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SYMPOSIUM INTRODUCTION

CHILD LAW IN MUSLIM JURISDICTIONS: THE ROLE OF THE STATE IN ESTABLISHING FILIATION (*NASAB*) AND PROTECTING PARENTLESS CHILDREN

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This special issue comprises some of the contributions to the workshop "Establishing Filiation: Towards a Social Definition of the Family?," which, under the auspices of the Max Planck Institute for Comparative and International Private Law, was convened at the German Orient Institute and the Université Saint-Joseph in Beirut, Lebanon, November 8–10, 2017. This was the second workshop of the Max Planck Working Group on Child Law in Muslim Countries, a community of scholars of law, Islamic studies, anthropology, and history that has come together to revisit the concepts of family, children's rights, and parenthood in Muslim and Middle Eastern jurisdictions.

In the first phase of the study, the working group explored the mechanism of custody and guardianship of children in "regular" family settings.[1] In the second phase, the study was taken further, moving from parental care to the establishment of filiation (*nasab*) and the schemes in place for the care and protection of "parentless" children, that is, children of uncertain, defective, or unknown filiation (*majhūl al-nasab*) or with unfit parents. Both issues, the regulation of *nasab* and the care of children without permanent caretakers, are particularly thorny matters because they touch on a number of sensitive issues, including sexual relationships out of wedlock, biological fatherhood, and international pressure to implement child protection laws.

A total of eighteen papers were commissioned: fourteen country studies discussing the legal framework governing the establishment of filiation and care for parentless children and four thematic papers highlighting those topics in premodern Sunni and Shiite Islamic jurisprudence (*fiqh*), Arab private international law, and public international law. Thus, while most of the country studies are being published in the form of an edited volume,[2] two country studies—one on India

1 Nadjma Yassari, Lena-Maria Möller, and Imen Gallala-Arndt, eds., *Parental Care and the Best Interests of the Child in Muslim Countries* (The Hague: T.M.C. Asser Press, 2017).

2 Nadjma Yassari, Lena-Maria Möller, and Marie-Claude Najm Kobeh, eds., *Filiation and the Protection of Parentless Children: Towards a Social Definition of the Family in Muslim Jurisdictions* (The Hague: T.M.C. Asser Press, 2019).

written by Jean-Phillippe Dequen and one on Indonesia written by Euis Nurlaelawati and Stijn Cornelis van Huis have been selected for this symposium in the *Journal of Law and Religion*. These contributions particularly highlight the involvement of the state in regulating *nasab* and organizing child care for destitute children. In addition, two thematic articles complete the picture: the first, by Shaheen Sardar Ali, deals with *nasab* and adoption under public international law. The second, by Dörthe Engelcke, is a comparative analysis of the role of the state in regulating *nasab* and the placement of children into new families across thirteen jurisdictions. It draws out commonalities and differences across cases and investigates the effects of state involvement on different religious communities.

From a global perspective, paternity has generally been based on the presumption that the mother's husband is the father of the child if that child is procreated in the context of a valid marriage within a certain time frame after the conclusion of that marriage or the date of divorce. Maternity, by contrast, is established through childbirth and most jurisdictions do not link motherhood to the woman's family status. Thus, whereas paternity is firmly linked to the existence of a (valid) marriage, maternity remains a matter of biology.

These aspects are of considerable importance, since children born out of wedlock are not entitled to *nasab* and, as a result, face serious legal discrimination: they are generally not entitled to carry their (biological) father's name and they have no right to maintenance, nor do they inherit from their father. Beside the legal issues, these children face social stigmatization. This is most evident in the case of single mothers, who continue to find it difficult to establish *nasab* for their children, get a birth certificate, or transfer their nationality to their children.

