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Is There Such a Thing as Transnational Family Law?

Analysis of transnational law embraces the idea that thinking about the law almost exclusively in national terms is inadequate. Transnational legal analysis further rests on the concept of legal pluralism. Family law has received little attention in the field of transnational law so far. But the existence of transnational and migrant families is plain. Moreover, family law pertains to events that take place in a pluralist environment. Does it therefore make sense to look at family law from the transnational point of view? This article explores this question in detail. It sets forth that the transnational perspective assists in depicting the operation of family law in a globalized world, including by encompassing the phenomenon of non-state actors being heavily involved in the creation, application and enforcement of family law.

Gibt es so etwas wie ein transnationales Familienrecht? Analysen des transnationalen Rechts gehen davon aus, dass es unzureichend ist, allein im nationalen Kontext über das Recht nachzudenken. Von besonderer Bedeutung ist für sie das Konzept des Rechtspluralismus. In den Forschungen zum transnationalen Recht wurde dem Familienrecht bisher wenig Aufmerksamkeit geschenkt. Aber es gibt transnationale Familien und Migrationsfamilien. Außerdem spielt sich das Familienrecht in einem pluralistischen Umfeld ab. Ist es daher sinnvoll, das Familienrecht aus der transnationalen Perspektive zu betrachten? Der Aufsatz geht dieser Frage im Detail nach. Er legt dar, dass die transnationale Perspektive dazu beitragen kann, die Funktionsweise des Familienrechts in einer globalisierten Welt darzustellen, einschließlich des Phänomens, dass nichtstaatliche Akteure in hohem Maße an seiner Schaffung, Anwendung und Durchsetzung beteiligt sind.

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I. Introduction

For the curious lawyer, it is intriguing to look at foreign legal systems and explore how they solve legal problems. This interest in the unfamiliar lies at the heart of comparative law. It is also highly pronounced in research on private international law. Determining where a legal relationship should be located and which laws apply to cross-border cases calls for a willingness to work with laws of different origins. In addition to comparative law and private international law, transnational law is another field of law that shares the same curiosity about laws that differ from those of one's own nation. By transnational law I mean a "methodological"¹ standpoint from which "the space that is left empty between conceptualizations of a legal order from either a 'national' or 'international' perspective" can be examined.² In other words, transnational law offers a perspective for analyzing legal relationships whose regulation does not necessarily depend on the nation-state.³

** I would like to thank Tim Dobiasch for his assistance.

- 1 *Peer Zumbansen*, *Transnational Legal Pluralism*, (2010) 1 *Transnational Legal Theory* (TLT) 141–189, 141. On transnational law, see monographs such as, e.g., *Philip C. Jessup*, *Transnational Law* (1956); *Graf-Peter Calliess/Peer Zumbansen*, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (2010); *Lars Viellechner*, *Transnationalisierung des Rechts* (2013); *Transnationales Recht: Stand und Perspektiven*, ed. by Graf-Peter Calliess (2014); *Transnational Legal Orders*, ed. by Terence C. Halliday/Gregory Shaffer (2015); *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal*, ed. by Peer Zumbansen (2020); *The Oxford Handbook of Transnational Law*, ed. by idem (2021); *The Foundations of European Transnational Private Law*, ed. by Anna Beckers/Hans-W. Micklitz/Rodrigo Vallejo/Pia Letto-Vanamo (2024).
- 2 *Zumbansen*, *Transnational Legal Pluralism* (n. 1) 150.
- 3 *Graf-Peter Calliess/Andreas Maurer*, *Transnationales Recht – eine Einleitung*, in: Calliess (n. 1) 1–36, 18.

In the field of family law, extensive comparative legal analysis has been carried out in recent years,⁴ and private international law – both as a field of law and as a discipline – can look back on a long tradition of dealing with cross-border cases ranging from the recognition of marriages entered into abroad to the implementation of measures for the protection of vulnerable adults.⁵ However, discussion of transnational law and its relevance to matters of family law with cross-border elements⁶ has been rather limited. Taking this observation as a starting point, this article will address the following questions: Is there such a thing as transnational family law? And if so, what insights can be gained from looking at family law from a transnational perspective?

In this article, I will argue first that family law can be analyzed from the perspective of transnational law, and second that the terminology, concepts and methodology of transnational law can help to describe and analyze family law cases with cross-border elements. To do so, I will look at the sociological phenomena of transnational and migrant families (II.). In a second step, I will present the core elements of transnational law and address criticisms of analyses of transnational law (III.). The focus will then be on demonstrating that the theory of transnational law can be applied to family law matters (IV.). Subsequently, the article will address the merits of looking at these matters through the lens of transnational law (V.). In conclusion, I will summarize the main findings and offer an outlook on farther-reaching projects in transnational family law (VI.).

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- 4 See, e.g., *The Cambridge Companion to Comparative Family Law*, ed. by Shazia Choudhry/Jonathan Herring (2019); *Jens Scherpe*, *Comparative Family Law*, in: *The Oxford Handbook of Comparative Law*², ed. by Mathias Reimann/Reinhard Zimmermann (2019) 1088–1109; *Katharina Boele-Woelki*, *What Comparative Family Law Should Entail*, *Utrecht Law Review* 4 (2008) 1–24; *idem*, *Combined Comparative Research in the Field of Family Relations: Some Reflections from the Legal Perspective*, *Zeitschrift für Familienforschung* 10 (2015) 238–256; *idem/Dieter Martiny*, *Die CEFL und ihre Prinzipien für Paare in faktischen Partnerschaften*, *Zeitschrift für Europäisches Privatrecht (ZEuP)* 2020, 543–564; *Normativity and Diversity in Family Law: Lessons from Comparative Law*, ed. by Nadjma Yassari/Marie-Claire Foblets (2022).
- 5 For recent academic treatment of the cross-border recognition of marriages, see, e.g., *Dagmar Coester-Waltjen*, *Überlegungen zur Reform des Internationalen Privatrechts der Eheschließung*, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2021, 29–38; *Heinz-Peter Mansel*, *Zur Liberalisierung des internationalen Ehe- und Lebenspartnerschaftsrecht des EGBGB*, *IPRax* 2022, 561–566; or on the cross-border protection of vulnerable adults, see *Jan von Hein*, *Die Europäisierung des internationalen Erwachsenenschutzes*, *ZEuP* 2024, 505–532.
- 6 But see *Ivana Isailović*, *Family Law: A Blind Spot*, in: *Zumbansen* (n. 1) 294–318; *Claire Fenton-Glynn*, *Transnational Family Law*, in: *Oxford Handbook of Transnational Law* (n. 1) 575–590; also *Jean de Munck*, *Law’s role in democratising the family*, *Oñati Socio-Legal Series* 14 (2024) 213–229, 225–227.

II. Transnational and migrant families

The question of whether there is such a thing as transnational family law is pertinent to the experiences of many people with cross-border family ties. In the sociology of the family, the concepts of the transnational family and the migrant family play an important role. Transnational families⁷ are “families whose members are separated physically between two or more nation-states but maintain close ties and relationships”.⁸ For example, in order to earn money a mother may live in a different country than her children. She then fulfills her parental obligations by providing financial resources⁹ and is present in her children’s lives virtually, through FaceTime calls and voicemails.¹⁰ A transnational family can also be created when parents send their children abroad to study in a different country (so-called “parachute kids”).¹¹ Marriages, registered partnerships or informal partnerships in which the partners reside in different countries also count as transnational families. Migrant families, on the other hand, are families whose members move from one country to another “due to new or established family ties”.¹² Family migration occurs for a number of reasons: family members might be reuniting with close family members who have emigrated in the past or accompanying family members doing so now. Family migration also occurs when spouses who have lived apart in different countries settle in one country, or when a couple adopts a child from another country.

Transnational and migrant families face special challenges. On the one hand, they strive to maintain kinship ties with members of their core or extended families over long distances and periods of time. For members of transnational families, it is particularly challenging to meet the expectations society places upon them to prove that they are “good” parents or children, and on the other hand they must navigate

7 On the concept of transnational families, see *Deborah Bryceson/Ulla Vuorela*, Transnational Families in the Twenty-First Century, in: *The Transnational Family: New European Frontiers and Global Networks*, ed. by idem (2002) 3–30; *Loretta Baldassar/Majella Kilkey/Laura Merla/Raelene Wilding*, Transnational Families, in: *The Wiley Blackwell Companion to the Sociology of Families*, ed. by Judith Treas/Jacqueline Scott/Martin Richards (2014) 155–175; *Joanna Dreby/Timothy Adkins*, Inequalities in Transnational Families, *Sociology Compass* 4/8 (2010) 673–689; *Steffen Mau*, Social Transnationalism: Lifeworlds Beyond the Nation-State (2010) 56–62.

