and New York: Oxford University Press, 2013.
- Carsten, Janet. 'Substance and Relationality: Blood in Contexts,' *Annual Review of Anthropology* 40 (2011), 19-35.
- Charsley, Katharina. 'Transnational Marriage,' in Katharine Charsley (ed.), *Transnational Marriage: New Perspectives from Europe and Beyond*, 1-22, New York: Routledge, 2012.
- Charsley, Katharine. 'Risk, Trust, Gender and Transnational Cousin Marriage among British Pakistanis,' *Ethnic and Racial Studies* 30:6 (2007), 1117-1131.
- Cho, Sumi, Crenshaw, Kimberlé Williams and McCall, Leslie. 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis,' *Signs* 38:4 (2013), 785-810.
- Choudhry, Shazia and Herring, Jonathan. *European Human Rights and Family Law*, Oxford and Portland, OR: Hart Publishing, 2010.
- Conaghan, Joanna. 'Intersectionality and the feminist project in law,' in Emily Grabham, Davina Cooper, Jane Krishnadas, and Didi Herman (eds.), *Intersectionality and Beyond: Law, Power and the Politics of Location*, 21-48, Abingdon, Oxon; New York, NY: Routledge-Cavendish, 2009.
- Corneloup, Sabine. 'Can Private International Law Contribute to Global Migration Governance?' in Horatia Muir Watt and Diego P. Fernández Arroyo (eds.), *Private international law and global governance*, 301-317. Oxford: Oxford University Press, 2014, 301.
- Costello, Cathryn. *The Human Rights of Migrants and Refugees in European Law*. Oxford: Oxford University Press, 2016.

- Cott, Nancy. *Public Vows: A History of Marriage and the Nation*. Cambridge: Harvard University Press, 2000.
- Cowan, Jane K., Marie-Benedicte Dembour and Richard A. Wilson. 'Introduction,' in Jane K. Cowan, Marie-Benedicte Dembour and Richard A. Wilson (eds.), *Culture and Rights: Anthropological Perspectives*, 1-26. Cambridge: Cambridge University Press 2001.
- Cox, Ruth. 'Recognition and Immigration,' in Shane O'Neill and Nicholas H. Smith (eds.), *Recognition Theory as Social Research: Investigating the Dynamics of Social Conflict*, 192–212. Basingstoke: Palgrave Macmillan, 2012.
- Crenshaw, Kimberlé Williams. 'Demarginalising the Intersection of Race and Sex; A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,' *University of Chicago Legal Forum* (1989), 139–167.
- Crenshaw, Kimberlé Williams. 'Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color,' *Stanford Law Review* 43:6 (1991), 1241–1299.
- De Hart, Betty. *Unlikely couples: Regulating mixed sex and marriage from the Dutch colonies to European Migration Law*. Amsterdam: Universiteit van Amsterdam, 2015.
- De Hart, Betty. 'The Right to Domicile of Women with a Migrant Partner in European Immigration Law,' in Sarah van Walsum and Thomas Spijkerboer (eds.), *Women and Immigration Law*, 142–159. Abingdon: Routledge-Cavendish, 2007.
- De Hart, Betty. 'Love thy neighbour: family reunification and the rights of insiders,' *European Journal of Migration and Law* 11:3 (2009), 235–252.
- De Hart, Betty. 'Introduction: The Marriage of Convenience in European Immigration Law,' *European Journal of Migration & Law* 8: 3-4 (2006), 251–262.
- De Hart, Betty, van Rossum, Wibo and Sportel, Iris. 'Law in the Everyday Lives of Transnational Families: An Introduction.' *Oñati Socio-Legal Series*, 3:6 (2013), 991–1003.
- De Hart, Nadia Sonneveld and Iris Sportel. 'New Perspectives on Gender in Shari'a-Based Family Law Studies: Moving Beyond the Women's Issue,' *Religion & Gender* 7:1 (2017), 42–52.