At the same time, the strict marriage/paternity nexus is somewhat mitigated by various constructions of Islamic law, including the so-called sleeping embryo and the possibility for a child born as a result of erroneous sexual intercourse (*al-waṭʾ bi-shubha*) to receive *nasab* under certain circumstances. The acknowledgment (*iqrār*) of filiation, according to which a child of unknown descent can be elevated to the legal status of a legal child through a declaration by the parent-to-be—in most cases the father-to-be—is another example. Legislatures, too, have often gone to considerable length to stretch the definition of what constitutes a marriage to bring children into the safety net of a marital union. The reception of these schemes reflects modern legislatures' concern to afford legal filiation to children, as far as possible, while at the same time trying to avoid any apparent violation of Islamic law. In the process, filiation is increasingly being acknowledged as a child's right, rather than a status that results from marriage.

The admission of scientific evidence such as DNA screening in filiation cases reflects this new approach and presents the first state policy that could effectively challenge definitions of filiation within Islamic law. Since *nasab* can be constructed as a legal fiction disregarding biological reality, DNA tests naturally create frictions by questioning these fictions: How do courts assess the value of such tests? Can a DNA test be used to overrule the presumption of paternity within the context of a valid marriage? The answers to these questions often revolve around the interpretation and valuation of the principle of the best interests of the child (*maṣlaḥat al-ṭifl*), with a careful balancing of the various interests at stake. However, whereas an increased focus on the concept of the best interests of the child is evident across all Muslim and Middle Eastern jurisdictions in the area of custody and led to deviations from those custody rules that are based on Islamic jurisprudence (*fiqh*),[3] the concept of the best interests of the child has not been introduced in statutory law with respect to *nasab*, the provisions of which remain largely faithful to classical Islamic law.

3 See Yassari, Möller, and Gallala-Arndt, *Parental Care and the Best Interests of the Child in Muslim Countries*, 326.

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A key aspect of the country studies and thematic papers commissioned for the project was the various schemes conceived by the legislatures and the judicature to place children without caretakers into new homes. The articles in this symposium explore the variety of schemes under which these caretakers can be appointed to perform specific tasks or meet certain needs of a child of whom one or both parents are temporarily or permanently absent. The most contentious issue remains the permanent placement of a child into a new family, as premodern Islamic law does not allow adoption. In fact, Tunisia is the only Muslim-majority country that explicitly provides for full adoption and uses the Arabic term *tabannī* to denote it. Other jurisdictions explicitly forbid *tabannī*; some have designed other schemes such as *riʿāya*, *iḥtiḍān, ḥaḍāna usrīyya*, *usra badīla* or *sarparastī* to integrate children with unfit caretakers, children of unknown filiation, and foundlings (singular *laqīṭ*) into new families. In some cases, aspects of a full child-parent relationship are incorporated into the scheme; in others, the particular rights to inherit and to carry the new parent's name are denied.

One important issue that features in all of the articles in this symposium is the role of the state in the protection of these children. The articles particularly showcase key aspects of state legal pluralism and its impact on the implementation of rules regulating *nasab* and care for these children. The main focus is put on the ways in which *nasab* and the organization of care for children without permanent caretakers operate in jurisdictions that differ with respect to institutional and normative unification.[4] The contributions investigate the effects of these differences on the allocation of *nasab* and the placement of destitute children into new families. India is institutionally unified but lacks normative unification. That means that the court system is unified and (secularly trained) judges apply the family laws of different religious communities in regular state courts, including Muslim family law. Indonesia is an example of institutional and normative semi-unification. The provisions of the 1974 Marriage Law apply to all Indonesians except for those provisions that explicitly stipulate otherwise. Islamic courts have jurisdiction in family matters pertaining to Muslims and general courts adjudicate family law matters for all non-Muslims. In Indonesia, in practice, these religious and regular courts hold concurrent jurisdiction in a number of areas, including *nasab* and the placement of children into new families. The literature has formulated several theoretical assumptions on the effects of concurrent jurisdiction on the development of Muslim family law and court practice. It has been claimed that concurrent jurisdiction can encourage change because it allows religious group members to opt out of the jurisdiction of a religious court should this court fail to respond to the needs of a group member.[5] It has further been argued that competition between regular and religious courts can lead to religious courts becoming more accommodating to what are commonly described as "liberal values" while resistance to liberal values remains stronger in areas in which religious tribunals hold exclusive jurisdiction.[6] Others have stressed that concurrent jurisdiction between secular and shariʿa courts has not led to broad changes within Islamic family law, but has encouraged self-reform within the shariʿa judiciary.[7] The

4 For further discussion on institutional and normative unification, see Yüksel Sezgin, *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt, and India* (Cambridge: Cambridge University Press, 2013), 5–8.