8 *Kristy Y. Shih*, Transnational Families, in: *The Wiley Blackwell Encyclopedia of Family Studies*, ed. by Constance L. Shehan (2016) 1–7, 1.

9 *Shih*, Transnational Families (n. 8) 1.

10 *Baldassar/Kilkey/Merla/Wilding*, Transnational Families (n. 7) 166.

11 *Shih*, Transnational Families (n. 8) 3.

12 *Eleonore Kofman/Franz Buhr/Maria Lucinda Fonseca*, Family Migration, in: *Introduction to Migration Studies*, ed. by Peter Scholten (2022) 137–149; grouping transnational and migrant families together in the category of transnational families, see *Nadjma Yassari/Marie-Claire Foblets*, Diverse Families: A Challenge to Family Law? – A Comparative Exercise, in: idem (n. 4) 1–27, 8.

social and cultural environments that may be markedly different than their own.¹³ This can lead to the emergence of “multiple identities and [...] belongings”,¹⁴ which can be both enriching¹⁵ and challenging.

Although precise figures about the prevalence of transnational and migrant families are difficult to obtain, studies using approximate data suggest that they are not a marginal phenomenon. Within the EU alone, 27.3 million people who were not Union citizens lived in the Member States at the beginning of 2023.¹⁶ Nationals of Member States who moved from one EU country to another are not included in this figure and should be added to the number. A further finding of the study is that roughly 26% of new residence permits in the EU and Norway were issued for family reasons.¹⁷ Thus, the desire to move closer to family members is one of the key factors of migration. Given the significant number of people living in transnational or migrant families, there is a need to take a closer look at how they are treated in law.

III. Transnational law: A brief introduction

The introduction and previous section have explained the meaning of the terms “transnational family” and “migrant family” but have only touched upon the meaning of transnational law.¹⁸ In order to clarify the concept of transnational law, this section presents the core assumptions underlying transnational law (III.1.) and then addresses the main points of criticism of the concept (III.2.).

1. Core assumptions

In introductions to transnational law, it is fairly common to find references to remarks made by Philip Jessup in 1956.¹⁹ Although he was not the first to comment on transnational law, his statements stand out from other academic publications on the topic because he helped give the term “transnational law” greater visibility.²⁰ He stated,

¹³ Cf. *Iris Sportel/Betty de Hart/Friso Kulk*, Transnational families navigating the law, in: *Wellbeing of Transnational Muslim Families: Marriage, Law and Gender*, ed. by Marja Tiilikainen/Mulki Al-Sharmani/Sanna Mustasaari (2019) 94–111, 95.

¹⁴ *Baldassar/Kilkey/Merla/Wilding*, *Transnational Families* (n. 7) 163.

¹⁵ On this point *Mau*, *Social Transnationalism* (n. 7) 59 ff.

¹⁶ *Eurostat/European Migration Network*, *Annual Report on Migration and Asylum 2023 – Statistical Annex* (2024) 8.

¹⁷ *Eurostat/European Migration Network*, *Annual Report* (n. 16) 11.

¹⁸ See section I.

¹⁹ *Jessup*, *Transnational Law* (n. 1).

²⁰ *Peer Zumbansen*, *Transnational Law, with and beyond Jessup*, in: *idem* (n. 1) 1–54, 3.

“I shall use [...] the term ‘transnational law’ to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.”²¹

Admittedly, Jessup’s definition relies heavily on the existence of a cross-border situation,²² it takes a practical approach,²³ and it is so broad that it borders on the all-encompassing. But it has become very influential nevertheless, because it clearly points out that in a globalized world, laws can take different forms, and that their creation, application and enforcement can involve different state and non-state actors.²⁴

The conception of transnational law has evolved beyond Jessup’s²⁵ definition. Today transnational law is understood as applying exclusively to autonomous, non-state normative orders,²⁶ as a “radical critique” of a state-centered understanding of law,²⁷ as a process of legal development in which the internationalization of law meets its privatization²⁸ or as a methodological approach towards analyzing legal relationships that do not adhere to the neatly demarcated boundaries of national law.²⁹ This article’s analysis follows the interpretation of transnational law as a methodological approach. It best expresses the focal point of all the other interpretations of transnational law without being either too expansive or too narrow: it embodies the particular perspective on law as a social practice³⁰ taking place in different state and non-state settings.

However, the choice of a methodological understanding of transnational law says little about the substantive content of the approach. A more comprehensive explana-

21 *Jessup*, *Transnational Law* (n. 1) 2.

22 *Calliess/Maurer*, *Transnationales Recht* (n. 3) 6; *Zumbansen*, *Transnational Law* (n. 20) 5, 15.

23 *Zumbansen*, *Transnational Law* (n. 20) 4.

24 See *Calliess/Maurer*, *Transnationales Recht* (n. 3) 4; *Zumbansen*, *Transnational Law* (n. 20) 31.

25 “[I]t is important to acknowledge and to accept that transnational law continues to be a contested concept that potentially stands for several different things”; *Zumbansen*, *Transnational Law* (n. 20) 29.

26 *Gunther Teubner*, *Global Bukowina: Legal Pluralism in the World Society*, in: *Global Law Without a State*, ed. by *idem* (1997) 3–28, 3–4.

27 *Zumbansen*, *Transnational Law* (n. 20) 38.

28 *A. Claire Cutler*, *Private Power and Global Authority – Transnational Merchant Law in the Global Political Economy* (2003); *idem*, *Locating Private Transnational Authority in the Global Political Economy*, in: *Zumbansen* (n. 1) 321–347; *Horatia Muir Watt*, *Private International Law’s Shadow Contribution to the Question of Informal Transnational Authority*, 25 *Indiana Journal of Global Legal Studies* 37–60 (2018).

29 *Calliess/Maurer*, *Transnationales Recht* (n. 3) 11, 15; *Zumbansen*, *Transnational Law* (n. 20) 39, 40, 43; *idem*, *Transnational Legal Pluralism* (n. 1) 148, 151; cf. *Horatia Muir Watt*, *Conflicts of Laws Unbounded: The Case for a Legal-Pluralist Revival*, (2016) 7 *TLT* 313–353, 314.

30 On this point, see *Roger Cotterrell*, *Why Must Legal Ideas be Interpreted Sociologically?*, *Journal of Law and Society* 25 (1998) 171–192, 187, 188; see also *Zumbansen*, *Transnational Legal Pluralism* (n. 1) 156.

tion is needed. To my mind, two aspects in particular characterize the transnational law approach.

The first aspect is the importance it attaches to the cross-border element. Transnational law is global law.³¹ In a globalized world with continual migration flows, interconnected economic systems and instant worldwide communication, transnational law embraces the idea that it is inadequate to think about the law almost exclusively in national terms.³² Consequently, transnational law pays particular attention to cross-border situations in which facts and effects are not limited to a single country. In this respect, it shares similarities with private international law, which is concerned with locating legal relationships and determining the applicable law in cases with references to more than one country. Moreover, the analysis of transnational law shifts the focus away from the Westphalian model of the nation-state³³ because it is not confined to exploring what a particular event or development means from the viewpoint of national law. Instead, it shows an openness to “alternative approaches to political legitimacy and legal order”.³⁴ There are parallels here to the evolving research agenda of decolonial comparative law³⁵ with its critique of a Eurocentric perspective on law.

The second aspect of transnational law is its embrace of legal pluralism.³⁶ Basically, legal pluralism holds that multiple legal orders with competing claims to authority can coexist within a single geographical space.³⁷ Transnational law takes this claim seriously and places it at the center of its considerations. The consequences are far-reaching. To begin with, there is a genuine understanding that the regulation of an issue can take place in different legal orders, whether national, supranational or international. Such regulation may even take place within those different legal or-

31 *Teubner*, *Global Bukowina* (n. 26) 4, 7–8; *Zumbansen*, *Transnational Legal Pluralism* (n. 1) 184; see also *Calliess/Maurer*, *Transnationales Recht* (n. 3) 30–31; *Watt*, *Conflicts of Laws Unbounded* (n. 29) 317; *Zumbansen*, *Transnational Law* (n. 20) 25; for a critical view, see *Terence Halliday/Gregory Shaffer*, *Transnational Legal Orders*, in: *idem* (n. 1) 3–72, 4.