- Dembour, Marie-Bénédicte. *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint*. Oxford: Oxford University Press, 2015.
- Dewar, John. 'The Normal Chaos of Family Law,' *Modern Law Review* 61 (1998), 467–485.
- Eekelaar, John. 'Law and Community Practices,' in John Eekelaar and Mavis Maclean (eds.), *Managing Family Justice in Diverse Societies*, 15–31. Oxford: Hart Publishing, 2013.
- Ewick, Patricia and Susan Silbey. *The Common Place of Law: Stories from the Everyday Life*. Chicago and London: Chicago University Press, 1998.
- Finch, Janet and Jennifer Mason. *Passing On: Kinship and inheritance in England*. London: Routledge, 2000.
- Fischer-Lescano, Andreas and Teubner, Gunther. 2004. 'Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law,' *Michigan Journal of International Law* 25:4 (2004-2005), 999–1046.
- Foucault, Michel. 'Governmentality,' in Graham Burchell, Colin Gordon, Peter Miller, and Michel Foucault. *The Foucault Effect: Studies in Governmentality: With Two Lectures By and an Interview With Michel Foucault*, 87–104. Chicago: University of Chicago Press, 1991.
- Foucault, Michel. *Society Must Be Defended: Lectures at the Collège de France 1975-1976*. Picador 2003.
- Fournier, Pascale. *Muslim Marriage in Western Courts: Lost in Transplantation*. Farnham: Ashgate, 2010.
- Fraser, Nancy. 'Reframing justice in a globalizing world,' in Terry Lovell (ed.), *(Mis)recognition, Social Inequality and Social Justice: Nancy Fraser and Pierre Bourdieu*, 17–35. London and New York: Routledge, 2007.
- Fraser; Nancy and Honneth, Axel. *Redistribution or Recognition? A Political-Philosophical Exchange*. London and New York: Verso, 2003.
- Fraser, Nancy. *Adding Insult to Injury: Nancy Fraser debates her critics*. Edited by Kevin Olson. London and New York: Verso, 2008.

- Fredman, Sandra. 'Engendering Socio-Economic Rights,' in Anne Hellum and Henrietta Aasen (eds.), *Women's Human Rights: CEDAW in International, Regional and National Law*, 217–241. Cambridge: Cambridge University Press, 2013.
- García-Villegas, Mauricio. 'Comparative Sociology of Law: Legal Fields, Legal Scholarships, and Social Sciences in Europe and the United States,' *Law & Social Inquiry* 31 (2006), 343–382.
- Glick Schiller, Nina and Peggy Levitt. 'Conceptualizing Simultaneity: A Transnational Social Field Perspective on Society,' *International Migration Review* 38:3 (2004), 1002–1039.
- Glick Schiller, Nina, Linda Basch and Cristina Blanc-Szanton. 'Transnationalism: A New Analytic Framework for Understanding Migration,' *Annals New York Academy of Science* 625 (1992), 1–24.
- Goulbourne Harry, Reynolds, Tracey, Solomos, John, and Zontini, Elisabetta Zontini. *Transnational Families: Ethnicities, Identities and Social Capital*. Abingdon: Routledge, 2010.
- Grabham, Emily. 'Intersectionality: Traumatic impressions,' in Emily Grabham, Davina Cooper, Jane Krishnadas, and Didi Herman (eds.) *Intersectionality and beyond: Law power and the politics of location*, 183–201. Abingdon, Oxon; New York: Routledge-Cavendish, 2009.
- Grabham, Emily with Didi Herman, Davina Cooper and Jane Krishnadas. 'Introduction,' in Emily Grabham, Davina Cooper, Jane Krishnadas, and Didi Herman (eds.) *Intersectionality and Beyond: Law, Power and the Politics of Location*, 1–17, Abingdon, Oxon; New York, NY: Routledge-Cavendish, 2009.
- Grillo, Ralph. *Muslim Families, Politics and the Law: A Legal Industry in Multicultural Britain*. Farnham; Burlington, VT: Ashgate, 2015.
- Harding, Rosie. *Regulating sexuality: Legal consciousness in lesbian and gay lives*. Abingdon: Routledge, 2011.
- Hart, H.L.A.. *The Concept of Law*. Oxford: Clarendon Press, 1961.
- Hart, Linda. *Relational Subjects: Family Relations, Law and Gender in the European Court of Human Rights*. Faculty of Social Sciences, University of Helsinki, 2016.

