



God's Law on the Path to Modernity

Dynamic family law reform, recognition of adoption and consideration of a child's best interests: **Nadjma Yassari** from the **Max Planck Institute for Comparative and International Private Law** in Hamburg and her "Changes in God's Law – An Inner-Islamic Comparison of Family and Succession Law" research group illustrate how complex and mutable law in Muslim countries is.

TEXT **MICHAELA HUTTERER**



Forward into the stone age,” read a headline in the German newspaper FRANKFURTER ALLGEMEINE ZEITUNG in early May in a report on the introduction of sharia in the Sultanate of Brunei: ultimately even with the threat of death by stoning.

“Islamic law really doesn’t have a good image,” bemoans Nadjma Yassari. “It is generally reduced to Islamic criminal law and its corporal punishments. Many people underestimate how diverse and open to reform Islamic law is, and consequently also jurisprudence in Muslim countries,” remarks the head of the research group “Changes in God’s Law” at the Max Planck Institute for Comparative and International Law in Hamburg.

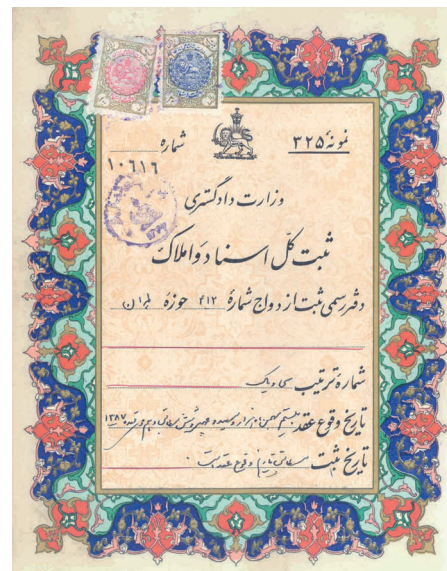
Together with her team of eight, she is providing significant insights and information. “Emotions and generalizations prevent objective, scientific analysis of legal systems that are often fraught with controversy,” emphasizes Yassari. Disputes often arise between law and religion, between state legislation and religious norms. Family law is a minefield of conflicting interests, for instance between the sexes and between the individual and society.

The research team is examining common traits and differences, as well as areas of conflict in the family law of countries governed by Islamic law – which, after all, number 33. Only Turkey has completely rejected Islamic family law, instead adopting Swiss family law.

A young couple caught between tradition and modernity: He stands still, she is moving. They move apart but don’t let go. Is she taking him with her, or is he standing firm and not letting her go? Much is in flux in Islamic societies, including the perception of the roles of men and women in the family and society.

In most Islamic countries, family law nevertheless continues to be based on Islamic law in the respective regional form of the predominant Islamic school of jurisprudence. Islamic law’s claim to validity differs in these countries. The research group sees its task as exploring and conducting research into this field.

“I am delighted to be part of a team of outstanding academics who share my passion and desire for research into the law of Muslim countries. Our field



» Islamic law is often reduced to criminal law and its corporal punishments – its diversity and openness to reform are overlooked.

is, unfortunately, still perceived as some exotic form of science,” says the 43-year-old lawyer.

There is, however, nothing exotic about divorce, custody or a child’s best interests. When marriages break down, the same disputes arise regardless of whether it happens in the Persian Gulf or on Lake Constance: Who gets custody of the children, who has to pay maintenance and who receives the assets? “It’s ultimately about life plans unraveling, injured pride, unfulfilled expectations, revenge and money – that’s not very different from what goes on in German courtrooms,” says Yassari.

When legal scholars conduct research, they don’t develop patents, invent equipment or discover serums. Instead, they establish the foundations for objective decision-making, and provide academic insight into legal systems that are only ostensibly exotic.

The research group has been analyzing the bases and forms of family and succession law in Muslim countries since 2009. “The full complexity of the law needs to be understood to make its effects transparent and to identify reforms and reform potentials,” explains Yassari, outlining the adopted research approach.