32 See, e. g., *Roger Cotterrell*, *Transnational Communities and the Concept of Law*, *Ratio Juris* 21 (2008) 1–18, 2.

33 See *Horatia Muir Watt*, *Private International Law as “Ligature”: Elements for a Post-Monist Jurisprudence*, in: *Philosophical Foundations of Private International Law*, ed. by Roxana Banu/Michael S. Green/Ralf Michaels (2024) 278–300, 279 ff.; *Watt*, *Conflicts of Laws Unbounded* (n. 29) 315; see also *Zumbansen*, *Transnational Law* (n. 20) 11, 21, 23.

34 *Zumbansen*, *Transnational Legal Pluralism* (n. 1) 163.

35 *Lena Salaymeh/Ralf Michaels*, *Decolonial Comparative Law: A Conceptual Beginning*, *RabelsZ* 86 (2022) 166–188; *Sherally Munshi*, *Comparative Law and Decolonizing Critique*, 65 *American Journal of Comparative Law* 207–235 (2017).

36 *Cotterrell*, *Transnational Communities* (n. 32) 6–12; *Watt*, *Conflicts of Laws Unbounded* (n. 29) 315–319; *Teubner*, *Global Bukowina* (n. 26) 4, 7–8; *Zumbansen*, *Transnational Legal Pluralism* (n. 1) 150, 169.

37 *Sally Engle Merry*, *Legal Pluralism*, (1988) 22 *Law and Society Review* 869–896, 870; see also *Ralf Michaels*, *Private International Law and the Legal Pluriverse*, in: *Banu / Green / Michaels* (n. 33) 258–277, 259.

ders simultaneously. A transnational lawyer does not consider it peculiar or a deviation from the norm if the solution to a legal question is found in the interplay of a national statute, a rule of EU law and an international human rights guarantee. Moreover, transnational law questions whether there is a clear demarcation between the public and private spheres,³⁸ assuming instead that an issue can be regulated in either sphere or in both simultaneously. In other words, transnational law proceeds from the assumption that state and non-state actors are both capable of constructing autonomous legal orders. This can be illustrated with an example from sports law:³⁹ a soccer player under contract with a team in the German Bundesliga exercises his profession in compliance not only with national labor law but also with standards set by UEFA,⁴⁰ with the latter having even greater relevance.

Transnational law as it is understood here holds that different and at times competing processes of law-making, dispute resolution and law enforcement coexist due to the plurality of legal orders. To be clear, this is a statement *describing* what can be observed in the workings of law in a globalized context. It is not accompanied by a normative claim. However, an evaluation of what has been observed is of great importance. In particular, it calls for answers on how to deal with conflicts between legal orders should they provide divergent answers to a legal problem.

2. Main points of criticism and counterarguments

The theory of transnational law has been met with skepticism. Especially the power of non-state actors to create law, which transnational law presupposes, has been called into doubt. Can a rule or standard be called “law” even if it is not the outcome of a legislative process?⁴¹ To argue that it is indeed possible, one must be prepared to

38 A. Claire Cutler, *Artifice, Ideology and Paradox: The Public/Private Distinction in International Law*, (1997) 4 *Review of International Political Economy* 261–285; Hans-W. Micklitz, *Rethinking the Public/Private Divide*, in: *Transnational Law, Rethinking European Law and Legal Thinking*, ed. by Miguel Maduro/Kaarlo Tuori/Suvi Sankari (2014) 271–306; Calliess/Zumbansen, *Rough Consensus* (n. 1) 207; Horatia Muir Watt, *The Global Governance Implications of Private International Law*, in: *Oxford Handbook of Transnational Law* (n. 1) 893–909, 904–907. For a counter-perspective, see Matthias Goldmann, *A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and Not Law)*, (2016) 5 *Global Constitutionalism* 48–84.

39 See *The European Roots of the Lex Sportiva*, ed. by Antoine Duval/Alexander Krüger/Johan Lindholm (2024); Antoine Duval, *Lex Sportiva: A Playground for Transnational Law*, *European Law Journal* (ELJ) 19 (2013) 822–842; Franck Latty, *La lex sportiva: Recherche sur le droit transnational* (2007).

40 On the influence of these private standards, see Antoine Duval, *Embedded Lex Sportiva: The Swiss Roots of Transnational Sports Law and Governance*, in: Duval/Krüger/Lindholm (n. 39) 17–40.

41 Cf. Ralf Seinecke, *Der Rechtsbegriff des lebenden Rechts*, *Zeitschrift für Rechtssoziologie (ZfRSoz)* 44 (2024) 241–276, 269.

extend the traditional canon of sources of law to include rules and standards that are established independently of state involvement.⁴² This may require less of a change than even adherents of a strongly positivist view of law might initially think. First, recognizing non-state law as a source of law would not be entering uncharted territory.⁴³ Customary law is already an established source of law that derives its legitimacy not from state power but from the practices, behaviors and beliefs a community holds and from the acceptance of those laws as binding. Second, even positivist theories of law must eventually allude to some form of recognition of state law in order to support its validity. As has been pointed out repeatedly, Hans Kelsen's theory of the basic norm⁴⁴ cannot do without the fiction of its recognition in its field of application, at least at some point in time.⁴⁵ H.L.A. Hart, for his part, incorporated the rule of recognition⁴⁶ into his theory of law. According to his positivist conception, members of a community still have to accept the rule of recognition as their standard from "an internal point of view" when applying it.⁴⁷ Therefore, the "rule of recognition is also a *social* rule".⁴⁸ Hence, even the most renowned legal theorists have had to make space for an element of acceptance of rules that goes beyond their creation in a system of state authority.

The second criticism voiced against transnational law centers on "issues of accountability, legitimacy and democratic control".⁴⁹ According to transnational law, private actors are able to create, apply and enforce their own laws without their actions always being subject to review by state authorities. As a result, transnational law recognizes that laws created by non-state actors are to a certain extent beyond state control. However, since transnational law is understood here as being of a descriptive nature, this observation does not imply normative approval. Rather, the perspective of transnational law allows one to clearly identify this lack of accounta-

42 See Roger Cotterrell, *What Is Transnational Law?*, 37 *Law & Social Inquiry* 500–524, 504 (2012); Teubner, *Global Bukowina* (n. 26) 8–11; Zumbansen, *Transnational Law* (n. 20) 20; Watt, *Conflicts of Laws Unbounded* (n. 29) 331 ff.

43 On the overlap between customary law and transnational law, see Jan Hendrik Dalhuisen, *Custom and Its Revival in Transnational Private Law*, (2008) 18 *Duke Journal of Comparative & International Law* 339–370, 348–352.

44 Hans Kelsen, *Reine Rechtslehre*, Studienausgabe der 1. Auflage 1934, ed. by Matthias Jestaedt (2008) 73 ff.

45 Kelsen himself speaks of the basic norm as a "hypothetical basis" of a legal system; Kelsen, *Reine Rechtslehre* (n. 44) 77.

46 H.L.A. Hart, *The Concept of Law*³ (2012) 94–95, 100–110.

47 Scott J. Shapiro, *What is the Rule of Recognition? (And Does It Exist?)*, *Public Law and Legal Theory Research Paper No. 181* (2009) 4.

48 Shapiro, *What is the Rule of Recognition?* (n. 47) 4 ff.

49 Zumbansen, *Transnational Legal Pluralism* (n. 1) 160; see generally Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, *Regulation and Governance* 2 (2008) 137 ff.; Carol Harlow/Richard Rawlings, *Promoting Accountability in Multi-Level Governance: A Network Approach*, *ELJ* 13 (2007) 542–562.

bility and legitimacy and then to focus on dealing with these deficits. In order to subject non-state law to state control again, some of the relevant questions are whether and to what extent state legal orders can or should react to non-state law by means of reentry,⁵⁰ responsiveness⁵¹ or reflexivity.⁵²

IV. Transnational family law

So far, this article has drawn attention to the fact that a significant number of people live in family constellations with a cross-border element (II.) and shown that “transnational law” stands for looking at law in both state and non-state settings in cross-border cases and for embracing the idea of legal pluralism (III.). Juxtaposing these two considerations, one might ask: Is there a connection between transnational law and the situations of transnational or migrant families? In other words, is there such a thing as transnational family law? In the following, I will argue the case for the existence of transnational family law.⁵³ Key publications in transnational law indicate that the theory can be applied to the family context (IV.1.). Moreover, family law has long been intensively concerned with cases that are not confined to one country (IV.2.). Today, family law cases featuring a cross-border element cannot be adequately understood without considering legal pluralism (IV.3.).

