Journal of Law and Religion 34, no. 3 (2019): 408–432
doi:10.1017/jlr.2019.45

ARTICLE SYMPOSIUM

ESTABLISHING FILIATION (*NASAB*) AND THE PLACEMENT OF DESTITUTE CHILDREN INTO NEW FAMILIES: WHAT ROLE DOES THE STATE PLAY?

DÖRTHE ENGELCKE
Senior Research Fellow, Max Planck Institute for Comparative and International Private Law

ABSTRACT

The article comparatively maps state involvement in the establishment of filiation and the placement of destitute children into new families. It first reports findings from an expert survey that investigates four key areas of state involvement—the legal framework, the role of courts and ministries, guardianship regulations, and financial support and services for destitute children—across fourteen jurisdictions, twelve Muslim-majority countries, and two Muslim-minority countries. Overall, the placement of children into new families remains a sensitive issue because it is linked to different communities "claiming" the child. In principle, the states surveyed do not allow the creation of new families across religious lines. Using Jordan as a case study, the article then focuses on the implications of one particular survey finding: non-Muslims in Muslim-majority countries sometimes cannot have children placed into their homes. This finding is based on qualitative data collected in Jordan on adoption (*tabannī*) in the Greek Catholic community. The article argues that in settings of legal pluralism, state involvement affects different religious communities in different ways. In Jordan, due to structural factors, the state shapes Islamic family law differently than the family laws applied by Christian communities. This leads to the unequal development of different bodies of religious law and thereby to the unequal treatment of Muslim and Christian citizens.

KEYWORDS: *nasab* (filiation), Islamic family law, *tabannī* (adoption), personal status laws applied by Christians, Greek Catholic Christians, the best interests of the child

INTRODUCTION

In most Muslim and Middle Eastern jurisdictions, filiation (*nasab*) of a child to its father remains linked to the existence of a valid marriage.[1] The husband is automatically considered the father of

1 *Nasab* is translated here as *filiation*. However, the concept of *nasab* goes beyond that, implying a person's lineage and his or her belonging in society. See Nadjma Yassari and Lena-Maria Möller, "Synopsis," in *Filiation and the Protection of Parentless Children: Towards a Social Definition of the Family in Muslim Jurisdictions*, ed. Nadjma Yassari, Lena-Maria Möller, and Marie-Claude Najm (The Hague: T. M. C. Asser Press, 2019), 403–11, 403. All Arabic-speaking countries use the term *nasab*. In Indonesia, the term *asal usul anak* is used, but the 1991

the child if the child is born within a certain timeframe after the conclusion of a valid marriage or the date of a divorce.[2] Thus, biological fatherhood and legal fatherhood do not necessarily coincide. The introduction of DNA tests across jurisdictions has brought tensions between biological fatherhood and the concept of *nasab* to the forefront. Motherhood, by contrast, results from childbirth, irrespective of the women's marital status.[3] In the area of custody, an increased focus on the concept of the best interests of the child (*maṣlaḥat al-ṭifl*) across all Muslim and Middle Eastern countries has led to deviations from custody rules based on Islamic jurisprudence (*fiqh*).[4] By contrast, the concept of the best interests of the child has not been introduced in statutory law with respect to *nasab*, the provisions for which remain largely faithful to classical interpretations of Islamic law.

The link between *nasab* and the existence of a valid marriage is not unique to Islamic family laws;[5] rather, it is equally evident when considering the provisions of family laws that are applied by Christian communities in Middle Eastern countries.[6] Mothers, Muslim and Christian, who have children out of wedlock face serious social discrimination and find it difficult to establish paternity for their children. Usually, children born out of wedlock are not entitled to carry their (biological) father's name and they have no right to maintenance or inheritance from their fathers.[7] Filiation is also an issue when destitute children of known, uncertain, or unknown filiation (*majhūl al-nasab*)

Compilation of Islamic Law also uses the term *nasab*. The term *nasab* is also used in Malaysia, Iran, and Pakistan. In Jordan, judgments issued by the Greek Orthodox Court of First Instance also use the term *nasab* to denote filiation among Greek Orthodox Christians. However, the Byzantine family law that the Greek Orthodox community applies uses the term *bunuwwa* for filiation.

2 The presumption that the husband is the father of the child still holds true in most Western jurisdictions. Jana Singer observes that "the increasing dissociation of marriage and legal parenthood" has been one of the most conspicuous developments over the past decades. Jana Singer, "Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption," *Maryland Law Review* 65, no. 1 (2006): 246–70, at 246.

3 By contrast, in Shiite law no filiation to the mother is established in such cases except if the mother acknowledges the child. See Yassari and Möller, "Synopsis," 406.

4 Nadjma Yassari, Lena-Maria Möller, and Imen Gallala-Arndt, "Synopsis," in *Parental Care and the Best Interests of the Child in Muslim Countries*, ed. Nadjma Yassari, Lena-Maria Möller, and Imen Gallala-Arndt (The Hague: T. M. C. Asser Press, 2017), 325–53, at 326.

5 Also commonly referred to as personal status law (*qānūn al-aḥwāl al-shakhṣiyya*), family law regulates practices such as marriage, divorce, custody, guardianship, and filiation. Family law is often referred to as *Islamic* law by ordinary citizens as well as legal practitioners in Middle East and North African countries. However, family law cannot be equated with Islamic law. Shaheen Sardar Ali has therefore coined the term *operative Islamic law* to emphasize that the family laws that are in operation today in Muslim-majority countries are composed of different normative systems, including Islamic law, customary law, and Western legal concepts. See Shaheen Sardar Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man?* (The Hague: Kluwer Law International, 2000), 90–91.

6 Pursuant to the Byzantine family law that the Greek Orthodox community, the largest Christian community in Jordan, applies, a legitimate child (*al-walad al-sharʿī*) is born within the context of a valid marriage (*zawāj sharʿī*). Article 276 of the Byzantine Family Law, on file with author.

7 For an analysis of *nasab* in Sunni Islamic law, see Ahmed Fekry Ibrahim, "Care of Abandoned Children in Sunni Islamic Law: Early Modern Egypt in Theory and Practice," in Yassari, Möller, and Najm, *Filiation and the Protection of Parentless Children*, 1–23, at 1–20. According to Shiite law, these children have the right to maintenance and to carry the father's name, but no reciprocal intestate inheritance rights are established. See Nadjma Yassari, "Iran," in Yassari, Möller, and Najm, *Filiation and the Protection of Parentless Children*, 67–102, at 81–82. Similar discriminatory provisions exist in Jewish law. According to Jewish law, a child whose father is not its mother's husband—thus a child who was born as the result of an extramarital relationship or because a Jewish woman was unable to get a divorce from her previous husband—is considered a *mamzer* (bastard or, literally, "estranged person"). *Mamzers* face severe legal discrimination (for example, they can marry only other *mamzers*), and the status of *mamzer* is passed on for ten generations. See Sylvia Fogiel-Bijaoui, "Why Won't There Be

https://doi.org/10.1017/jlr.2019.45 Published online by Cambridge University Press

are to be placed into new families. The growing number of children affected by war and poverty, in combination with tight public budgets, has exacerbated the urgency of finding new homes for these children.[8] In Western countries, too, adoption regained prominence after World War II as a result of the numerous orphans the war had created.[9]

Despite the claim that adoption (*tabannī*) is forbidden according to Islamic law, all Muslim and Middle Eastern countries operate legal schemes that place destitute children into new families.[10] These placements remain sensitive, given the common understanding that Islamic law prohibits adoption.[11] The role of the state in these processes remains unclear. In this article I thus explore the following questions: What role does the state play in establishing filiation and in organizing and legalizing the placement of children into new families? How does the state direct and influence these processes and, by extension, the creation or prevention of new families? To what extent can states reshape religious law and how do they attempt to do so? What areas do they choose to reform and how? How does state law pluralism affect state engagement?

The article is organized into two parts. To draw out commonalities and differences across cases, in the first part I map state engagement across fourteen jurisdictions, twelve Muslim-majority countries, and two Muslim-minority countries in Asia and Africa. The data is based on a survey that investigated state engagement in four key areas: the legal framework, the role of courts and ministries, guardianship regulations, and financial support and services for destitute children. The survey was completed by fourteen country experts.[12] The results

Civil Marriage Any Time Soon in Israel?," *Nashim: A Journal of Jewish Women's Studies and Gender Issues* 1, no. 6 (2003): 28–34, at 31.

8 According to UNICEF, in Syria alone around five million children require humanitarian assistance and about half of them have been forced to flee their homes. See "Syrian Crisis," UNICEF, last accessed January, 26, 2019, https://www.unicef.org/emergencies/syria/.