PROCEDURAL LAW ENABLES REFORM

The influence of procedural law is highly significant. It often contains provisions that affect substantive law. Under Islamic law, marriage can be entered into without formalities. Nevertheless, marriages must be registered in most countries. This is due, on one hand, to the desire for the administration to acquire legal certainty, while on the other, legislators are also seeking to curb

the estimated number of unknown cases of marriages between minors and so-called informal marriages. “Substantive law is reformed through the introduction of mandatory registration into a neutral branch of law, such as procedural law, thus avoiding directly addressing the discrepancy between what is permitted by religion and the state,” Yassari points out.

This has far-reaching consequences that differ from country to country. Whereas a non-registered marriage has legal implications in Iran, claims from such marriages will not be heard in Egyptian courts, even if they are valid under Islamic law. In Tunisia, however, unregistered marriages are always deemed invalid.

In order to conduct research into family law in Muslim countries, extensive knowledge of the sources of Islamic law and its methods of law-finding

Left page, on the left: Nadjma Yassari, a native of Iran, grew up in Vienna and has worked at the Max Planck Institute in Hamburg since 2000.

Left page, on the right: The cover sheet of an Iranian marriage certificate from 1968 with the emblem of the last dynasty of the Persian Shahs, the Pahlavi dynasty. Since 1967, Iranian marriage certificates have contained standardized marital arrangements that grant the wife extensive rights, such as in the event of dissolution of marriage.

This page: Imen Gallala-Arndt, Lena-Maria Möller, Tess Chemnitzer and Nadjma Yassari (in clockwise order) discussing an Iraqi adoption case.

are essential. Law sources include the Koran, the traditions of the prophet Mohammed, the consensus of legal scholars and the findings of law by analogy – in other words, the transfer of existing provisions to similar new cases. Islamic law is established through the interpretation of these sources – known as *iğtihād* in Arabic – by Islamic scholars. They play a significant role in the formulation of legal norms.

ISLAMIC LAW IN TRANSITION

The research group's first project focused primarily on marriage law. From 2009 to 2013, the group traced, by means of inner-Islamic legal comparison, the development of particular legal issues and phenomena – such as informal and interfaith marriages or the placing of Islamic family law under state control – in various countries. In doing so, they revisited the myth of the immutability of Islamic law.

As part of their work, the scientists visit the region, conduct local interviews with attorneys, authorities and judges, and observe proceedings. They evaluate judgments and specialist publications, follow legislative processes and foster an interdisciplinary international network. Research into Islamic law requires more than just legal and linguistic expertise: an understanding of people, their situation and the historical context is also a vital attribute. >





Imen Gallala-Arndt (second from the left) speaking about interfaith marriages at a conference in Yogyakarta, Indonesia. Indonesian family law draws not only on Islamic law, but also on *adat*, Indonesian customary law and state-governed secular law. Family law is particularly complex in pluralistic societies.

The view has long prevailed that, toward the outside, a homogeneous Muslim community acts uniformly as a united group. “The Arab Spring has shown that there is no such Arab community per se, but rather individual countries whose seemingly uniform appearance ends just as abruptly as their regimes with the fall of their rulers,” reports Imen Gallala-Arndt.

UNCERTAINTY OVER MARRIAGE LAW

The native Tunisian is currently qualifying as a university lecturer with a thesis on interfaith marriages in Tunisia, Israel and Lebanon. Her specialist field is highly contentious: Difference of faith is an obstacle to marriage under religious law. When interfaith couples marry in Germany, they often don’t know whether the marriage will also be recognized in their native countries. This results in a lack of legal clarity. While the

marriage is valid under German jurisdiction, it may not have any effect in the spouses’ countries of origin.

Gallala-Arndt has also been focusing intensively on the upheaval in the Arab world since 2010. “Arab society is going through a transformation and is revealing its true face with all the conflicts and contradictions, whether in law, family or faith.” Secular forces calling for detachment from Islamic law and conservative religious factions are currently going head to head. “Everything is in a state of flux. It’s unclear how events will turn out,” acknowledges the jurist.