1. References to transnational family law

Transnational law is typically used to understand rules in a commercial environment. *Lex mercatoria*, for example, concerns itself with laws designed by merchants to regulate their practices.⁵⁴ *Lex sportiva* focuses on the rules and regulations that

⁵⁰ Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (1998) 179 ff.

⁵¹ Michael Grünberger, *Responsive Rechtsdogmatik – Eine Skizze*, *Archiv für die civilistische Praxis* (AcP) 219 (2019) 924–942; *idem*, *Verträge über digitale Güter*, AcP 218 (2018) 213–296, 241–245; Philippe Nonet/Philip Selznick, *Law and Society in Transition: Towards Responsive Law* (1978) 77; Jan-Erik Schirmer, *Nachhaltiges Privatrecht* (2023) 80–82.

⁵² Gunther Teubner, *Reflexives Recht: Entwicklungsmodelle des Rechts in vergleichender Perspektive*, *Archiv für Rechts- und Sozialphilosophie* 68 (1982) 13–59.

⁵³ Likewise, see Isailović, *Family Law* (n. 6) 294–318.

⁵⁴ See, e.g., Norbert Horn, *Transnationales Handelsrecht: Zur Normqualität der lex mercatoria*, in: FS Karsten Schmidt (2009) 705–724, 708; Ursula Stein, *Lex mercatoria: Realität und Theorie* (1995) 35–69; Gunther Teubner, *Breaking Frames: Economic Globalization and the Emergence of Lex Mercatoria*, 5 *European Journal of Social Theory* 199–217 (2002); Peer Zumbansen, *Lex mercatoria: Zum Geltungsanspruch transnationalen Rechts*, *RabelsZ* 67 (2003) 637–682; Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, (2006) 13 *Journal of European Public Policy* 627–646; Orsolya Toth, *The Lex Mercatoria in Theory and Practice* (2017) 49 ff.

athletes are subject to, including those of private sports associations.⁵⁵ And transnational internet law is concerned with standards set by service providers and their regulatory effects on their worldwide users.⁵⁶ However, the regulation of close private interpersonal relationships is rarely explored in transnational law theory, which is surprising in light of two seminal texts on transnational law – one by Eugen Ehrlich, the other by Jessup – that deal with this issue.

Ehrlich addressed issues of family law in his “Grundlegung der Soziologie des Rechts”,⁵⁷ considered to be one of the foundational texts of transnational law.⁵⁸ Although not concerned with transnational law per se and written before transnational law had established itself as an independent perspective for the study of law, the book’s concept of “living law” now plays an important role in our understanding of transnational law.⁵⁹ Living law differs from state law in that it is anchored in social interactions and customs.⁶⁰ As evidence of a living law, Ehrlich described how an institution of family law – the matrimonial community of property – was practiced in Austria. He observed that the Austrian Civil Code devoted only four paragraphs to the matter of assets held jointly by spouses⁶¹ and continued:

“Whoever has had the opportunity to come into contact with the German-Austrian peasantry knows that they live almost exclusively in matrimonial community of property. But this matrimonial community of property, which is the prevailing voluntary matrimonial property regime of the German-Austrian peasantry, has nothing to do with that which the Austrian Civil Code deals with, and the provisions of the Civil Code are therefore never applied, as they are always excluded by a marriage contract agreed in every form.”⁶²

Jessup, with a very different focus, also wrote about non-state rules applied in the context of family.⁶³ He suggested that requirements on how to behave within a family unit could take on a legal character:

55 See n. 39.

56 Bodo P. Bützler, *Lex Digitalis Intermedia: Transnational Law and Legal Legitimacy* (2024) 133 ff.; Christopher Marsden, *Transnational Internet Law*, in: *Oxford Handbook of Transnational Law* (n. 1) 419–435, 423.

57 Eugen Ehrlich, *Grundlegung der Soziologie des Rechts* (1913).

58 Zumbansen, *Transnational Legal Pluralism* (n. 1) 176.

59 See Cotterrell, *Transnational Communities* (n. 32) 3; Hugues Rabault, “Global Bukovina”: Gunther Teubner’s Homage to Eugen Ehrlich, *ZfRSoz* 44 (2024) 48–66, 53–56; Ralf Seinecke, *Der Ehrlicheffekt*, in: Eugen Ehrlich: Kontexte und Rezeptionen, ed. by Marietta Auer / Ralf Seinecke (2024) 3–39; *idem*, *Ehrlichbilder: Freirecht, Rechtssoziologie und Rechtspluralismus: Zum 100. Todestag von Eugen Ehrlich*, *ZEuP* 2022, 302–336, 311 ff.

60 Ehrlich, *Grundlegung* (n. 57) 399; *idem*, *Über das “lebende Recht”*, in: *idem*, *Politische Schriften*, ed. by Manfred Rehbinder (2007) 191–200, 192, 196–197, orig. published 1921.

61 Ehrlich, *Grundlegung* (n. 57) 396.

62 Ehrlich, *Grundlegung* (n. 57) 396 (translation by the author).

63 See also the reference to this in *Isailović*, *Family Law* (n. 6) 298.

“As man has developed his needs and his facilities for meeting his needs, the rules become more numerous and more complicated. Some rules are made by the head of family, whether it be father or mother, such as ‘wash your hands before supper.’ [...] Nowadays, it is neither novel nor heretical to call all of these rules ‘law’.”⁶⁴

These two passages show that both Ehrlich and Jessup referred to the family context to demonstrate the existence of law beyond the state. One can only speculate about their reasons. One may be that many people can relate to the experience of feeling that rules in a family are binding even though they were not created by state authorities. What is clear, however, is that neither Ehrlich nor Jessup had reservations about applying their concepts of living law or transnational law to the family context.

2. Family law and cross-border situations

Cross-border situations have already been mentioned as one of the core elements of transnational law. Family law is also no stranger to regulating matters not confined to one country.⁶⁵ International family law provides lawyers with the rules and principles to determine which law is applicable to cases involving at least two different states, and it contains provisions determining international jurisdiction in family law cases with a cross-border element. It concerns itself with determining the applicable law and competent jurisdiction in matters such as marriage, registered partnership, parentage, adoption, parent-child relationship, guardianship, custody and trusteeship. International family law is relevant when answers to “genuine” family law questions must be found, such as in determining a child’s parentage. It also provides answers to preliminary or incidental questions (*Vorfragen*), which is to say, when questions of international family law must be clarified in order to interpret other laws.⁶⁶ For example, if a provision of law states that the surviving spouse of the deceased may be entitled to compensation for lost maintenance (see § 844(2) of the German Civil Code), compensation can only be granted after it is determined whether there was a marital bond between the deceased and the claimant. Should the deceased and the claimant be of different nationalities, it raises the preliminary question of which law is applicable to the marriage. Given the prevalence of transnational and migrant families (see above II.), international family law is of particular importance in answering these questions, and its application is not an exception to the rule but normal, everyday legal practice.

⁶⁴ Jessup, *Transnational Law* (n. 1) 8 ff.

⁶⁵ See especially *Marianne Andrae*, *Internationales Familienrecht*⁵ (2024) § 9.

⁶⁶ On preliminary or incidental questions generally, see, e.g., *Susanne Gössl*, *Preliminary Questions in EU Private International Law*, (2012) 8 *Journal of Private International Law* 63–76, 64; *Jan von Hein*, in: *Münchener Kommentar zum BGB*, vol. XII (2024) Einl. IPR nos. 159–163.