9 Sylvain Vité, André Alen, and Hervé Boéchat, *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden: Nijhoff, 2008), 1.

10 I use the phrase *placement of children into new families* without evaluating whether or not these placements qualify as functional equivalents of adoption. This allows me to incorporate a wider range of legal schemes into my analysis. It also avoids conceptual stretching, as adoption means different things in different contexts. I refer to adoption only when the respective laws use the term *tabannī*, which translates as *adoption*. Similarly, I do not use the terms *adoptive parent* or *custodial parent* for legal schemes other than *tabannī*, but rather I opt for the term *caretaker* to include a wide range of functions. For a discussion of functional equivalents of adoption, see Nadjma Yassari, "Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law," *American Journal of Comparative Law* 63, no. 4 (2015): 927–62.

11 The prohibition of adoption under Islamic law is often justified with reference to Qur'an 33:4 and Qur'an 33:5. The Prophet Muhammad himself had dissolved the adoption of his adoptive son Zayd. More specifically, shortly before having his first revelations, Muhammad bought a slave, Zayd, at a slave market in Mecca. Subsequently, Muhammad freed Zayd and adopted him. Zayd married the prophet's cousin, Zaynab bint Jahsh. The marriage eventually ended in divorce. Muhammad had fallen in love with Zaynab and subsequently married her. Muhammad then dissolved the adoption of Zayd. For an account of Zayd, see David S. Powers, *Zayd* (Philadelphia: University of Pennsylvania Press, 2014), 1–125.

12 The country experts are as follows: Melanie Guénon (Algeria), Jean-Philippe Dequen (India), Euis Nurlaelawati and Stijn van Huis (Indonesia), Nadjma Yassari (Iran), Harith Al-Dabbagh (Iraq), Talia Einhorn (Israel), Somoud al-Damiri (Palestine), Marie Claude Najm (Lebanon), Dörthe Engelcke (Jordan), Azizah Mohd (Malaysia), Ayesha Shahid and Isfandyar Ali Khan (Pakistan), Dominik Krell (Saudi Arabia), Souhayma Ben Achour (Tunisia), and Lena-Maria Möller (United Arab Emirates). All of them are law scholars or scholars of Islamic law. They were selected because they are members of the Max Planck Working Group on Child Law and had prepared detailed papers on *nasab* and the placement of children into new families in their respective jurisdictions for a workshop that was convened by the research group in Beirut in November 2017. Somoud al-Damiri was not part of the original working group but was solicited separately by the author. The questionnaire (see

https://doi.org/10.1017/jlr.2019.45 Published online by Cambridge University Press

are compiled in a table, which, with the questionnaire, are available as online appendices to this article.[13]

In the second part of the article, I use adoption in Jordan as a case study to shed light on one crucial issue which the survey brought to light: most Muslim-majority countries do not categorically exclude non-Muslims as eligible caretakers, but non-Muslims are only eligible caretakers for non-Muslim children, as the religion of the caretaker and the child need to match. In some cases, the legal frameworks that place children into new families explicitly state that the parties need to be Muslim to be eligible to have a child placed into their home, de facto excluding non-Muslims regardless of the child's religion. Non-Muslims also often do not have the right to apply the adoption provisions of their own family laws. Many of the countries included in the questionnaire are settings of state law pluralism, where Christians apply their own family laws. In Jordan, too, Christian communities enjoy a certain degree of legal autonomy and can largely determine the content of their own family laws with limited or no state involvement.[14] Following a brief introduction to adoption among Christian communities in Muslim jurisdictions to situate the Jordanian case study, I discuss the data collected in Jordan on adoption (*tabannī*) among Greek Catholics (*al-rūm al-kāthūlīk*).[15] I focus here on Greek Catholics in Jordan because in 2015, the Greek Catholic Court of First Instance in Amman adjudicated the only known case of adoption (*tabannī*) by Christians in Jordan.

I argue that in settings of state law pluralism, state intervention in the establishment of filiation and the placement of children into new families affects Muslim and Christian communities differently. State law pluralism refers to a situation in which different sets of laws and organizational structures are recognized by the state for different (religious) groups.[16] This has led to the unequal development of different bodies of religious law. When conceptualizing the role of the state, we need to keep these differences in mind. It is thus more accurate to talk about the *roles* of the state. Overall, I argue that the placement of children into new families remains a sensitive issue

appendix 2) was distributed in March 2018 via email. After the country experts had completed and submitted their questionnaires, I clarified any answers that were open to speculation over the course of several email and personal exchanges. In a last step, the country experts had the opportunity to review the data compiled in the table (appendix 1) and this article to ensure correct representation of their respective jurisdiction. Regarding the coding of answers, I gave preference to actual practice rather than legal rules, but indicate so in the notes to the table as applicable.

13 Appendix 1: Table, State Role in the Placement of Destitute Children, https://doi.org/10.1017/jlr.2019.45; Appendix 2: Questionnaire on the State's Role in the Placement of Destitute Children, https://doi.org/10.1017/jlr.2019.45.

14 In most Middle Eastern countries, Christian communities enjoy some form of legal autonomy in family law matters. For an account of the historical and political origins of these pluralist legal systems, see Yüksel Sezgin, *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt, and India* (Cambridge: Cambridge University Press, 2013), 24–37. On Coptic family law in Egypt, see Ron Shaham, "Communal Identity, Political Islam and Family Law: Copts and the Debate over the Grounds for Dissolution of Marriage in Twentieth-Century Egypt," *Islam and Christian-Muslim Relations* 21, no. 4 (2010): 409–22. See also Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton: Princeton University Press, 2016), 111–48. For the family laws applied by Christians in Syria, see Esther van Eijk, *Family Law in Syria: Patriarchy, Pluralism and Personal Status Laws* (London: I. B. Tauris, 2016).

15 The data was collected during several fieldwork trips to Jordan in 2016, 2017, and 2018. To increase protection for the subjects of the study, all of the names and places referred to in court judgment and documents have been altered.

16 State law pluralism is sometimes termed informal plurality. For a discussion of these terms, see Sezgin, *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt, and India*, 23–24.

because it is linked to different communities *claiming* the child as a member of their (religious) community. Especially in multireligious societies, the process of *claiming* is highly politicized.

THE LEGAL FRAMEWORK GOVERNING THE PLACEMENT OF CHILDREN AND THE ESTABLISHMENT OF *NASAB*

The states included in this survey have become more engaged in establishing national legal frameworks that allow for the placement of children into new families. Only in four of the fourteen countries is there a national family law that applies to all citizens in that jurisdiction regardless of religious affiliation.[17] Yet in nine of the fourteen jurisdictions there exists a national scheme to place destitute children into new families that is open to all citizens in that country.[18] Thus, there is a greater move toward nationally applicable legal schemes that place destitute children into new families, whereas family laws often remain communally based.[19] This might be the case because many of the family law provisions were codified after states in the Middle East had achieved formal independence primarily in the 1940s and 1950s.[20] The legal autonomy of non-Muslim communities had been cemented by that point. By contrast, the regulation of the placement of children into new families is a more recent endeavor.[21] States have also actively shaped or prevented the creation of new families by determining who can have a child placed into his home, as the discussion below elaborates.

In all jurisdictions, states have only made limited attempts to reshape provisions on filiation through statutory law reform. *Nasab* remains linked to the existence of a valid marriage—that is, the marital bed (*firāsh zawjiyya*). The concept of the best interests of the child has been introduced in family law provisions relating to custody as well as in different legal schemes that place children into new families, but the concept has not been introduced in the provisions that regulate *nasab*.[22] The admission of scientific evidence like DNA tests presents the first state policy that could effectively challenge definitions of filiation within Islamic law. The contexts in which DNA tests have become admissible are discussed below.

17 These states are Algeria, Tunisia, Saudi Arabia, and Indonesia. It should be noted that Algeria, Tunisia, and Saudi Arabia are relatively religiously homogenous states. The provisions of the 1974 Indonesian Marriage Law apply to all Indonesians except for those provisions that explicitly stipulate otherwise. Muslims have their own family law provisions. Thus, normative pluralism in family law matters remains. See appendix 1, table, Q1.

18 In Saudi Arabia the *iḥtiḍān* regulations apply to all Saudi citizens. The assumption is that there are only Muslim Saudi citizens. Non-Muslims could not have a child placed into their home under the *iḥtiḍān* provisions, but since supposedly there are no non-Muslim Saudi citizens, the *iḥtiḍān* regulations apply to all Saudis. See appendix 1, table, Q3.

19 Malaysia operates a legal scheme that is open to both Muslims and non-Muslims, but this law is applicable only to residents of West Malaysia. See appendix 1, table, Q3.