Take Egypt, for example: Long before the first protests took place on Cairo’s Tahrir Square, Suzanne Mubarak, the wife of former president Hosni Mubarak, was fighting for women’s rights as part of a feminist organization. The progress made was swept away with the fall of the regime. Indeed, everything associated with the past is regarded as dubious and is frowned upon.

Reform didn’t begin with the Arab Spring. Family law has long been dynamic. “The law is as diverse as the countries in which it is practiced,” explains Lena-Maria Möller, who analyzed family law in the Gulf States in her recently completed doctoral thesis. “There are these ultra-modern cities and centuries-old law that is supposed to meet the needs of the modern world.”

MORE DIVORCES

Marriages are no longer lasting a lifetime in Islamic states, either. Divorce rates are rising and traditional roles are being eroded. “Almost all of the Gulf States have adopted new codes of family law over the past decade that govern divorce and its consequential matters, such as custody and alimony,” remarked Möller. All Arab countries have codified family law except for Saudi Arabia.

» Islam doesn't prohibit liberal views, and reform is compatible with Islam.

The United Arab Emirates have made significant headway in this respect. Emirati law firstly followed a general trend of Islamic states by establishing the principle of the child's best interests in custody law. It has also taken an extraordinary step beyond that: if a divorced mother marries again, she now no longer automatically loses custody of her child. "This provision represents a departure from traditional teaching," observed Möller.

Children are traditionally transferred to the custody of the father starting at a certain age – girls somewhat later and boys somewhat earlier. Irrespective of who initiated proceedings, a divorce therefore often meant a life of asceticism or informal marriage for the mother. "A new principle is now establishing itself: the child's best interests take precedence over traditional Islamic law," explains the scientist. Recent judgments show that this law doesn't just exist on paper. The Court of Cassation there recently allowed the child to stay with the mother despite the fact that she had remarried.

The research team led by Nadjma Yassari isn't yet extolling the virtues of statutory law. The researchers are aware that it takes time before new legislation is accepted and implemented in practice. Take another example from Egypt: Egyptian law grants engaged couples the right to contractually govern their personal and financial affairs upon marriage. Space is provided for special agreements in the official marriage certificates. However, when a German-Egyptian woman in Cairo wished to register a different custody arrangement, the official refused to admit the clause. "This field always remains emp-

ty," he told her unsympathetically. Having and exercising rights are two different things.

LIBERAL JUDGES, LIBERAL LAW

Even more significant is the administration of justice. It is the judges who interpret and breathe life into positive law. It is their duty to further the law through *iğtihād*, or interpretation. They can't be accused of lacking relevant experience. Iran's family judges, for example, have to be married themselves to sit on the bench in family matters. Although judicial office is open to women in almost all Muslim countries, there are but few women in the judiciary.

Irrespective of how judges reach their decisions, one thing is clear: in contrast to secularized countries, the interpretation of statutory law can-

not contradict the principles of religious law.

However, this doesn't restrict judges' discretionary powers. "Islam doesn't prohibit liberal views," emphasizes Imen Gallala-Arndt, dispelling a stereotypical belief. "Reform is compatible with Islam." Yassari also stresses this point. "If you search hard enough, you'll find a relevant verse in the Koran for any perspective," she says with a twinkle in her eye. "The essence of Islamic law is the dynamic nature of law-finding. Since Islamic law is derived from the sources and has to be interpreted, human analysis, which is fallible and pluralistic, is combined with the divine."

This also points to the most important finding of her research: the immutability of Islamic law doesn't stand up to scientific analysis. >

The Emirate of Abu Dhabi provides teaching material on divorce, custody and maintenance law for the training of judges.





Top: Yassari's research is also attracting great interest from students in Islamic countries. Her seminar on the rights and obligations of spouses at Pardis II University sparked intensive debate among students. The seminar took place in Qom, one of the holy sites of Shiite Islam in Iran, well known because of Ayatollah Khomeini, who taught at the Islamic University of Theology there.