3. The legal pluralism of family law

Family law today is characterized not only by the frequent occurrence of cross-border cases and the resulting importance of international family law but also by a proliferation of rules originating from different legal orders.⁶⁷ Any approach to family law that neglects both the interaction of those different legal orders and the workings of legal pluralism would fail to adequately depict the field of law. More specifically, one can observe the operation both of various legal orders that draw their legitimacy from state actors (IV.3.a)) as well as of laws created by non-state actors (IV.3.b)).

a) Legal pluralism centered on the state

Family law as it exists today is an entity made up of different legal orders. For the most part, these different legal orders derive their legitimacy from state authority and operate at national, supranational and international levels.⁶⁸ The legal environment in which German family lawyers operate can serve as an instructive example.

aa) National level. At the national level in Germany, substantive provisions of family law are found in the German Civil Code and in a residual stock of provisions concerning international family law in the *Einführungsgesetz zum Bürgerlichen Gesetzbuche*, but the main corpus of international family law applicable in Germany is now at the European level. Multiple laws in addition to the German Civil Code concern themselves with substantive family law matters. Among these are the *Personenstandsgesetz*,⁶⁹ which regulates the status of persons, and the *Gesetz über die Selbstbestimmung in Bezug auf den Geschlechtseintrag*,⁷⁰ which specifies the conditions under which a person can change her gender entry in the official register. More extensive accounts of family law also include a range of social-security-related statutes such as the *Bundeselterngeld- und Elternzeitgesetz*,⁷¹ which regulates parental

⁶⁷ *Isailović*, Family Law (n. 6) 299.

⁶⁸ See *Fenton-Glynn*, Transnational Family Law (n. 6) 580ff.; *Joachim Gernhuber/Dagmar Coester-Waltjen*, *Familienrecht*⁷ (2020) § 2 nos. 4–9; *European Family Law*, ed. by Jens Scherpe (2016); *Christiane Budzikiewicz*, *Der Einfluss der Menschenrechte auf das IPR*, in: *Abkehr vom Multilateralismus – Internationales Recht in Gefahr?*, ed. by Anne Peters/Stephan Hobe/Eva-Maria Kieninger (2023) 153–188, 158, 172ff.

⁶⁹ *Personenstandsgesetz (PStG)* of 19 February 2007, BGBl. 2007 I 122, last amended by Art. 4 *Gesetz zum Schutz Minderjähriger bei Auslandsehen* of 24 June 2024, BGBl. 2024 I No. 212.

⁷⁰ *Gesetz über die Selbstbestimmung in Bezug auf den Geschlechtseintrag (SBGG)* of 19 June 2024, BGBl. 2024 I 206.

⁷¹ *Bundeselterngeld- und Elternzeitgesetz (BEEG)* of 27 January 2015, BGBl. 2015 I 33, last amended by Art. 7 *Zweites Haushaltsfinanzierungsgesetz 2024* of 27 March 2024, BGBl. 2024 I No. 107.

benefits and paid parental leave, or the *Unterhaltsvorschussgesetz*,⁷² which governs child support advances when the noncustodial parent fails to meet his or her obligations.

In view of the number and variety of national laws concerning family matters, one might even speak of an “internal legal pluralism”, a term that also seems appropriate because certain family law provisions of the German Civil Code can be seen as combining elements of private and public law. In particular, the rules on parentage (§§ 1591 ff. BGB) have an organizing function, and the provisions on guardianship (§§ 1814 ff. BGB) are designed to protect vulnerable adults by establishing legal guardianship relationships. The ordering function as well as the protective function in family law are generally associated with the exercise of sovereign power as it is understood in public law.⁷³

bb) European level. At the European level, two distinct but intertwined legal orders contain family law provisions. One is the regime of the European Convention on Human Rights (ECHR). Articles 8 and 12 of the ECHR respectively guarantee “the right to respect for” private and family life and “the right to marry and to found a family”, although the latter is only granted to different-sex couples.⁷⁴ Article 14 prohibits discrimination based on grounds such as sex, birth or status. The impact of the ECHR on the development of family law in the states signatory to the convention

72 *Unterhaltsvorschussgesetz* (UHVorschG) of 17 July 2008, BGBl. 2008 I 1446, last amended by Art. 6 Gesetz zur Anpassung von Datenübermittlungsvorschriften im Ausländer- und Sozialrecht of 8 May 2024, BGBl. 2024 I No. 152.

73 On the “publicized” nature of family law, see *Isailović*, Family Law (n. 6) 306; *Anne Röthel*, Familienrechtswissenschaft im wiedervereinigten Deutschland, AcP 214 (2014) 609–663, 626–628; see also *Elisabeth Koch*, in: Münchener Kommentar zum BGB, vol. IX (2022) Einl. FamR nos. 58–59; *Reinhard Voppel*, in: Staudinger, Kommentar zum BGB (2023) Einl. FamR no. 25. – The legal developments surrounding coercive treatment of assisted persons further illustrate the point. Initially, there was no basis for authorizing the subjection of assisted persons to compulsory inpatient medical procedures against their natural will under German law even when they were at risk of serious health impairment and were unable to appreciate the need for treatment or act accordingly. When asked about the legality of the situation, the Bundesgerichtshof (Federal Supreme Court) opted to interpret the care relationship in a way that stressed the element of sovereign authority (BGH 1 February 2006 – XII ZB 236/05, BGHZ 166, 141; *Röthel*, Familienrechtswissenschaft im wiedervereinigten Deutschland (this fn.) 628; *Andreas Spickhoff*, Autonomie und Heteronomie im Alter, AcP 208 (2008) 345–415, 390 ff. In the opinion of the Court, the guardian’s task was not so much to support the ward’s exercise of free will as much as to look after the ward’s rights and legal interests (BGH 1 February 2006 no. 21). Following the decision, the requirements for compulsory medical treatment of assisted persons was laid down in § 1832 BGB.

74 ECHR 21 July 2015 – 18766/11 and 36030/11 (*Oliari and Others./Italy*) no. 191; ECHR 14 December 2017 – 26431/12 (*Orlandi and Others./Italy*).

has been palpable.⁷⁵ Claire Fenton-Glynn has described the convention as a “catalyst for changes in family law across the continent”.⁷⁶ For example, the European Court of Human Rights’ interpretation of the right to family life under Art. 8 of the ECHR has contributed significantly to strengthening the rights of biological fathers in Germany.⁷⁷

Provisions of EU law constitute the other legal order shaping family law in the EU Member States. Although the EU does not have the authority to harmonize substantive family law,⁷⁸ EU law affects family law in the EU Member States in other ways. First, the harmonization of international family law in the Member States has increased in the last two decades through EU secondary law, with regulations on the law applicable to divorce and legal separation,⁷⁹ matrimonial property regimes,⁸⁰ and the property consequences of registered partnerships,⁸¹ to name but a few examples. Secondly, EU primary law has also shaped the substantive family law of the Member States: similar to the provisions of the ECHR just discussed, Art. 7 of the Charter of Fundamental Rights of the European Union guarantees the right to respect for private and family life, Art. 9 provides the rights to marry and to found a family (with no distinction between different-sex and same-sex couples), and Art. 21 provides the right not be discriminated against based on grounds such as sex or birth. EU law on free movement and citizenship has also influenced the development of family law in the Member States, for instance through case law of the Court

75 *Dagmar Coester-Waltjen*, The Impact of the ECHR and the ECtHR on European Family Law, in: Scherpe (n. 68) vol. I, 49–94, 65; *Isailović*, Family Law (n. 6) 301.

76 *Fenton-Glynn*, Transnational Family Law (n. 6) 579, similarly speaking of a “motor [...] of development”; *Anne Sanders*, Elternschaft und elterliche Verantwortung im Familienverfassungsrecht, JURA 2024, 701–712, 712.

77 ECHR 21 December 2010 – 20578/07 (*Anayo./Germany*); ECHR 15 September 2011 – 17080/07 (*Schneider./Germany*); ECHR 22 March 2012 – 23338/09 (*Kautzor./Germany*); see *Sanders*, Elternschaft (n. 76) 706.

78 See, e.g., *Jens Scherpe*, Introduction to European Family Law I: The Impact of Institutions and Organisations on European Family Law, in: idem (n. 68) vol. I, 1.

79 Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III), OJ 2010 L 343.

80 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ 2016 L 183.