- Helin, Markku. *Suomen kansainvälinen perhe- ja perintöoikeus*. Helsinki: Talentum, 2013.
- Hellum, Anne, Shaheen Sardar Ali and Anne Griffiths. 'Introduction: Transnational Law in the Making,' in Anne Hellum, Shaheen Sardar Ali and Anne Griffiths (eds.), *From Transnational Relations to Transnational Laws: Northern European Laws at the Crossroads*, 1–26. Farnham: Ashgate, 2011.
- Herring, Jonathan. 'Relational autonomy and family law,' in Julie Wallbank, Shazia Choudhry and Jonathan Herring (eds.), *Rights, Gender and Family Law*, 257–275. London: Routledge, 2010.
- Haenen, Iris. *Force & Marriage: The criminalisation of forced marriages in Dutch, English and European criminal law*. Cambridge: Intersentia, 2014.
- Honneth, Axel. *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, Reprinted 2005 ed., Cambridge: Polity Press, 1995.
- Honneth, Axel. *The 'I' in 'we': Studies in the Theory of Recognition*. Cambridge: Polity Press, 2012.
- Hurri, Samuli. *Birth of the European Individual: Law, Security, Economy*. Farnham: Routledge, 2014.
- Hurri, Samuli. 'Akhilleuksen kilpi: ensimmäiset käräjät', *Tiede & Edistys* 2:2014, 142–147.
- Isailovic, Ivana. 'Political Recognition and Transnational Law: Gender Equality and Cultural Diversification in French Courts,' in Horatia Muir Watt and Diego P. Fernández Arroyo (eds.) *Private international law and global governance*, 318–343. Oxford: Oxford University Press, 2014.
- Jänäterä-Jareborg, Maarit. 'On the Cooperation between Religious and State Institutions in Family Matters: Nordic Experiences,' in Prakash Shah, Marie-Claire Foblets and Mathias Rohe (eds.), *Family, Religion and Law: Cultural Encounters in Europe*, 79-114. Farnham and Burlington: Ashgate, 2014.
- Jänäterä-Jareborg, Maarit. 'The Incidental Question of Private International Law, Formalised Same-Sex Relationships and Muslim Marriages,' in Patrik Lindskoug, Ulf Maunsbach and Göran Millqvist (eds.) *Essays in Honour of Michael Bogdan*, 149–164. Lund: Juristförlaget, 2013.

- Jänterä-Jareborg, Maarit. 'The Legal Scope for Religious Identity in Family Matters – The Paradoxes of the Swedish Approach' in Jane Mair and Esin Örüciü (eds.), *The Place of Religion in Family Law: A Comparative Search*, 73–96. Cambridge: Intersentia, 2011.
- Jänterä-Jareborg, Maarit. 'Women's Human Rights: International Law in the Intersections between Socioeconomic Conditions, Culture, Tradition and Religion,' in Maarit Jänterä-Jareborg and Hélène Tigroudja (eds.) *Women's Human Rights and the Elimination of Discrimination / Les droits des femmes et l'élimination de la discrimination*, 391–420. Leiden: Brill.
- Kantola, Johanna and Kevät Nousiainen. 'Institutionalising Intersectionality in Europe: Introducing the theme,' *International Feminist Journal of Politics* 11:4 (2009), 459–477.
- Karjalainen, Katja. *Ikääntyminen, liikkuvuus ja kansainvälinen yksityisoikeus Euroopassa*. Helsinki: Suomalainen Lakimiesyhdistys, 2016.
- Kiestra, Louwrens. *The Impact of the European Convention On Human Rights On Private International Law*. Den Haag: T.M.C. Asser Press, 2014.
- Kostakopoulou, Dora. 'Matters of Control: Integration Tests, Naturalisation Reform and Probationary Citizenship in the United Kingdom,' *Journal of Ethnic and Migration Studies* 36:5 (2010), 829–846.
- Koskenniemi, Martti. "International Law in Europe: Between Tradition and Renewal," *The European Journal of International Law* 16:1 (2005), 113–124.
- Kruiniger, Pauline. *Islamic Divorces in Europe: Bridging the Gap between European and Islamic Legal Orders*. Den Haag: Eleven International Publishing, 2015.
- Lambertz, Göran. 'Child marriages and the law – with special reference to Swedish developments,' in Maarit Jänterä-Jareborg (ed.) *The Child's Interests in Conflict: The Intersections Between Society, Family, Faith and Culture*, 85–110. Cambridge: Intersentia.
- Lavrysen, Laurens. *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*. Cambridge: Intersentia, 2016.