20 For codification in the Maghreb states see, for example, Mounira M. Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco* (Berkeley: University of California Press, 2001). For Egypt, Israel and India see Sezgin, *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt, and India*.

21 See appendix 1, table, Q5.

22 The legal schemes that place children into new families in Bahrain, the United Arab Emirates, Iraq, Jordan, Morocco, Saudi Arabia, and Tunisia have incorporated the concept of the best interests of the child. The Islamic family laws of Egypt, Algeria, Bahrain, the United Arab Emirates, Iraq, Jordan, Lebanon, Morocco, and Tunisia have not yet incorporated the concept of the best interests of the child in the provisions pertaining to *nasab*. I thank Lauan Al Khazail for surveying the respective laws and regulations.

https://doi.org/10.1017/jlr.2019.45 Published online by Cambridge University Press

Claiming the Child: Citizenship, Religious Affiliation, and the Question of Who Can Have a Child Placed in Their Home

The legal framework determines who can "claim" a child. The *claiming* of the child can be conceptualized on several levels. This section investigates whether or not religious minorities, single women, and foreigners can have children placed into their homes and thereby *claim* the child as a member of their *family*. This section also investigates whether the state claims a child as a member of the national community by automatically assigning citizenship to foundlings or by incorporating foundlings into the state's majority religion.

One visible trend is that the pool of caretakers has been expanded, in the course of which single women have become eligible caretakers. At the same time, state efforts to create more eligible caretakers rarely cross religious lines. Normally the religion of the caretaker and the child need to match and inter-religious mixing is avoided. This also affects the opportunity of foreigners to have a child placed into their home. Overall, foreigners are often not allowed to have a child placed into their home, and in most cases the nationality of the potential caregiver and the child need to overlap.

Citizenship and Membership in a Religious Community

In almost all of the fourteen jurisdictions included in the questionnaire, foundlings automatically received the citizenship of the country where they were found. In Indonesia, this is a relatively new development. Before 2009, children of unknown filiation hardly ever received citizenship, since they had to prove their filiation. Malaysia presents a notable exception. In Malaysia, foundlings do not automatically receive citizenship. If the foundling is placed into a new family and the new caretakers are Malaysian citizens, the child will receive permanent residency.[23]

In all of the Muslim-majority countries, foundlings are automatically considered Muslim, the exception being Indonesia, where foundlings are considered to have the religion of the neighborhood where they are found. This is also the case in Lebanon. In Palestine, the child is automatically considered Muslim except if the child carries a token that would indicate that the child is Christian or is found in front of a Christian organization.[24] In the two Muslim-minority countries included in this survey, foundlings do not automatically receive the majority religion. In Israel, this is likely the case because Jewish religious identity is transmitted through the mother. In India, there is no state religion hence there is no default religion to fall back on. However, there is legal uncertainty concerning the religious affiliation of foundlings as the law is silent on this issue.[25]

Single Women as Eligible Caretakers

In most countries, single women, meaning unmarried women, have the right to have children placed into their homes. These provisions thus favor women as eligible caretakers. In Pakistan, the category of eligible single women is more narrowly defined, including only divorced women and widows. Similarly, in Tunisia, a woman who has a child placed in her home within the framework of *tabannī* needs to be married or divorced. Widows or divorced women can thus have a child placed in their home under the 1958 law that regulates *tabannī* in Tunisia. In Malaysia, the 1952

23 See appendix 1, table, Q11.

24 The country expert did not classify Lebanon as a Muslim-majority nor as a Muslim-minority country. See appendix 1, table, Q12. Regarding Palestine, see also note 86, below.

25 See appendix 1, table, Q13.

https://doi.org/10.1017/jlr.2019.45 Published online by Cambridge University Press

Registration of Adoption Act is silent on this issue. In Iran, single women can only have a female child placed into their home. Most couples prefer male over female children and the provision is meant to help female children to find new homes. In Israel, unmarried women cannot have children placed into their homes under the Adoption of Children Law. The only exception is if the parents of the child have passed away and the future caretaker is a relative of the child and is unmarried. Otherwise, unmarried women are eligible as regards schemes, other than the Adoption of Children Law, that place children into new families. It should be noted, however, that while there is no marriage requirement for these schemes, women need to have a reputed spouse—that is, the couple is cohabitating without being formally married.

In Indonesia, under law No. 54 of 2007, single women cannot have children placed into their homes. However, customary practice demonstrates that single women have frequently become caretakers in the past. As for Iraq, pursuant to Juvenile Protection Act No. 76 of 1983, applications can be made by married couples only. *Kafālat al-laqīṭ*, a foster care scheme for foundlings that is not regulated by law, but which does exist as an informal practice, can be done by single women. According to a 1978 judgment of the Iraqi Court of Cassation, the judge must check whether the woman who has taken the child into her home was fit to look after the child, take care of him, and educate him.[26]

In Jordan, the United Arab Emirates, and Iran, single women became eligible caretakers in the 2010s, reflecting an increasing need to widen the pool of eligible caretakers.[27] Overall, it can be said that single women are eligible caretakers in all jurisdictions except Palestine.[28] This is either explicitly stipulated by legislation or forms part of informal practice. This development might be driven by financial considerations. It might also be motivated by the conviction that providing care for children within a private home is better for children then fosterage in institutional care facilities. This position is also reflected in international legal instruments.[29]

The Right of Foreigners to Have a Child Placed into Their Homes

The question whether foreigners can have children placed into their homes adds another layer to who can and cannot claim a child. This question has become particularly important due to the enhanced demand for intercountry adoption partly driven by infertility in Western countries. There is an increased demand for *adoptable* children, which has also opened up avenues of potential abuse and dependencies.[30] The question of whether or not foreigners can have a child placed into their home has led to heated political debates, especially in Muslim-majority countries, when the future foster parents come from Western and predominantly Christian countries. The assertion is that the Muslim upbringing of a child cannot be guaranteed in these cases. These debates are often driven by fear that foreigners will convert the children to Christianity.[31]

26 See appendix 1, table, Q8.

27 See appendix 1, table, Q8.

28 This applies to Muslim women in Palestine. Whether or not single Christian women in Palestine are eligible to adopt is unclear.

29 The Convention on the Rights of the Child and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption both adopt this perspective. Vité, Alen, and Boéchat, *A Commentary on the United Nations Convention on the Rights of the Child*, 46.

30 Vité, Alen, and Boéchat, 1–2.

31 Jaouad Midech, "Les étrangers n'ont plus droit à la 'kafala,' les associations protestent" [Foreigners no longer have the right to "kafala," associations protest] *La Vie éco*, October 29, 2012, https://www.lavieeco.com/societe/les-etrangers-nont-plus-droit-a-la-kafala-les-associations-protestent-23619/.

https://doi.org/10.1017/jlr.2019.45 Published online by Cambridge University Press

In Algeria, Jordan, the United Arab Emirates, Saudi Arabia, Iraq, Pakistan, Palestine, and Iran, foreigners cannot have a child placed into their home. In all of these countries, at least one of the members of a couple applying to become caretakers must be a national of that respective country; in some of these countries, such as in the United Arab Emirates, and Iran, both future parents must be nationals. In Jordan, the *iḥtiḍān* instructions are silent on the issue of nationality, but the practice of the Ministry of Social Development reveals that at least the husband needs to be of Jordanian nationality.[32] In Tunisia, Lebanon, Israel, India, Indonesia, and Malaysia, foreigners can have a child placed into their home under certain conditions. Some of these conditions relate to religious requirements. In Tunisia, foreigners are sometimes asked to convert to Islam,[33] while in Indonesia and Lebanon there must be congruence of religious affiliation between the child and the prospective parents. For Lebanon, this means that only Christian foreigners have the right to apply for *tabannī* (adoption), since *tabannī* is allowed only according to the personal status laws applied by Christians. In Israel, Malaysia, and Indonesia, the state has put in place residency requirements that oblige future foster parents to have lived in the country for a certain period of time. In Indonesia, future parents must also have the same religion as the child.[34]

The Right of Non-Muslims in Muslim-Majority States to Have a Child Placed into Their Homes

The organization of the legal framework also invites the question of how inclusive that framework is in terms of religious affiliation. In Israel and India, the two Muslim-minority jurisdictions included in the questionnaire, Muslims have the right to have children placed into their homes as both states operate national legal schemes that are open to all citizens regardless of religious affiliation.[35] In Jordan, the United Arab Emirates, and Saudi Arabia, non-Muslims cannot have a child placed into their home. In Saudi Arabia, the law is silent on this issue, but the legal literature states that parties who have a child placed into their home within the context of the *iḥtiḍān* program need to be Muslim. In Algeria, the law is silent on the matter of religious affiliation. Most Muslim-majority countries do not categorically exclude non-Muslims.[36]

In general, it seems that countries that allow non-Muslims to have a child placed into their home apply a policy of concurrence of religious affiliation between the child and the prospective parents. In Iraq, for example, the 1983 Juvenile Welfare Act is also open to Christian Iraqis, but it seems that Christian Iraqis can only have a Christian child placed into their family. Similarly, in Indonesia, non-Muslims can only have non-Muslim children placed into their homes, and in Pakistan, Christians can only take in a child if the agency in Pakistan that is placing the child knows that the child is of Christian background. For placements that happen in the context of the Iranian 2013 Act on the Protection of Children without a Guardian or with an Unfit Guardian, the religion of the child must be the same as the religion of the person who has the child placed into his home.