81 Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ 2016 L 183.

of Justice of the European Union (CJEU) that has established what is called the “principle”⁸² or “method”⁸³ of recognition.⁸⁴

The impact of this case law is perhaps best explained with the help of the CJEU’s decision in *Coman*.⁸⁵ The facts that gave rise to the preliminary reference procedure in *Coman* are quickly told: a Romanian national residing in Belgium had married a US citizen in Belgium and then sought recognition by the Romanian authorities of the couple’s same-sex marriage for purposes of family reunification in Romania. The CJEU ruled that refusal by the authorities of a Member State to recognize a marriage concluded in another Member State was a restriction of the right of EU citizens to freedom of movement, and therefore that it required special justification, for example to protect a Member State’s national identity.⁸⁶ In *Coman*, the CJEU found that the restriction was not justified.⁸⁷ Much could be said based on *Coman* about the evolution of EU free movement law or about the complex task of striking a balance between accepting legal diversity at the member-state level while ensuring equal treatment throughout the European Union. For the purposes of this analysis, it is sufficient to focus on one point: *Coman* shows, in an exemplary manner, how EU free movement law is part of the regulation of transnational family law in Europe. In their original conceptualization, EU rights to free movement were only marginally linked to family law and were instead market-oriented.⁸⁸ Their interpretation was based on the goal of facilitating the free movement of EU citizens between Member

82 See, e.g., *Dagmar Coester-Waltjen*, Anerkennung im Internationalen Personen-, Familien- und Erbrecht und das Europäische Kollisionsrecht, IPRax 2006, 392–400; *idem*, Das Anerkennungsprinzip im Dornröschenschlaf, in: FS Erik Jayme, vol. I (2004) 121–129; *Johanna Croon-Gestefeld*, Der Einfluss der Unionsbürgerschaft auf das Internationale Familienrecht, RabelsZ 86 (2022) 32–64, 39–53; *Michael Grünberger*, Alles obsolet? – Anerkennungsprinzip vs. klassisches IPR, in: Brauchen wir eine Rom 0-Verordnung?, ed. by Stefan Leible / Hannes Unberath (2013) 81–160; *Peter Mankowski*, Primärrechtliche Anerkennungsspflicht im Internationalen Familienrecht?, in: FS Dagmar Coester-Waltjen (2015) 571–585.

83 *Leonhard Hübner*, Die Integration der primärrechtlichen Anerkennungsmethode in das IPR, RabelsZ 85 (2021) 106–145; see also *Colin Partington*, Das Geschlecht im Internationalen Privatrecht, Neue Zeitschrift für Familienrecht (NZFam) 2024, 433–439, 439.

84 CJEU 30 March 1993 – Case C-168/91 (*Christos Konstantinidis*), ECLI:EU:C:1993:115; CJEU 2 October 2003 – Case C-148/02 (*Carlos Garcia Avello*), ECLI:EU:C:2003:539; CJEU 14 October 2008 – Case C-353/06 (*Stefan Grunkin und Dorothee Regina Paul*), ECLI:EU:C:2008:559; CJEU 22 December 2010 – Case C-208/09 (*Ilonka Sayn-Wittgenstein*), ECLI:EU:C:2010:806; CJEU 2 June 2016 – Case C-438/14 (*Nabiel Peter Bogendorff von Wolfersdorff*), ECLI:EU:C:2016:401; CJEU 5 June 2018 – Case C-673/16 (*Relu Adrian Coman*), ECLI:EU:C:2018:385; CJEU 14 December 2021 – Case C-490/20 (*Stolichna obshtina, rayon “Pancharevo”*), ECLI:EU:C:2021:1008.

85 CJEU 5 June 2018 – *Coman* (n. 84).

86 CJEU 5 June 2018 – *Coman* (n. 84) nos. 39–43.

87 CJEU 5 June 2018 – *Coman* (n. 84) nos. 45–46.

88 *Dirk Ehlers/Claas Friedrich Germelmann*, Allgemeine Lehren der Grundfreiheiten, in: Europäische Grundrechte und Grundfreiheiten⁵, ed. by *idem* (2023) § 12 nos. 1–2.

States. But the CJEU's broad interpretation of the rules has changed the way family law deals with cross-border situations.

cc) International level. There are also provisions on the international level that must be taken into account when describing the workings of family law in a pluralist legal environment. It would go too far to list all the relevant provisions here. However, insight into their significance is provided by the International Covenant on Civil and Political Rights, which contains articles on the protection of the family (Arts. 17(1), 23(1)), marriage (Art. 23(2), (4)) and children's rights (Art. 24). Children's rights are further elaborated in the Convention on the Rights of the Child. In addition, treaties such as the Hague Convention on Parental Responsibility and Protection of Children or the Hague Protection of Adults Convention are part of the corpus of international family law. All state parties to these conventions have committed themselves to complying with their provisions and must therefore take them into account when creating new or applying existing family law.

b) Legal pluralism beyond the state

So far, this analysis has sought to make the case for the existence of transnational law by presenting relatively uncontroversial features of current family law. I will now introduce a more controversial argument based on the activities of non-state actors in the field of family law that would also come under the definition of transnational law. This section substantiates the thesis of legal pluralism beyond the state in family law by reviewing the operation of marriage contracts (aa), the practice of mediation procedures to resolve family law conflicts (bb), and the phenomenon of a so-called "parallel justice"⁸⁹ in family matters (cc).

aa) Marriage contracts. Marriage contracts can be seen as a form of private family law. They are often concluded in order to deviate from statutory marriage regulations, either before the wedding in a prenuptial agreement or at a later point in time.

⁸⁹ See explorations of the term by *Frauke Brosius-Gersdorf*, *Dritte Gewalt im Wandel: Veränderte Anforderungen an Legitimität und Effektivität?*, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 74 (2015) 115–167, 120 ff.; *Hatem Elliesie/Marie Claire Foblets/Mahabat Sadyrbek/Mahmoud Jaraba*, *Konfliktregulierung in Deutschlands pluraler Gesellschaft: "Paralleljustiz"?* – Konzeptioneller Rahmen eines Forschungsprojekts, *Max Planck Institute for Social Anthropology Working Paper No. 199* (2019) 3 ff.; *Markus Porsche-Ludwig*, *Wie parallel ist die "Paralleljustiz"?*, *Recht und Politik* 52 (2016) 218–228, 218 ff.; *Mathias Rohe/Mahmoud Jaraba*, *Paralleljustiz: Eine Studie im Auftrag des Landes Berlin*, vertreten durch die Senatsverwaltung für Justiz und Verbraucherschutz (2015) 8 ff.; *Mathias Rohe*, *Außergerichtliche Streitbeilegung und "Paralleljustiz" in Deutschland unter kulturell-religiösen Vorzeichen*, in: *Normenkonflikte in pluralistischen Gesellschaften*, ed. by Susanne Schröter (2017) 195–219, 203.

In marriage contracts, spouses often agree on marital property arrangements they consider to be better suited to their case than the relevant statutory provisions.⁹⁰ This is precisely the point that Ehrlich made to substantiate his claim of a living law when he referred to the convention among Austrian peasants of agreeing to a matrimonial community of property.⁹¹ Marriage contracts can also regulate the consequences of divorce, including such issues as the provision of alimony.⁹² International family law recognizes the existence and effects of marriage contracts. For example, Art. 22 of Regulation 2016/1103 (EU), which deals with the jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes,⁹³ provides that spouses may choose the law applicable to their matrimonial property regime,⁹⁴ and Art. 7 provides that parties to a dispute concerning a matrimonial property regime may choose the court with jurisdiction if certain conditions are met.⁹⁵

It is undisputed that spouses, as private actors, can enter into marriage contracts. It is also undisputed that their contractual agreements are only valid in so far as they comply with state law. Looking at marriage contracts through the lens of transnational law turns the focus to aspects of marriage contracts that doctrinal analyses tend to neglect, such as their social dimension. It is much more advisable for some people than for others to conclude marriage contracts. One spouse with significant business interests may be strongly encouraged to do so⁹⁶ because it may be advantageous in the event of divorce. In contrast to statutory law, contractual provisions can prevent the other spouse from benefitting if the value of the one spouse's investments increases during the marriage. Spouses whose relationship features a cross-border element⁹⁷ may also be advised to draw up a marriage contract to specify what law governs their financial circumstances during the marriage, since different legal orders may come into consideration. By setting up an agreement tailored to the specifics of their case, spouses can resolve ambiguities about the applicable law and how it should apply to them. While concluding a marriage contract is an individual decision, lawyers usually use forms and templates when drafting them, and the stand-

90 *Gernhuber/Coester-Waltjen*, Familienrecht (n. 68) § 31 no. 1.

91 See n. 62.

92 *Marina Wellenhofer*, Richterliche Inhaltskontrolle von Eheverträgen und Leitlinien der Vertragsgestaltung, NZFam 2020, 645–650.