- Lecoyer, Kim. 'Marriage Conclusion in Belgian Muslim Families: Navigating Transnational Social Spaces of Normativity,' *Migration Letters* 14:1 (2017): 11–24.
- Leinonen, Johanna and Saara Pellander. 'Court decisions over marriage migration in Finland: a problem with transnational family ties,' *Journal of Ethnic and Migration Studies* 40:9 (2014), 1488–1506.
- Levitt, Peggy and B. Nadya Jaworsky. 'Transnational Migration Studies: Past Developments and Future Trends,' *Annual Review of Sociology* 33, (2007), 129–156.
- Liversage, Anika. 'Secrets and Lies: When Ethnic Minority Youth Have a Nikah', in Prakash Shah with Marie-Claire Foblets and Mathias Rohe (eds.) *Family, Religion and Law: Cultural Encounters*, 171–180, Farnham and Burlington: Ashgate, 2014.
- Lloyd, Jenna. 'Carceral Citizenship in an Age of Global Apartheid,' *Occasion* 8 (2015), 1–15.
- Mahmood, Saba. *Religious Difference in a Secular Age: A Minority Report*. Princeton, NJ: Princeton University Press, 2015.
- Marcus, George E. 'Ethnography in/of the world system: The emergence of multi-sited ethnography,' *Annual review of anthropology* (1995), 95–117.
- Marcus, George E., 'Multi-sited Ethnography: Five or Six Things I Know About it Now,' in Simon Coleman and Pauline Von Hellermann (eds), *Multi-sited Ethnography: Problems and Possibilities in the Translocation of Research Methods*, 16–32. New York: Routledge, 2011.
- Marshall, T.H. *Citizenship and Social Class and other essays*. Cambridge: Cambridge University Press, 1950.
- Maynes, Mary Jo and Waltner, Ann. *The Family: A World History*. Oxford: Oxford University Press, 2012.
- McCall, Leslie. 'The complexity of intersectionality,' in Emily Grabham, Davina Cooper, Jane Krishnadas, and Didi Herman (eds.), *Intersectionality and beyond: Law power and the politics of location*, 49–76. New York: Routledge-Cavendish, 2009.
- Mehdi, Rubya, Werner Menski and Jorgen Nielsen (eds.) *Interpreting Divorce Laws in Islam*. Copenhagen: DJOF Publishing, 2012.

- Mir-Hosseini, Ziba, Mulki Al-Sharmani and Jana Rumminger (eds.), *Men in Charge? Rethinking Authority in Muslim Legal Tradition*. London: Oneworld Publications, 2015.
- Moore, Sally Falk. *Law as Process: An Anthropological Approach*. Routledge and Kegan Paul, 1978.
- Moors, Annelies. 'Unregistered Islamic Marriages: Anxieties About Sexuality and Islam in the Netherlands' in Maurits Berger (ed.) *The Application of Sharia in the West*, 141–164. Leiden: Leiden University Press, 2013.
- Moors, Annelies and Vanessa Vroom-Najem. 'Converts, Marriage and the Dutch Nation-State: Contestations about Muslim Women's Wellbeing,' in Marja Tiilikainen, Mulki Al-Sharmani and Sanna Mustasaari (eds.), *Wellbeing of Transnational Muslim Families: Marriage, Law and Gender*. Routledge, forthcoming.
- Murthy, Hamsa M. 'Sovereignty and Its Alternatives: On the Terms of (Illegal) Alienage in U.S. Law,' in Austin Sarat (ed.) *Special Issue: Who Belongs? Immigration, Citizenship, and the Constitution of Legality* (Studies in Law, Politics and Society, Volume 60), 1–27. Bingley: Emerald Group Publishing Limited, 2013.
- Oliver, Kelly. *Witnessing beyond recognition*. Minneapolis and London: University of Minnesota Press, 2001.
- Pellander, Saara. *Gatekeepers of the Family - Regulating Family Migration to Finland*. Department of Political and Economic Studies, University of Helsinki, 2016.
- Pellander, Saara. "An Acceptable Marriage": Marriage Migration and Moral Gatekeeping in Finland,' *Journal of Family Issues* 36:11 (2014), 1472–1489.
- Portes, Alejandro, Luis E. Guarnizo and Patricia Landolt. 'The study of transnationalism: pitfalls and promise of an emergent research field,' *Ethnic and Racial Studies* 22:2 (1999), 217-237.
- Purdy, Simon. 'Surveillance, Knowledge and Inequality: Understanding Power Through Foucault and Beyond,' *The Hilltop Review*, 8:1 (2015), 3–13.
- Pylkkänen, Anu. *Vaihtoehto avioliitolle*. Tampere: Vastapaino, 2012.
- Pålsson, Lennart. *Haltande äktenskap och skilsmässor: Komparativa studier över internationelltprivaträttsliga problem beträffande äktenskap*