32 See appendix 1, table, Q9. *Iḥtiḍān* literally translates as *embracing*.

33 An analysis of one hundred judgments of the Tunisian tribunal cantonal, the tribunal that has jurisdiction in *tabannī* cases, demonstrated that religion is no longer a decisive factor when approving *tabannī*. See Malek Ghazouani, "Cent jugements d'adoptions internationales" [One hundred international adoption judgments], in *La diversité dans le droit: mélanges offerts à la Doyenne Kalthoum Meziou-Douraï* [Diversity in the law: mélange offered at the Dean Kalthoum Meziou-Douraï], ed. Kalthoum Meziou-Douraï (Manouba: Centre de Publication Universitaire, 2013), 395–96, at 389.

34 See appendix 1, table, Q10.

35 See appendix 1, table, Q7.

36 In Saudi Arabia and Algeria, this question might be less relevant because it is unclear whether there are non-Muslim Algerians and Saudi citizens. Especially in Saudi Arabia the assumption is often that there are not.

https://doi.org/10.1017/jlr.2019.45 Published online by Cambridge University Press

Thus, Christians can become caretakers of a Christian child. However, the court can order the placement of a non-Muslim child with Muslim parents if that is in the best interests of the child.[37]

Overall, the process of *claiming* a child needs to be understood in historical context. The process of claiming a child, and the role of religion in that process, became more and more politicized in Muslim-majority countries during the nineteenth century, partly due to the operation of orphanages by European missionaries. In Egypt, the work of missionaries came under increasing scrutiny in 1933 when the case of Turkiyya Hasan created a public scandal. She was an orphan girl who, according to her own account, was beaten by missionaries of the Swedish Salaam Mission in Port Said because she refused to embrace Christianity. The Egyptian authorities subsequently became more suspicious of missionary activity and paid greater attention to illegal conversions of Muslim children. Many Muslim children were taken out of missionary-run orphanages in an effort to protect their religious identities. Efforts were undertaken to house them in state institutions, and as a result orphans were increasingly segregated on the basis of religion.[38] Sensitivity about foreigners taking in children from Muslim countries also needs to be understood in relation to earlier missionary activities and European colonialism in the region. Furthermore, studies on the core provinces of the Ottoman Empire during the nineteenth century demonstrate that a non-Muslim could not take a Muslim foundling into their household.[39] This also needs to be understood in relation to Islamic law, which does not allow a non-Muslim to exercise power over a Muslim.[40]

During the Ottoman Empire, religious filiation was often determined on the basis of the location where the foundling was discovered. A child who was abandoned near a mosque or in a Muslim neighborhood was considered Muslim. And a child who was abandoned in front of a church or in a Christian neighborhood was normally considered Christian.[41] However, in the 1900s, non-Muslim authorities repeatedly voiced the grievances that despite clear indications of the child's Christian origin, foundlings were normally registered as Muslims.[42] The religious filiation of foundlings became politicized during the nineteenth century in the core provinces of the Ottoman Empire and the issue of foundlings led to rivalries among different religious communities.[43] Saving abandoned children became a way to strengthen one's community.[44] This neighborhood policy still applies in Lebanon. In Jordan, by contrast, whose territories were formally part of the Ottoman province of Syria, the neighborhood policy no longer holds. Foundlings have the state religion and are thus automatically considered Muslim.[45]

The Admissibility of DNA Tests

One of the most significant examples of state legislative intervention as regards the establishment of *nasab* is the introduction of DNA tests in family matters which have been introduced increasingly

37 See appendix 1, table, Q6.

38 Beth Baron, *The Orphan Scandal: Christian Missionaries and the Rise of the Muslim Brotherhood* (Stanford: Stanford University Press, 2014), 191.

39 Nazan Maksudyan describes a case from 1817 in Koca. See Nazan Maksudyan, *Orphans and Destitute Children in the Late Ottoman Empire* (Syracuse: Syracuse University Press, 2014), 28.

40 This rule is often justified with reference to Qur'an 4:141.

41 Maksudyan, *Orphans and Destitute Children in the Late Ottoman Empire*, 24.

42 Maksudyan, 45.

43 Maksudyan, 20.

44 Maksudyan, 21.

45 See Jordanian Civil Status Law no. 9 of 2001.

https://doi.org/10.1017/jlr.2019.45 Published online by Cambridge University Press

since the 2000s.[46] DNA tests as means of evidence in *nasab* cases have been introduced in all jurisdictions included in the questionnaire except for Palestine.[47] Sometimes the introduction of DNA tests has been based on amendments to the respective family law provisions, as it has been in Jordan or Algeria. In other cases, the admissibility of DNA tests has been regulated by the laws of evidence, as it has been in Malaysia, India, Pakistan, and Iraq. A third category of countries is composed of jurisdictions in which the use of DNA tests is mere legal practice and is not regulated by statutory or procedural law, as in Saudi Arabia, Lebanon, and Iran. In Lebanon, Muslim family laws and the family laws applied by Christian communities do not refer to DNA tests. For Christians who try to establish filiation outside of marriage, DNA tests can be ordered by regular courts, because out-of-wedlock filiation for non-Muslims is governed by the civil law of 1959. Thus, church courts have jurisdiction only in cases of "legitimate" filiation. Court practice shows that Sunni courts in Lebanon have refused to order or to admit DNA tests as evidence for establishing or refuting *nasab*. Conversely, Jaʿfari courts have taken DNA results into account in filiation claims. Shiʿi scholars have stated that DNA tests that offer clear results should be considered definitive proof, even when they are in contradiction with other forms of evidence presented. Likewise, Druze courts also resort to DNA tests. Similarly, Iranian statutory law does not take up the question of whether DNA tests are admissible in *nasab* cases. In fact, the law makes no reference to any kind of medical assistance for the proof or refutation of *nasab*.[48]

However, most countries have made DNA tests admissible only within the context of a valid marriage, like in Iran, the United Arab Emirates, Saudi Arabia, and Pakistan.[49] In Malaysia, these tests are admissible in the context of a valid marriage or in cases of *al-waṭʾ bi-shubha* (erroneous sexual intercourse), which refers to a situation in which the parents incorrectly believed that they were married at the time of intercourse. Moreover, DNA tests cannot be used to negate paternity that is already established or presumed as a result of *firāsh* (valid marriage). In Algeria, Article 40 of the family law is silent on the issue of whether or not DNA tests are admissible only in the context of marriage, but legal practice seems to indicate that DNA tests are not admissible in the context of extramarital relationships.

Tunisia and Indonesia present notable exceptions in this regard. In Tunisia, DNA tests are possible both within and outside of marriage. In Indonesia, DNA-based evidence is also admissible as proof when the parents are not married in order to prove the biological parental relationship between father and child. In practice, this biological relationship can be registered through the inclusion of a marginal note in the civil register, stating that the child is the biological child (*anak biologis*) of the father (instead of his legal child or *anak sah*), even if the couple remains unmarried. Courts have ordered such an entry based on the 2009 Child Protection Law and, more specifically, the principle of the best interests of the child and a child's right to know their parents. In Jordan, Article 157 of the Jordanian family law that regulates the establishment of *nasab* was reformed in 2019. Since then it is up to the discretionary authority of the judge whether or not DNA-based evidence is admissible only in the context of a (valid) marriage or also in cases in which no marital relationship has been established.[50]

46 In countries in which DNA tests are merely part of legal practice and have not been introduced in statutory law, such as Lebanon and Saudi Arabia, it is difficult to establish how long these tests have been admissible. See appendix 1, table, Q15.