93 Regulation (EU) No 2016/1103 (n. 80).

94 An equivalent stipulation regarding registered partnerships is to be found in Art. 22 Regulation (EU) No 2016/1104 (n. 81).

95 For the equivalent regarding registered partnerships, see Art. 7 Reg. (EU) 2016/1104 (n. 81).

96 Not uncommonly, shareholder agreements oblige shareholders to exclude their spouses from being entitled to move for equalization of accrued gains; see *Günter Brambring*, Güterstandsklauseln in Gesellschaftsverträgen, Deutsche Notar-Zeitschrift 2008, 724–739, 725.

97 *Claudia Campbell*, Ehevertrag mit Auslandsberührung, NZFam 2020, 678–684; *Erne Jessica Meise*, Rechtswahl in vorsorgenden Eheverträgen und Scheidungsfolgenvereinbarungen – Teil 1, Rheinische Notar-Zeitschrift 2016, 485–501.

ardized wording of specific clauses is adapted only as much as necessary to suit the individual case. In this way, private actors over time establish the substance of marriage contracts separately from state legislatures.

Studies of marriage contracts tend to adopt an individualistic perspective,⁹⁸ stressing their potential for realizing the autonomous decision of a spouse about how to arrange his or her family affairs.⁹⁹ Legal discussions then focus on whether specific clauses in marriage contracts will pass judicial scrutiny. I would like to argue that the perspective of transnational law can “complement”¹⁰⁰ these studies, for transnational law is less concerned with assessing individual clauses than with examining the creation and operation of marriage contracts as well as the approaches taken by state authorities to review the clauses.

bb) Mediation in family matters. Apart from the creation of law by non-state actors, the settlement of legal disputes by non-state actors¹⁰¹ is another feature of transnational law. Family law also contains elements of alternative dispute resolution, and mediation in particular is a recognized and proven means of resolving family law conflicts.¹⁰² It is a structured, confidential process in which parties voluntarily and independently seek amicable settlement of a conflict with the help of one or more neutral, independent persons without decision-making power (see § 1(1 and 2) of the Mediationsgesetz). In contrast to arbitral tribunals, mediators are not obliged to apply state law when resolving the conflict.¹⁰³ Instead, they can take into account other considerations – financial, social, psychological etc. – when proposing solutions. The motivation for using mediation in family law matters is to reduce the

98 *Meo-Micaela Hahne*, Wider die Diktatur des § 138 BGB bei Eheverträgen in: FS Elisabeth Koch (2019) 357–362; *Christof Münch*, Was kann die Ausübungskontrolle?, in: FS Elisabeth Koch (2019) 389–398; *Wellenhofer*, Richterliche Inhaltskontrolle (n. 92) 645–646; on this point with respect to contracts in general, see *Klaas Hendrik Eller*, Transnational Contract Law, in: Oxford Handbook of Transnational Law (n. 1) 513–530, 516.

99 *Christof Münch*, in: Münchener Kommentar zum BGB, vol. IX (2022) § 1408 no. 1; *Johannes Scheller/Miriam Sprink*, in: Beck’scher Online-Kommentar zum BGB (1 August 2024) § 1408 no. 1; *Wellenhofer*, Richterliche Inhaltskontrolle (n. 92) 646.

100 *Eller*, Transnational Contract Law (n. 98) 516.

101 *Yves Dezalay/Bryant G. Garth*, Dealing in Virtue, International Commercial Arbitration and the Construction of a Transnational Legal Order (1998) 18; *Florian Grisel*, Transnational Law in Context: The Relevance of Jessup’s Analysis for the Study of “International” Arbitration, in: Zumbansen (n. 1) 186–196, 190–192.

102 See, e. g., *Rudolf Schröder*, Familienmediation (2004) no. 7.

103 *Bernhard Ulrici*, in Münchener Kommentar zur ZPO, vol. I (2020), Mediationsgesetz §§ 1–9 no. 18.

burden of litigation on the courts¹⁰⁴ as well as to address the emotional nature of family law disputes by seeking amicable solutions outside the courtroom.¹⁰⁵

At the national level in Germany, § 36a of the Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG), Germany's rules of family procedure, states that the courts may submit proposals for out-of-court conflict resolution to the parties in family law disputes. Furthermore, § 156 of the FamFG holds that the judge can order the parties to attend an information session about mediation. Mediation is also an instrument of international family law. In cases of cross-border child abduction, for example, Art. 7 lit. c of the 1980 Hague Convention on the Civil Aspects of International Child Abduction requires the competent authorities to take measures to ensure the voluntary return of the child and to bring about an amicable settlement. Article 25 of the Brussels IIb Regulation, which supplements the provisions of the Hague Convention,¹⁰⁶ is even clearer, stating that in cases of international child abduction a court must "invite the parties to consider whether they are willing to engage in mediation or other means of alternative dispute resolution", a procedure to be disregarded only if it would be "contrary to the best interests of the child, [...] not appropriate in the particular case or would unduly delay proceedings".

As mediating a child abduction case is not an everyday task, an institutional structure has been set up to assist judges and parties in finding competent mediators. The German Federal Office of Justice (the Bundesamt für Justiz), which is responsible for international returns, informs family mediation specialists when a new international child abduction dispute arises. For example, it contacts the International Mediation Centre for Family Conflict and Child Abduction (the MIKK),¹⁰⁷ a private association active in the field of international family mediation that initiates the process once the parties to the dispute agree to mediation. But the MIKK is not the only such association; mediators in different countries who share expertise in the area have set up transnational networks to share their knowledge and experience.¹⁰⁸

Much that can be observed in the context of family law mediation can be analyzed with help of the terminology, concepts and methodology of transnational law. Family law mediation is used not only in cases confined to one state but also in cases with a cross-border element. More importantly, its presence shows the role of private, non-state actors in resolving legal conflicts as state courts transfer responsi-

¹⁰⁴ *Deutscher Bundestag*, Entwurf eines Gesetzes zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung, BT-Drs. 17/5335 of 1 April 2011, p. 11.

¹⁰⁵ See *Sophie Gräfin von Ballestrem / Jürgen Schmid / Anke Loebel*, Mediation und grenzüberschreitende Mediation, NZFam 2015, 811–814, 812–813.

¹⁰⁶ Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (Brussels IIb), OJ 2019 L 178.

¹⁰⁷ Internet presence under <<https://mikk-ev.org/>> (25 September 2024).

¹⁰⁸ *Ballestrem / Schmid / Loebel*, Mediation (n. 105) 813.

bility for resolving family matters to private actors. This blurring of the public-private divide is a typical feature of transnational law. Furthermore, the way in which mediation in international child abduction cases is organized shows that transnational structures have been established. Not only does the German Federal Office of Justice cooperate with private mediation associations, thereby giving legitimacy to these private actors, but private mediators have also begun creating their own transnational networks.

cc) Unregistered marriages and parallel justice. In contrast to the situation with mediation, private actors are sometimes involved in resolving family law matters without the voluntary consent of both parties. These private actors may be heads of families, religious leaders, or distinguished members of the community.¹⁰⁹ Legal anthropologists discuss their activity under the heading of “parallel justice”¹¹⁰ – a phenomenon whose existence is further evidence of transnational family law.

First the precise meaning of parallel justice must be clarified. Hatem Elliesie, Marie-Claire Foblets, Mahabat Sadyrbek and Mahmoud Jaraba, all of whom take a critical view, describe it as “a form of specific mechanisms in the use of norm derivatives for conflict resolution that takes place outside state institutions”.¹¹¹ In a different passage, they refer to parallel justice as a “catchword”¹¹² that is “associated with an unspecified and indeterminable range of conflict settlements conducted without state control and/or without compliance with legal requirements”.¹¹³ Their definition is missing the element of compulsion or involuntariness, and it does not allow a clear-cut demarcation to be made between parallel justice and mediation practices. A more apt characterization of parallel justice should therefore refer to the fact that it is an involuntary exercise for at least one of the parties.¹¹⁴ Thus, in cases of parallel justice there “is a lack of necessary opt-out possibilities/access to state protection”.¹¹⁵

Claims of parallel justice in family law are backed by a study by Mathias Rohe and Mahmoud Jaraba¹¹⁶ about the phenomenon of unregistered marriages in Berlin¹¹⁷ which are concluded solely with the help of community or religious leaders.¹¹⁸ Unregistered marriages are not recognized as marriages in civil law because under

109 For an analysis of similar developments in the US, see *Michael A. Helfand*, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, *New York University Law Review* 86 (2011) 1231–1305.