- och skillsmässor med territoriellt begränsad giltighet. Stockholm: P. A. Nordstedt & Söners förlag, 1966.
- Ricoeur, Paul. *The Course of Recognition*. Cambridge, MA: Harvard University Press, 2007.
- Rohe, Mathias. 'Islamic Law in German Courts,' *Hawwa: Journal of Women in the Middle East and the Islamic World* 1:1 (2003), 46–59.
- Roseneil, Sasha. 'Intimate Citizenship: A Pragmatic, Yet Radical, Proposal for a Politics of Personal Life,' *European Journal of Women's Studies* 17:1 (2010), 77–82.
- Rutten, Susan W. E. 'Protection of Spouses in Informal Marriages by Human Rights,' *Utrecht Law Review* 6:2 (2010): 77–92.
- Sassen, Saskia. *Territory, authority and rights*. Princeton: Princeton University Press, 2006.
- Sayed, Mosa. *Islam och arvsrätt i det mångkulturella Sverige: En internationellt privaträttslig och jämförande studie*. Uppsala: Iustus Förlag, 2009.
- Schmidt, Garbi. 'Law and Identity: Transnational Arranged Marriages and the Boundaries of Danishness,' *Journal of Ethnic and Migration Studies* 37:2 (2011), 257–275.
- Shakargy, Sharon. 'Marriage by the State or Married to the State? On Choice of Law in Marriage and Divorce,' *Journal of Private International Law* 9:3 (2013), 499–533.
- Smart, Carol. 'Relationality and Socio-Cultural Theories of Family Life,' in Jallinoja, Riitta, and Eric Widmer (eds.), *Families and Kinship in Contemporary Europe: Rules and Practices of Relatedness*, 13–28. Basingstoke: Palgrave Macmillan, 2011.
- Smart, Carol. 'Making Kin: Relationality and Law' in Anne Bottomley and Simone Wong (eds.), *Changing Contours of Domestic Life, Family and Law: Caring and Sharing*, 7–23. Oxford and Portland Oregon: Hart Publishing, 2009.
- Smith, Nicholas H. 'Introduction: A Recognition-Theoretical Research Programme for the Social Sciences,' in Shane O'Neill and Nicholas H. Smith (eds.), *Recognition Theory as Social Research: Investigating the Dynamics of Social Conflict*, 1–18. Basingstoke: Palgrave Macmillan, 2012.

- Spijkerboer, Thomas. 'Structural instability: Strasbourg case law on children's family reunion,' *European Journal of Migration and Law* 11:3 (2009), 271–293.
- Sportel, Iris. *Divorce in Transnational Families: Marriage, Migration and Family Law*. London: Palgrave Macmillan, 2016.
- Sporte, Iris. 'Who's Afraid of Islamic Family Law? Dealing with *Shari'a*-based Family Law Systems in the Netherlands,' *Religion & Gender* 7:1 (2017), 53–69.
- Staver, Anne. *From Right to Earned Privilege? The Development of Stricter Family Immigration Rules in Denmark, Norway, and the United Kingdom*. Political Science, University of Toronto, 2014.
- Staver, Anne. 'Free Movement and the Fragmentation of Family Reunification Rights,' *European Journal of Migration and Law* 15 (2013), 69–89.
- Tamanaha, Brian Z. *A General Jurisprudence of Law and Society*. Oxford; New York: Oxford University Press, 2001.
- Taylor, Charles. 'The Politics of Recognition,' in Amy Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition*, 25–73. Princeton: Princeton University Press, 1994.
- Testa, Italo. 'Social Space and the Ontology of Recognition,' in Heikki Ikäheimo and Arto Laitinen (eds.), *Recognition and Social Ontology*, 287–308. Leiden and Boston: Brill, 2011.
- Thompson, Simon. 'Is redistribution a form of recognition? Comments on the Fraser–Honneth debate,' *Critical Review of International Social and Political Philosophy* 8:1 (2005), 85–102.
- Thun, Cecilie. 'Norwegiannes as Lived Citizenship: Religious Women Doing Identity Work at the Intersections of Nationality, Gender and Religion,' *Nordic Journal of Religion and Society* 25:1 (2012), 1–25.
- Tuori, Kaarlo. 'Transnational Law: On Legal Hybrids and Perspectivism,' in Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, 11–47. Cambridge: Cambridge University Press, 2014.
- Twining, William. *General Jurisprudence: Understanding Law From a Global Perspective*. Cambridge: Cambridge University Press, 2009.