47 See appendix 1, table, Q14.

48 See appendix 1, table, Q14.

49 See appendix 1, table, Q16.

50 "Qānūn al-aḥwāl al-shakhṣiyya," Law no. 15 of 2019, Al-Jarīda al-Rasmiyya [Jordan], no. 5578 (June 2, 2019), 3181–225. (Hereafter cited as the 2019 law).

https://doi.org/10.1017/jlr.2019.45 Published online by Cambridge University Press

As a result of the limited admissibility of DNA-based evidence in most jurisdictions, women who have children out of wedlock continue to find it difficult to establish *nasab* for their children. A DNA test alone is often not sufficient to establish *nasab*.[51] If admissible, DNA tests are often used in conjunction with other means of evidence to establish filiation.[52] The introduction of DNA tests has not been able to bring all children into the safety net of filiation because the legislature continues to link *nasab* to the existence of a valid marriage. The introduction of DNA tests thus does not eliminate the legal discrimination faced by children who are born outside the context of a valid marriage. States have been reluctant to admit DNA-based evidence outside the context of a valid marriage, because these states do not want to legitimize extramarital sexual relationships. In most Muslim-majority jurisdictions, extramarital relationships are criminalized;[53] without decriminalizing these relationships, it is less likely that DNA tests will be admitted in such cases.

THE ROLE OF COURTS AND MINISTRIES IN CHILD PLACEMENT AND *NASAB*

Adopting a theoretical approach to the state that focuses on different state institutions rather than the state as a monolithic actor,[54] this section establishes which institutions are involved in the placement of children into new families and the establishment of *nasab*. It investigates whether courts hear cases on *nasab* and the placement of children into new families and whether or not court approval or ministerial approval is required for the placement of children into new families. It investigates whether states have put in place systems of concurrent jurisdiction that allow people to engage in forum shopping, that is the strategic choice by litigants to have their case heard by the tribunal that is likely to issue the most favorable ruling.[55]

In the fourteen jurisdictions studied, different institutions of the state are involved in the placement of children into new families and in the establishment of *nasab*. The courts that hear cases on *nasab* and the fora through which the placement of children into new families are regulated are often not the same. In Jordan and Malaysia, shariʿa courts have jurisdiction in cases of *nasab* pertaining to Muslims, but juvenile courts and civil courts respectively have jurisdiction when it comes to the placement of children into new families.[56] Knowingly or not, legislators took this sensitive legal issue out of the religious courts.

In all cases, either court or ministerial approval (or both) is necessary to authorize the placement of children into new families. In the overwhelming majority of cases, including in Tunisia, Jordan, the United Arab Emirates, Iraq, and Iran, court approval is required to legalize the placement of children into new families. In Jordan and Indonesia, ministerial approval as well as court approval is required. In the case of foreign adoptions in Pakistan the additional approval of the Ministry of

51 Yassari and Möller, "Synopsis," 406.

52 Dörthe Engelcke, "Jordan," in Yassari, Möller, and Najm, *Filiation and the Protection of Parentless Children*, 135–64, at 142; Yassari and Möller, "Synopsis," 406.

53 For the rules on fornication (*zinā'*) in classical Islamic law, see Mathias Rohe, *Das islamische Recht: Geschichte und Gegenwart* [Islamic law: History and present age] (Munich: Verlag C. H. Beck, 2009), 125–26.

54 The state-in-society approach emphasizes the non-monolithic nature of the state. See Joel S. Migdal, *State in Society: Studying How States and Societies Transform and Constitute One Another* (Cambridge: Cambridge University Press, 2001), 3–38.

55 On the practice of forum shopping in settings of legal pluralism, see Keebet von Benda-Beckmann, "Forum Shopping and Shopping Forums: Dispute Processing in a Minangkabau Village in West Sumatra," *Journal of Legal Pluralism and Unofficial Law* 13, no. 19 (1981): 117–59.

56 See appendix 1, table, Q17 and Q18.

Interior is also required alongside court approval.[57] In Algeria, Palestine, and Saudi Arabia, the placement of children into new families does not require court approval, but is legalized through ministerial approval.[58] The ministries that are involved in the placement of children into new families in these countries are normally the ministries that deal with public welfare.[59] Overall, all jurisdictions require official approval from a fairly senior level, indicating a reluctance to delegate such decisions to lower level implementing agencies.

Only three states (Lebanon, Israel, and Indonesia) have a system of concurrent jurisdiction in place, that is, a system in which two or more courts have jurisdiction over a specific case at the same time.[60] This has enabled forum shopping. In Lebanon, religious courts have jurisdiction over family law cases, but the 2002 Juvenile Protection Law gives the juvenile courts jurisdiction and the power to order protective measures whenever they deem that a child is in physical or psychological danger. Israel has the most extensive system of concurrent jurisdiction: family and religious courts have concurrent jurisdiction in the areas of spousal maintenance, matrimonial property, filiation, the placement of children into new families, child maintenance, child custody and guardianship, parental authority, and succession. Family courts in Israel will adjudicate the case, unless all parties consent to having the case decided by the religious court. In Indonesia, in legal practice, general courts and Islamic courts have jurisdiction in areas such as the placement of children into new families, succession, and acknowledgment and legalization of a child. This practice continues despite the fact that a recent amendment restricts concurrent jurisdiction.[61] Forum shopping is of particular importance because in most jurisdictions judgments issued by religious courts cannot be appealed before the regular courts[62] or the high court.[63] Concurrent jurisdiction has allowed states, consciously or not, to weaken the jurisdiction of religious courts in an area that is deemed sensitive.

The literature has formulated several theoretical assumptions about the effects of concurrent jurisdiction on the development of Islamic family law and court practice. It has been claimed that concurrent jurisdiction can encourage change because it allows members of that religious group to opt out of the jurisdiction of a religious court, should this court fail to respond to the needs of a group member.[64] It is also assumed that concurrent jurisdiction has increased competition between courts. Competition between regular and religious courts can lead religious courts to become more accommodating to what are commonly described as "liberal values" while resistance to such values remains stronger in areas in which religious tribunals hold exclusive jurisdiction.[65] Along similar lines, others have argued that concurrent jurisdiction between regular and shariʿa courts has encouraged self-reform within the shariʿa judiciary.[66] Testing these assumptions is, however, beyond the scope of this article.

57 See appendix 1, table, Q23.
58 See appendix 1, table, Q24.
59 See appendix 1, table, Q25.
60 See appendix 1, table, Q19.
61 See appendix 1, table, Q20.
62 See appendix 1, table, Q21.
63 See appendix 1, table, Q22.
64 Ayelet Shachar, *Multicourt Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001), 122.
65 Daphna Hacker, "Religious Tribunals in Democratic States: Lessons from the Israeli Rabbinical Courts," *Journal of Law and Religion* 27, no. 1 (2012): 59–81.
66 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): 235–73, at 238; see also Ido Shahar, *Legal Pluralism in the*

https://doi.org/10.1017/jlr.2019.45 Published online by Cambridge University Press

In several countries, a subcategory of *nasab* has been established through court practice, classifying the relationship between a child and its biological father as civil paternity or biological paternity, among other labels. These countries include Indonesia, Algeria, Malaysia, and India.[67] Judicature is one way through which state institutions can shape religious law. Establishing filiation without terming it *nasab* could be an attempt to bring children into the safety net of filiation while avoiding any obvious violation of Islamic law and without statutory law reform that could create public opposition to such reforms. However, none of these subcategories have created the same rights that would emerge once *nasab* is established. Often children only receive the right to maintenance, but not the right to inherit from the biological father.[68]

GUARDIANSHIP OVER CHILDREN WHO ARE PLACED INTO NEW FAMILIES

All of the surveyed states except Saudi Arabia operate a legal scheme in which parents, who have a child placed into their home, have guardianship over that child. In Saudi Arabia, guardianship remains with the state.[69] In roughly half the countries, guardianship entitles the parents to decide on behalf of the child in all matters.

Whether or not the father can act as the marriage guardian of a woman or girl placed into his home remains a grey area in many jurisdictions. Marriage guardianship means that the guardian (*walī* or *waṣī*) concludes the marriage contract for the woman or girl or consents to it. The marriage guardian, normally the woman's father, represents the interests of the woman during the negotiation of the contract.[70] In Jordan, Indonesia, and Malaysia, marriage guardianship is exempted from the *wiṣāya*, and in Iran the courts determine the scope of guardianship.[71] In these countries as well as Saudi Arabia, the father cannot act as the marriage guardian of a girl placed into his home. In Indonesia, this is only possible if he was appointed the so-called *wali hakim* by the competent religious authorities. A person who has formally been appointed as marriage guardian (*wali nikah*) is called a *wali hakim*. The appointment of a *wali hakim* can take place only in cases of neglect of the child by the biological father and his family, the absence of a *wali* (missing and unknown whereabouts of the *wali*), an unqualified *wali* (for example, a non-Muslim one), or the inability of the *wali* to act as such.[72] In Malaysia and Jordan, the judge acts as the marriage guardian for women and girls.[73] Overall, therefore, states display varying degrees of willingness to delegate

Holy City: Competing Courts, Forum Shopping, and Institutional Dynamics in Jerusalem (Farnham: Ashgate, 2015), 107–122, at 107.