Bottom: A seminar on the limitations of freedom of contract in Qom, where participants included Yassari, as well as Jürgen Basedow, Director at the Max Planck Institute in Hamburg (left of Yassari), and researchers from the Universities of Qom and Teheran.

The Center of Expertise for the Laws of Islamic Countries in Hamburg is one of the most important sources of knowledge for both teaching and practice. An understanding of over 30 different legal systems make Yassari and her team leading experts on the law of Islamic countries, and German judges and officials are glad to call upon their knowledge.

In her post-doc thesis, Nadjma Yassari looked at the Islamic dower, a proprietary right of the wife against the husband, which isn't known in German law. German judges nevertheless

The research group's findings aren't just of benefit to legal scholars and practitioners in the Muslim world. Whether in Saarland, Berlin or Bremen, German judges also require knowledge of the law of Muslim countries. It is also applied in Germany in the same way as

Italian, Turkish or Spanish law each time private international law makes reference to foreign law. If two Italian citizens get married in Munich, for example, the marriage is subject to Italian law. If two Iranians wish to divorce in Hamburg, Iranian law applies.

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must decide upon dower claims in divorce cases. In her monograph on the dower, published in summer 2014, Yassari examines this legal institution from various perspectives, including those of classical Islamic law, contemporary law in selected Islamic countries, and German law.

THE CHILD'S BEST INTERESTS IN ADOPTION CASES

In order to enable it to continue following legal developments in the region, the research group's funding period was extended by a further two years until March 2016. The second research project focuses on legislation governing the rights of children and how the principle of the child's best interests has found its way into the legislation and courts of Muslim countries. Yassari focuses in particular on adoptions in Muslim countries that are to be recognized in Germany.

One such case involved a married couple from Cologne with Iranian roots who flew to Teheran in 2008, rented an apartment and met "their" child for the first time at an orphanage. The initial visits turned into a six-month trial stay during which the parents completed all the paperwork. They even changed their will to benefit their future adoptive child.

A court in Teheran awarded them the "definitive parental rights" to the then six-year-old. When the mother sought to return with him to Cologne, the German authorities refused the child entry. Their argument: Islamic law doesn't recognize adoption and,

what's more, the Koran expressly forbids it. The German father appealed, taking the case as far as the Higher Regional Court in Cologne. He demanded that the court recognize the adoption abroad.

The family was involved in a three-year court battle, and received support from Nadjma Yassari. The family won the case thanks to her expertise. The Federal Office of Justice's view was that Iranian law, as an Islamic legal system, didn't recognize adoption. This interpretation fell short of the mark. "Iran has had its own legal structure – the *sarparasti*, which enables adoption – for

the past 35 years, without referring to it as such," explained Yassari. The *sarparasti* establishes a parentage relationship between the adoptive child and the adoptive parents, similar to the adoption of adults under German law.

Expert opinions like this help authorities such as courts to carefully address specialist issues and better put them into context in their domestic legal setting. In an ever more globalized world, various legal systems are increasingly applied alongside one another. Disputes still arise between legal traditions. Yassari's research contributes to less-biased analysis of conflicts. ◀

TO THE POINT

- The principles of Islamic law are a source of law in the majority of Islamic countries. The influence of this basic structure differs in each country.
- Family law is based on religious law in most Islamic countries. However, this doesn't restrict discretionary powers either in legislation or administration of justice. Islamic law also allows various interpretations.
- Foreign law applies in Germany in view of private international law. German judges must therefore also apply Syrian, Iranian and Egyptian law.

GLOSSARY

iğtihād: This refers to the efforts of Islamic scholars to resolve a legal issue through independent interpretation of the legal sources of Islamic law.

Best interests of the child: A legal term covering a child's physical, psychological and emotional development. Many decisions in family law are subject to the assessment of the child's best interests as a benchmark.

Sharia: The term signifies the rules in their entirety for leading a godly life according to Islamic teaching, and is often used to refer to Islamic law. Sharia is based on the Koran and the written traditions of the prophet Mohammed.