- Tyler, Imogen. 'The Marketization of Mobility: Some thoughts on Value, Movement and Classification,' blog post in *Cemore*, <http://www.lancaster.ac.uk/cemore/the-marketization-of-mobility-some-thoughts-on-value-movement-and-classification/> (accessed 11 September 2017).
- Van Walsum, Sarah. *The Family and the Nation: Dutch Family Migration Policies in the Context of Changing Family Norms*. Cambridge: Cambridge Scholars Publishing, 2008.
- Vertovec, Steven. *Transnationalism*. London: Routledge, 2009.
- Von Daniels, Detlef. *The Concept of Law from a Transnational Perspective*. Farnham, Surrey, England; Burlington, VT: Ashgate, 2010.
- Von Savigny, Karl F. *Private International Law: A Treatise on the Conflict of Laws and the Limits of Their Operation*. London: Forgotten Books, 2012.
- Wray, Helena. *Regulating Marriage Migration into the UK: A Stranger in the Home*. Farnham: Ashgate, 2011.
- Wray, Helena. 'An Ideal Husband? Marriages of Convenience, Moral Gate-Keeping and Immigration to the UK,' *European Journal of Migration and Law* 8:3-4 (2006), 303–320.
- Yuval-Davis, Nira, Kalpana Kannabiran, and Ulrike M. Vieten. 'Introduction,' in Nira Yuval-Davis, Kalpana Kannabiran and Ulrike M. Vieten (eds.) *The Situated Politics of Belonging*. London: SAGE Publications, 2006.
- Yuval-Davis, Nira. 'Power, Intersectionality and the Politics of Belonging,' *FREIA Working Paper No. 75* (2011). Aalborg Denmark.
- Zurn, Christopher F. 'Misrecognition, Marriage, and Derecognition,' in Shane O'Neill and Nicholas H. Smith (eds.), *Recognition Theory as Social Research: Investigating the Dynamics of Social Conflict*, 63-86. Basingstoke: Palgrave Macmillan, 2012.
- Yesilova, Katja. *Ydinperheen politiikka*. Helsinki: Gaudeamus, 2009.
- Yetano, Toni Marzal. 'The constitutionalisation of party autonomy in European family law,' *Journal of Private International Law* 6 (2010), 168.

Young, Iris Marion. *Responsibility for Justice*. New York: Oxford University Press, 2011.

CASES

Court of Justice of the European Union

Sahyoni C-372/16, pending.

Chakroun C-578/08, 4 March 2010, EU:C:2010:117.

Khachab C-558/14, 21 April 2016, EU:C:2016:285.

O. and S. v. Maahanmuuttovirasto C-356/11 and

Maahanmuuttovirasto v. L. C-357, 6 December 2012, EU:C:2012:776 (joint cases).

Parliament v Council, C-540/03, 27 June 2006, EU:C:2006:429.

CS C-304/14, 13 September 2016, EU:C:2016:674.

Rendón Marín C-165/14, 13 September 2016, EU:C:2016:675.

Chavez-Vilchez and others C-133/15, 10 May 2017, EU:C:2017:354.

European Court of Human Rights

R.H. and Z.H. v. Switzerland, 8 December 2015, application no. 60119/12.

Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, application nos. 9214/80; 9473/81; 9474/81.

Nunez v. Norway, 28 June 2011, application no. 55597/09.

Jeunesse v. The Netherlands, 3 October 2014, Grand Chamber, application no. 12738/10.

Butt v. Norway, 4 December 2012, application no. 47017/09.

Gül v. Switzerland, 19 February 1996, application no. 23218/94.

Rodrigues Da Silva Hoogkamer v. The Netherlands, 31 January 2006, application no. 50435/99.

The Swedish Migration Court of Appeal

MIG 2012:4, 5 March 2012.

The Supreme Court of Finland

KKO:2016:65, 14 October 2016.

The Supreme Administrative Court of Finland

KHO:2013:97, 22 May 2013.