67 See appendix 1, table, Q26.

68 See appendix 1, table, Q26.

69 See appendix 1, table, Q27. In most jurisdictions future caretakers receive the *wiṣāya* for a child that is placed into their home. *Wiṣāya* and *wilāya* are most commonly translated as *guardianship*. However, the *wilāya* is a form of *natural* guardianship that results from a (biological) relationship based on family status and thus *nasab*. The *wiṣāya* is a form of assigned guardianship in the event that the *walī* (guardian) is absent. The *wiṣāya* can be assigned by the *walī* or a court. See Dörthe Engelcke, "Jordan," in Yassari, Möller, and Gallala-Arndt, *Parental Care and the Best Interests of the Child in Muslim Countries*, 121–43, at 133.

70 Mathias Rohe, *Das islamische Recht: Geschichte und Gegenwart* [Islamic law: History and present age] (Munich: Verlag C. H. Beck, 2009), 84.

71 See appendix 1, table, Q28.

72 No transliteration is used here because Bahasa Indonesia, the Indonesian language, is written in the Latin alphabet.

73 In Lebanon, Christian women do not need a marriage guardian to get married. In Iraq, the consent of the *walī* is only required between the ages of fifteen and eighteen. Otherwise the presence of the *walī* is recommended but not mandatory. See appendix 1, table, Q29.

guardianship prerogatives to caretakers who have children placed in their homes, resulting in varying degrees of control over these children's lives that remains with the state.

STATE SERVICES FOR DESTITUTE CHILDREN

State engagement with respect to services for destitute children varies. In most jurisdictions, the state does not financially compensate families who have a child placed into their homes. This is particularly the case when the placement is not temporary but of a more permanent nature. In Algeria and Tunisia, the law is silent on the financial responsibility of the state, but it stipulates that a person who has a child placed into his home within the context of *kafāla* or *tabannī* has the same obligations toward that child as the law imposes on biological parents. Similarly, in Jordan, the *iḥtiḍān* instructions do not explicitly mention the state's financial responsibilities. They stipulate that the parents must provide for the child and meet all of the child's medical and educational needs. In Pakistan, the state does not provide any financial support to the parents, but the guardian appointed by the court is entitled to an allowance. The amount of the allowance is determined by the court and paid out of the property of the ward, and thus this applies only to cases in which the ward has property.[74]

Saudi Arabia and Israel are the most generous states when it comes to financially compensating families or single women who have a child placed into their home. In Saudi Arabia, families receive a monthly payment that depends on the age of the child. The placement generally ends when the child has reached the age of legal capacity, which is eighteen. However, the period can be extended if the child is still completing its education or suffers from impairments that justify further care. At that point, caretakers receive an extra one-time payment of 20,000 Saudi riyal (about USD 5,329) for each child they take in. In Israel, families who have a child placed into their home on a non-permanent basis receive maintenance of between 2,400 Israeli new shekels (NIS) (around USD 636) and NIS 4,423 (around USD 1,237) per month per child, determined according to the child's needs, for as long as this relationship is maintained in addition to other expenses.[75] In states such as Tunisia and Malaysia, parents or single women who take in a child on a non-permanent basis can receive smaller sums of money of approximately 150 Tunisian dinars (around USD 50) per month in Tunisia or about 250 Malaysian ringgit (around USD 60) in Malaysia.[76] In many countries, the law is silent on the state's financial responsibility. In the United Arab Emirates, the state's responsibility is defined in the negative. Article 15 of the Foster Care Act stipulates that the caretaker covers all of the costs related to the placement of a child into their family. The caretakers cannot ask the state for any reimbursement.[77]

In some countries, such as the United Arab Emirates, India, and Israel, the financial responsibility of the state is defined in the respective laws that regulate the placement of children into new families. In Iran, it is regulated in the Iranian Civil Code. By contrast, in Saudi Arabia and Tunisia, the financial responsibility is outlined in administrative regulations issued by the Ministry of Social Affairs and the Ministry of Women, Family and Childhood respectively.[78] Overall, financial responsibility often shifts from the state to the families who have had a child placed into their

74 See appendix 1, table, Q30.
75 See appendix 1, table, Q30.
76 See appendix 1, table, Q31.
77 See appendix 1, table, Q32.
78 See appendix 1, table, Q33.

https://doi.org/10.1017/jlr.2019.45 Published online by Cambridge University Press

homes. This suggests that delegating financial responsibility away from the state may be a factor for these states when setting up these legal schemes.

In almost all countries, the state runs orphanages for orphans and children with unfit or unavailable caretakers. Lebanon presents a notable exception, as the Lebanese state does not operate state orphanages.[79] Rather, in Lebanon the state provides funding for private orphanages that are run on a sectarian basis.[80] In Lebanon, the state is likely not seen as a neutral actor, and care for destitute children is organized entirely along sectarian lines. In 1925, the French colonial authorities issued Decree No. 3110, which obliged the state to house orphans in public orphanages. Under the decree, children could only be placed in private orphanages once state orphanages had reached capacity. After Lebanon achieved formal independence in 1943, state efforts were redirected to the funding of private orphanages along sectarian lines. The state is not a major welfare provider, but has outsourced this role to non-state actors. In 2016, according to data provided by the Ministry of Social Affairs, 24,106 children were placed in care facilities operated by various sectarian groups.[81] The organization of care for destitute children across sectarian lines and the absence of state options indicates how politicized the process of *claiming* children is. Even though Lebanon presents a notable exception in the sense that orphanages are run entirely along sectarian lines, in almost all of the surveyed jurisdictions religious or ethnic communities also operate orphanages.[82]

THE CASE OF ADOPTION AMONG CHRISTIAN COMMUNITIES IN MIDDLE EASTERN JURISDICTIONS

As the first part of this article has shown, most Muslim-majority countries do not categorically deny non-Muslims the right to become caretakers, but non-Muslims are only considered to be eligible caretakers of non-Muslim children. Non-Muslims also often do not have the right to apply the adoption provisions of their own family laws that regulate adoption. In contrast to Islamic law, the family laws applied by Christian communities do not prohibit adoption, but instead contain detailed provisions on adoption.[83] The legal mechanisms through which adoption is prohibited are not always clear and states have limited the application of adoption provisions in different ways. In some cases, like Syria and Jordan (prior to 2011), the jurisdiction of church courts is explicitly defined in a way that excludes adoption. In other cases the application of adoption

79 See appendix 1, table, Q34.

80 As of 2012, the Shiʿi scholar Ayatollah Husayn Fadlallah's charitable association operated nine orphanages in Lebanon supporting 4000 orphans. See Morgan Clarke, *Islam and Law in Lebanon: Sharia within and without the State* (Cambridge: Cambridge University Press, 2018), 239.

81 Marie-Claude Najm, Myriam Mehanna, and Lama Karamé, "Lebanon," in Yassari, Möller, and Najm, *Filiation and the Protection of Parentless Children*, 165–203, at 192–93.

82 See appendix 1, table, Q35.

83 Mary was impregnated by the Holy Spirit before the marriage to Joseph was consummated. Thus, Joseph was not the biological father of Jesus. In Nazareth, Jesus was known as Joseph's son, which implies that Joseph had adopted Jesus. See David S. Powers, *Muḥammad Is Not the Father of Any of Your Men: The Making of the Last Prophet* (Philadelphia: University of Pennsylvania Press, 2009), 18. Christianity also knows the concept of spiritual adoption. Upon baptism, Jesus became the Son of God. Similarly, believers become spiritual children of God when baptized by accepting God as their father. Powers, *Muhammad Is Not the Father of Any of Your Men*, 19–20. In interviews, members of different churches in Jordan have argued along similar lines stating that Jesus was himself adopted and adoption was therefore allowed according to Christian doctrine.

https://doi.org/10.1017/jlr.2019.45 Published online by Cambridge University Press

provisions seems to be restricted because it is interpreted as a violation of public policy.[84] In Iraq, for example, *tabannī* as such is prohibited and the ban seems to extend to non-Muslim Iraqis as a matter of public policy,[85]