5 Ayelet Shachar, *Multicourt Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001), 122.

6 Daphna Hacker, "Religious Tribunals in Democratic States: Lessons from the Israeli Rabbinical Courts," *Journal of Law and Religion* 27, no. 1 (2012), 59–81, at 80.

7 Yüksel Sezgin, "Muslim Family Laws in Israel and Greece: Can Non-Muslim Courts Bring about Legal Change in Shariʿa?," *Islamic Law and Society* 25, no. 3 (2018): 235–273, at 238.

different contributions shed further light on the effects of concurrent jurisdiction on the establishment of *nasab* and the placement of children into new families.

In addition to different institutional settings, states have also issued legislation that affect the establishment of *nasab*, which have at times modified Islamic provisions on filiation. This has further increased normative diversity in family law matters. By contrast, there is a trend toward the issuance of domestic legislation in matters pertaining to the placement of children into new families. Regulating alternative care for children without permanent caretakers has, since the 2000s, become a growing area of state intervention. While to date family laws that apply to all citizens regardless of religious affiliation remain rare, there are domestic laws that allow for the placement of destitute children into new families in Indonesia and India, which are open to all citizens regardless of religious filiation. In India, the Juvenile Justice (Care and Protection of Children) Act of 2000 allows Muslims to opt out of religious law in matters of adoption. Similarly, the Indonesian ministerial regulation No. 110 of 2009 on the Requirements for Adoption applies to all Indonesians regardless of their religious affiliation. These laws have not replaced existing Islamic or customary schemes to place children without permanent caretakers into new families, but rather have opened up new opportunities for forum shopping by creating a way for (Muslim) citizens to opt out.

The contributors thus answer a number of interrelated research questions. What effects do different manifestations of normative and institutional pluralism have on the development of *nasab* and adoption schemes? To what extent can states reshape religious law and how do they attempt to do so? What is the effect of a system of concurrent jurisdiction that has increased citizens' ability to forum shop on the development of children's rights? Overall, all of the contributions demonstrate that states have attempted to facilitate children's right to filiation while remaining hesitant to question that (paternal) filiation is a result of marriage. Similarly, Shaheen Sardar Ali demonstrates in her contribution that the Islamic legal traditions as well as international law operate with caution and restraint when it comes to extending equal rights on the basis of nondiscrimination to children born out of wedlock.

The contributors identify several key strategies states have employed to remedy some of the forms of legal discrimination faced by children born out of wedlock and Islamic impediments to full adoption. States have issued laws in areas in which religious laws are silent. Without reforming religious provisions on adoption, they have opened up alternative forms of adoption that allow citizens to opt out of religious law. By establishing concurrent jurisdiction of religious and regular courts in certain areas, states have increased people's ability to forum shop. Concurrent jurisdiction has also facilitated the emergence of new subcategories of *nasab* referred to as *civil paternity* or *biological paternity* without questioning the validity of the Islamic concept of *nasab*. Thus jurisdictional competition can, under certain circumstances, mitigate some of the discrimination that results from religious norms and practices. However, in none of the jurisdictions has legal discrimination against children born out of wedlock been abolished. One should thus be careful not to uncritically celebrate state involvement as a way to end legal discrimination against children. States can facilitate children's rights, but they can also harm them. Overall, all of the contributions invite us to rethink the role of the state. Especially in settings of state law pluralism, a monolithic understanding of the state does not help us to grasp state engagement in establishing *nasab* and the placement of children into new families. State engagement might mean different things to different (religious) communities—at times enabling the creation of new families, while at other times preventing it.

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