110 See n. 89.

111 *Elliesie/Foblets/Sadyrbek/Jaraba*, *Konfliktregulierung* (n. 89) 5 (translated by the author).

112 *Elliesie/Foblets/Sadyrbek/Jaraba*, *Konfliktregulierung* (n. 89) 3 (translated by the author).

113 *Elliesie/Foblets/Sadyrbek/Jaraba*, *Konfliktregulierung* (n. 89) 3 (translated by the author).

114 *Rohe*, *Außergerichtliche Streitbeilegung* (n. 89) 203.

115 *Rohe*, *Außergerichtliche Streitbeilegung* (n. 89) 203 (translated by the author).

116 *Rohe/Jaraba*, *Paralleljustiz* (n. 89).

117 *Rohe/Jaraba*, *Paralleljustiz* (n. 89) 111–127.

118 Another term is “‘non-state’ (informal) marriages”; *Yassari/Foblets*, *Diverse Families* (n. 12) 16.

German law a marriage is regarded as valid only if it has been entered into in conformity with the law.¹¹⁹ A marriage must therefore either fulfill the requirements of the German Civil Code (§§ 1303 ff. BGB) or, if the marriage has a cross-border element, the provisions applicable due to private international law. Although it is inherently difficult to obtain reliable figures on unregistered marriages, interviews with imams in Berlin led the authors of the study to estimate that 35–45% of Muslim marriages in Berlin during the period analyzed took place exclusively in private settings and were therefore not considered valid marriages under German law.¹²⁰

If both spouses know that the state authorities will not recognize the marriage and agree to enter a “private” marriage anyway, then the arrangement is not a case of parallel justice. However, the situation is different if a decision to enter into an unregistered marriage is forced or based on ignorance of the consequences. Under German law, unregistered spouses are treated as partners in an informal partnership.¹²¹ As a result, the partners cannot invoke the provisions on spousal maintenance that would apply either in marriage or divorce, nor can they demand an equalization of gains accrued during the marriage. Their chances of receiving financial compensation if the relationship ends are limited,¹²² which can be quite a disadvantage for the partner, usually the woman, in the weaker position.¹²³ It is not far-fetched to assume that at least some of the women who enter into unregistered marriages are ignorant of the lack of legal recognition and negative consequences of the arrangement. This suspicion is confirmed by the cited study’s finding that one of the reasons men deliberately choose to enter into unregistered marriages is to avoid incurring financial obligations to the woman in the event of divorce.¹²⁴ Under such circumstances, unregistered marriages can rightly be seen as instances of parallel justice.

Like marriage contracts and mediation, unregistered marriages have a number of features of transnational law: first, it is non-state actors rather than state registrars who are actively involved in concluding these marriages. Second, the spouses in unregistered marriages usually consider the commitments they make to be binding. These commitments may deviate from obligations imposed by state law but are perceived as binding within their scope. Third, not only do the spouses in unregistered marriages see themselves as husband and wife, but so do others in their social environment. Fourth, the spouses in unregistered marriages often come from ethnic,

119 On the “defense of civil marriage”, see *Anatol Dutta*, *Between Openness and Restriction: German Family Law and Multicultural Challenges*, in: *Yassari/Foblets* (n. 4) 255–276, 262.

120 *Rohe/Jaraba*, *Paralleljustiz* (n. 89) 112, 113.

121 *Dutta*, *Openness and Restriction* (n. 119) 262.

122 For the relevant case law, see especially BGH 19 September 2012 – XII ZR 136/10, NJW 2012, 3374.

123 *Rohe/Jaraba*, *Paralleljustiz* (n. 89) 124–126.

124 *Rohe/Jaraba*, *Paralleljustiz* (n. 89) 122.

cultural or religious backgrounds that differ from those of the majority society.¹²⁵ A cross-border dimension is present when the spouses are members of transnational or migrant families. In this context, it is important to stress that the assessment of unregistered marriages from the perspective of transnational law is purely descriptive and does not imply a normative evaluation in the sense that unregistered marriages are to be approved due to their transnational character.

V. The merits of looking at family law through the transnational lens

The last section has argued – or at least attempted to argue – for the existence of a transnational family law. The very argument provokes a follow-up question: What are the merits of studying family law from a transnational perspective? To my mind, the academic study of transnational family law is worthwhile for three main reasons.

First, transnational law constitutes an additional methodological approach to family law,¹²⁶ providing terminology, concepts and methodology that can be used to explain observable phenomena. One might even go so far as to argue that it is particularly suited to the purpose, and that it was no coincidence that Jessup alluded to rules designed by the head of the family as examples of transnational law. We can relate to the idea that in family relations, private actors are able to make rules that feel as binding as state laws do; our personal experience suggests it. It should be possible to build on this feeling to study matters of family law that are characterized by the activity of private actors. Moreover, in a world of multiple interacting normative orders, transnational law, with its emphasis on legal pluralism, offers the tools to describe and analyze the functioning of family law.

Second, with an epistemological interest in the other direction, engaging with transnational family law can help to broaden our understanding of transnational law.¹²⁷ Applying the methodology of transnational law to family law matters can teach us something about transnational law. Transnational law is sometimes perceived as focusing strongly on business law.¹²⁸ It is even said to have an overtly capitalist orientation¹²⁹ because it entertains the idea that private, often wealthy, actors can create binding rules in an effort to evade state control. The existence of transnational law applying to families indicates that its portrayal as a form of business law is one-sided. Moreover, transnational family law shows that it can be fruitful to analyze legal relationships in the more private interpersonal sphere through the lens of transnational law.

¹²⁵ See Dutta, Openness and Restriction (n. 119) 262; Rohe/Jaraba, Paralleljustiz (n. 89) 111.

¹²⁶ Isailović, Family Law (n. 6) 297.

¹²⁷ Isailović, Family Law (n. 6) 297.

¹²⁸ This may be due to its many links to the discussion of *lex mercatoria*.

¹²⁹ Cf. Zumbansen, Transnational Legal Pluralism (n. 1) 174.

Third, the existence of transnational family law provides further evidence against the thesis of the “exceptionalism” of family law. In the neighboring field of comparative law, it has been suggested that the possibilities of comparing different legal orders in family law is limited¹³⁰ because the social, cultural and religious influences that shape family law are too diverse to allow for meaningful comparison.¹³¹ However, researchers have demonstrated that, despite this complexity, the family law of different legal systems is a suitable subject for comparative law. Similarly, researchers of transnational law have paid so little attention to family law that it is considered a “blind spot”¹³² in the literature. Here, the wider socio-cultural context of family law may also be a decisive factor behind this relative neglect. Research on transnational family law can thus provide further evidence that family law is not so different from other fields of law and that it too can be analyzed using a theoretically grounded approach that takes into account the nature of contemporary global law.

VI. Conclusion

The question of whether transnational family law exists was the starting point of this analysis. The inquiry has sought to show that not only is it possible to think about family law using a transnational law methodology, but even that it is fruitful. Complementing international family law, transnational law methodology offers an additional perspective from which to look at family law matters featuring a cross-border element. This perspective can help to depict the operation of family law in a globalized world, including the phenomenon of non-state actors being heavily involved in its creation, application and enforcement. To substantiate this claim, the present analysis has portrayed the embeddedness of family law in a legal pluralist environment. It also examined three facets of family law – the drafting of marriage contracts, the practice and procedures of mediation to resolve family conflicts, and unregistered marriages – in greater detail to highlight their transnational aspect. These are not the only references one could think of to make the case for the existence of transnational family law. Further fields of application of the transnational law method come to mind. For example, one could analyze the structure of globally operating family-owned companies, the activities of NGOs in family law matters, the strategic use of EU law to bring about changes in national law or the handling of surrogacy in practice.¹³³ This potential diversity of topics indicates that transnational family law offers vast research potential and will be worth studying in the future.

130 Konrad Zweigert/Hein Kötz, Einführung in die Rechtsvergleichung³ (1996) § 3 III, 38–39.

131 Zweigert/Kötz, Einführung (n. 130) 38–39.

132 Isailović, Family Law (n. 6) 294.

133 Isailović, Family Law (n. 6) 309–311.