By contrast in Lebanon, as explained above, Christians have the right to apply the adoption provisions of their family laws. In Palestine, Christians gained the right to adopt in March 2019. It is likely that allowing adoption for Christians in Palestine was a concession made, first, in exchange for the Vatican recognizing Palestine as a state in February 2012 and, secondly, for the conclusion of the comprehensive agreement between the Vatican and the State of Palestine in 2015. This demonstrates the extent to which rights of Christian Palestinians are also a political bargaining chip and an international issue rather than a purely national affair.[86] Interestingly, Iran also allows Christian Iranians to apply their respective adoption provisions and does not consider those to be a violation of public policy. Iran has a public policy clause that limits the application of non-Shiite law. The law that authorizes the application of non-Shiite law specifies that one of the areas in which the law of the respective non-Muslim community is applied, unless it is seen as a violation of public policy, is the area of adoption. In Iran, *farzand khāndigī* (adoption) is not seen as a violation of public policy, and Christian communities whose laws allow *tabannī* can apply their respective provisions.[87]

STATE INTERVENTION OR ITS LACK: CHRISTIAN COMMUNITIES' LEGAL AUTONOMY IN JORDAN

In Jordan, church court judges and Christian lawyers often state in interviews that Christians in Jordan do not have the right to apply their respective adoption provisions. Many Jordanian

84 In Syria, although it is not among the countries covered by the survey, various family laws applied by Christian communities contain provisions on adoption. However, these provisions cannot be applied in practice, because Christian communities only enjoy legal autonomy in the areas that are listed in Article 308 of the Syrian Law of Personal Status. Adoption is not listed in Article 308 and thus does not fall under the jurisdiction of the church courts. It seems that between June 2006 and September 2010 the Catholic community's legal autonomy included matters of adoption. See Esther van Eijk, *Family Law in Syria: Patriarchy, Pluralism and Personal Status Laws* (New York: I. B. Tauris, 2016), 151.

85 See appendix 1, table, Q6.

86 See *qarār bi-qānūn raqm () li-sanat* 2019 *bi-shaʾn al-qarāʾin al-murtabiṭa bi-l-tabannī bayna al-masīḥiyyīn*, issued in Ramallah, March 26, 2019, signed by Mahmoud Abbas, the President of the State of Palestine, on file with author. Article 2, paragraph a, permits the adoption (*tabannī*) of children of unknown filiation if it is indicated that they belong to the Christian faith. Article 3 clarifies when a child is considered Christian. A child of unknown filiation (*majhūl al-nasab*) that is found at the doorstep of a church or monastery or a social organization or hospital or a care home (*dār riʿāya*) with a Christian name is considered Christian. The child is also considered Christian when a cross or icons of Jesus or the Virgin Mary or any other saints are found among the child's clothes. The child is also considered Christian if it is found in an unknown vehicle containing the Bible, the cross, or a picture of Jesus or the Virgin Marry or saints or any special sign that is recognized in the Christian faith. The child is also considered Christian if it is found in a region or city or village in which all or the overwhelming majority of the population is Christian. According to Article 5, the decision by law becomes binding once it has been published in the Official Gazette. The decree stipulates that it is also based on Article 13 of the comprehensive agreement between the Vatican and the State of Palestine which was concluded in 2015. Article 13, paragraph 4, of the comprehensive agreement explicitly stipulates that the church courts have jurisdiction with respect to *tabannī* as stipulated by canon law. The right of Christians to apply the adoption provisions of their respective family laws was thus also the result of lobbying efforts by the Vatican.

87 See appendix 1, table, Q6.

https://doi.org/10.1017/jlr.2019.45 Published online by Cambridge University Press

Christians, therefore, feel discriminated against by the law. A church court judge explained that different Christian communities had asked the government to enact an adoption law or to allow Christians to apply the provisions of their family laws. These calls remain unanswered. According to the church court judge, the government refused to enact a law regulating adoption out of fear that the Muslim Brotherhood would protest such a law, given that adoption is forbidden under Islamic law.[88] Thus, the issue of adoption serves as an example of state intervention in the family laws applied by Christians in Jordan—that is, preventing church courts from applying these provisions. Despite the perception that adoption is forbidden for Jordanian Christians, the legal situation since the constitutional reform of 2011 is far from clear. The following section provides a brief introduction to Jordanian Christians and the organization of the family laws applied by Christian communities in Jordan, and then analyzes the only known adoption judgment issued by a church court in 2015.[89]

When the British mandate of Transjordan was established in 1921, about ten percent of the population was Christian.[90] In the 2000s, the Christian population was estimated at about four percent.[91] Despite their decreasing percentage of the population in Jordan, Christians play a visible role in politics, associational life, and the economy. What constitutes the Hashemite Kingdom of Jordan today used to be part of the Ottoman province of Syria. Until the middle of the nineteenth century, all Christians who lived east of the Jordan River belonged to the Greek Orthodox Church. This only changed due to increased missionary activity by the Roman Catholic Church in the last decades of the nineteenth century. By the beginning of the twentieth century, about one-fifth of the local Christians had changed their denomination.[92] Today the Greek Orthodox community remains the largest Christian community, but there are eleven officially recognized communities (*ṭawāʾif*), as will be explained below.

Christians in Jordan enjoy a degree of legal autonomy. The legal system in Jordan is divided into religious, regular, and special courts.[93] Regular courts have jurisdiction over all people in regular and criminal matters.[94] Family law is adjudicated by religious courts, which are divided into shariʿa courts and courts of other religious communities.[95] Thus, shariʿa courts have jurisdiction over Muslim citizens in family law matters,[96] whereas the family law applicable to Christian Jordanians is adjudicated by different church courts.[97]

88 Interview with judge at the Greek Catholic church court of first instance, interview by author, Amman, September 25, 2016.

89 I use the term *church court* here. The 2014 law uses the term "councils of Christian communities" (*majālis al-ṭawāʾif al-masīḥiyya*). Art. 3, paragraph 1, of the 2014 law stipulates that the term *majālis al-ṭawāʾif al-masīḥiyya* means court (*maḥkama*). Since the church courts are the functional equivalents of the shariʿa courts, I use the term *court* rather than *council* to avoid confusion. The term *church court* (*maḥkama kanasiyya*) is also used in the family laws applied by Christian communities.

90 Géraldine Chatelard, "The Constitution of Christian Communal Boundaries and Spheres in Jordan," *Journal of Church and State* 52, no. 3 (2010): 476–502, at 476.

91 Géraldine Chatelard, *Briser la mosaïque: les tribus chrétiennes de Madaba, Jordanie, XIXe–XXe siècle* [Breaking the mosaic: the Christian tribes of Madaba, Jordan, 19th–20th centuries] (Paris: CNRS éditions, 2004), 20. However, there are no reliable statistics that provide the exact figures.

92 Chatelard, "The Constitution of Christian Communal Boundaries and Spheres in Jordan," 476.

93 See Article 99 of the Jordanian Constitution.

94 See Article 102 of the Jordanian Constitution.

95 See Article 104 of the Jordanian Constitution.

96 See Articles 103 and 105 of the Jordanian Constitution.

97 For an analysis of Jordanian court system and Islamic family law reform see Dörthe Engelcke, *Reforming Family Law: Social and Political Change in Jordan and Morocco* (Cambridge: Cambridge University Press, 2019); Dörthe

The operation of the church courts is regulated by the 2014 Law for Christian Councils.[98] The law stipulates that non-Muslim communities which are listed in its appendix have the right to establish their own tribunals.[99] The different family laws of Christian communities that these courts apply are not submitted to a vote by parliament and are not published in the *Official Gazette*. The Greek Catholic community operates its own courts. The Greek Catholics, the Armenian Catholics, the Maronites, and the Roman Catholics are in communion with Rome. The Roman Catholic community has established its own courts, but the Armenian Catholics and the Maronites do not have their own courts and their members can choose to use either the tribunal of the Greek Catholic or the Roman Catholic community.

The jurisdiction of the church courts is regulated in different pieces of legislation. The Jordanian constitution stipulates that the matters of personal status of Christian communities are the same matters of personal status as for Muslims under the jurisdiction of the shariʿa courts. The constitution further stipulates that the church courts apply the provisions relating to personal status that are not considered provisions of personal status for Muslims under the jurisdiction of the shariʿa courts.[100] Similarly, the 2014 Law for Christian Councils stipulates that the courts of Christian communities have jurisdiction to adjudicate cases that arise between their members concerning issues that fall under the personal status of Muslims, which are adjudicated by shariʿa courts, as well as issues of personal status that are stipulated by the communities' laws and that are not the personal status issues of Muslims.[101] The constitution as well as the 2014 Law for Christian Councils balances the jurisdiction of the shariʿa and the church courts while declaring at the same time that the personal status issues of Christians can be different from the personal status issues of Muslims. This is significant because prior to the constitutional amendments of 2011, the constitution merely stipulated that the personal status matters of Christians are the same as the personal status matters of Muslims.[102] Thus, the new wording expands the jurisdiction of the church courts beyond matters over which the shariʿa courts have jurisdiction to include matters of personal status contained in the laws of each Christian community.[103] According to a commentator, the most important issue that is considered a matter of personal status of Christians but not of Muslims is adoption (*tabannī*).[104]

Engelcke, "Law-Making in Jordan: Family Law Reform and the Supreme Justice Department," *Islamic Law and Society* 25, no. 3 (2018): 274–309.

98 "Qānūn majālis al–ṭawāʾif al–masīḥiyya," Law no. 28 of 2014, *Al-Jarīda al-Rasmiyya* [Jordan], no. 5299 (September 1, 2014), 5140–51. (Hereafter cited as the 2014 law.)

99 See Article 2 of the 2014 law. The appendix of the 2014 law lists eleven Christian communities (*ṭawāʾif*). These communities are the Greek Orthodox, the Greek Catholics, the Armenian community, the Roman Catholics, the Arab Evangelical Episcopalian church (the Anglican Church), the Maronites, the Evangelical Lutheran church, the Syrian (or Syriac) Orthodox, the Seventh Day Adventists, the Pentecost International Church, and the Orthodox Copts. In practice, the Armenian community is divided into Armenian Catholic and Armenian Orthodox. The Pentecost International Church is not technically a community (*ṭāʾifa*), but only a church.

100 See Article 109 of the Jordanian Constitution.

101 See Article 4 (paragraph a) of the 2014 law.

102 See "Taʿdīl al-dustūr *al-urdunnī* li-sanat 2011," *Al-Jarīda al-Rasmiyya*, no. 5118 (2011): 4452–68.

103 See also Yacoub al-Far, *Sharḥ qānūn al-aḥwāl al-shakhṣiyya li-l-ṭawāʾif al–masīḥiyya* [Commentary on the personal status law of Christian communities] (Amman: Office of Jacoub al-Far, 2015), 61–62. All of the matters that fall under the jurisdiction of the shariʿa courts are listed in Article 2 of the shariʿa court procedures law (*qānūn uṣūl al-muḥākamāt al-sharʿiyya*) no. 31 of 1959. However, the dissolution of an estate consisting of immovable property present in Jordan is done according to national legislation that applies to Muslims, that is, Islamic inheritance law. The article is silent on the issue of movable property. See Article 10 of the 2014 law.

104 Al-Far, Sharḥ qānūn al-aḥwāl al-shakhṣiyya li-l-ṭawāʾif al–masīḥiyya, 64.

https://doi.org/10.1017/jlr.2019.45 Published online by Cambridge University Press

Despite these changes, the question of whether or not *tabannī* is legal remains unclear. Article 14 of the Jordanian Constitution stipulates that the state protects the free exercise of religious practice and beliefs in accordance with the customs observed within the kingdom as long as they are not in violation of public policy (*niẓām al-ʿāmm*) or contrary to morality (*ādāb*).[105] Under the Constitution, Islam is the religion of the state.[106] Thus, when the family laws applied by Christian communities are seen as violating the provisions of Islamic law, the legal autonomy of Christians can be restricted.[107] *Nasab*, which falls under the jurisdiction of the shariʿa and church courts, is not considered a violation of public policy, because *nasab* provisions of the Jordanian Islamic and the family laws applied by Christian communities are similar. The Byzantine Family Law, for example, defines illegitimate children (*ghayr sharʿiyyīn*) as children who are born outside the context of a valid marriage. These children do not inherit from their fathers and are not maintained by him.[108] Thus, the state has not intervened in the family laws of Christian communities in this area, which means that Christians enjoy full autonomy when it comes to determining the provisions of their family laws that pertain to *nasab*. The case of adoption is more of a grey area. *Tabannī* (adoption) is not explicitly forbidden in Jordan, but *tabannī* is seen as contrary to Islamic law. Jordan ratified the Convention on the Rights of the Child on May 24, 1991.[109] The Jordanian government has stipulated reservations to Articles 20 and 21 of the convention which concern adoption. The Jordanian government justified its reservations with reference to Islamic law that, according to the government, does not permit the practice of adoption.[110] The application of *tabannī* can thus be interpreted as a violation of public policy and would thus likely be exempted from the free observance of religion and beliefs as stipulated by the Constitution.

Tabannī *under the Greek Catholic Family Law*

Adoption in the Greek Catholic community is regulated in Articles 98 to 118 of the Greek Catholic Family Law.[111] Pursuant to the law, adoption is a contract between two people that establishes paternity and legal filiation (*ubuwwa wa-bunuwwa sharʿiyyīn*).[112] The procedures for

105 See Article 14 of the Jordanian Constitution. Jordan's conflict of law rules are regulated in the 1977 Civil Code. Article 29 of the Jordanian Civil Code also contains a public policy clause that limits the application of foreign law when the legal rules are in violation of public policy or the good morals of Jordan. See Jan Kropholler et al., eds., *Außereuropäische IPR-Gesetze* [Non-European PIL laws] (Würzburg: Deutsches Notarinstitut, 1999), 239. The conflict of law rules outlined in the Jordanian Civil Code do not contain any references to adoption.

106 See Article 2 of the Jordanian Constitution.

107 This is similar to Egypt, where Maurits Berger observes that despite the existence of different family codes (Muslim and Christian), public policy is constructed based on the principles of Islamic law alone. Islamic law is thus the source of public policy. Maurits Berger, "Conflicts Law and Public Policy in Egyptian Family Law: Islamic Law through the Backdoor," *American Journal of Comparative Law* 50, no. 3 (2002): 555–94, at 569–70.

108 See Article 287 of the Byzantine Family Law, on file with author. The Byzantine Family Law is the law that the Greek Orthodox community, the largest Christian community in Jordan, applies.

109 The Convention on the Rights of the Child was published in the Official Gazette in 2006. See *qānūn al-taṣdīq ʿalā ittifāqiyyat ḥuqūq al-ṭifl* no. 50 of 2006, 16 October 2006, *Al-Jarīda al-Rasmiyya* no. 4787, pp 3991–4024.

110 Committee on the Rights of the Child, Initial Report of State Parties, U.N. Doc. CRC/C/8/Add. 4, at 23 (1993).

111 I obtained a copy of the Law from archimandrite Bassam Shahatit, the president of the Greek Catholic Court of First Instance in Amman. The Law is in Arabic. It is not dated, and it is unclear how old the Law is. Bassam Shahatit was unable to state when the Law was issued but stated that he thought it had last been amended in 1974. I asked the archimandrite to clarify several provisions of the law for me and he did so in writing July 4, 2019. The explanations added throughout the text are based on this document and correspondence.

112 See Article 98 of the Greek Catholic Family Law.

the awarding of *tabannī* stipulate that a minor child (*qāṣir*) who has reached the age of discernment (*mumayyizan*) needs to consent to the adoption for the adoption to be valid. Any parents who are still alive also need to give their consent.[113] This means that children who are not of unknown filiation (*majhūl al-nasab*) can also be adopted. If the parents are dead or unable to give their opinion, the bishop of the diocese, or whoever represents him, has to give his consent.[114] The adoption becomes legal only with a church court (*maḥkama kanasiyya*) decision which is approved by the bishop (*muṭrān*) of the diocese or his representative.[115] Whereas most of the schemes placing children into new families that were discussed in part one of this article match children and parents along religious lines, the Greek Catholic law stipulates that there also needs to be confessional congruence between the adopter and the child. Thus, a Catholic child can only be adopted by a Catholic.[116] This indicates the extent to which not only inter-religious but also inter-confessional competition exists regarding the claiming of a child.

Adoption is allowed only if the person being adopted has a proven interest in the adoption and if the adoptive parent has a good biography (*ḥusn al-sīra*).[117] The person who wants to adopt has to meet a number of criteria. Every layperson (*shakhṣ ʿalmānī*), a male or female, above the age of forty is eligible to adopt under the condition that he or she does not have any legal offspring (*nasl sharʿī*) at the time of the adoption.[118] A single person cannot adopt more than one child.[119] The law thus allows for single women (or men) to adopt, but it stipulates that that person cannot have children of their own. The *iḥtiḍān* provisions also stipulate that at least one party of a married couple has to be infertile.[120]

The biological parents are not obliged to pay maintenance for their child if the child is adopted unless the person who adopted him or her is unable to provide for the child.[121] The adopted person takes the family name of the family by whom he or she has been adopted, and his or her rights and duties toward the parents become the same as those of a legitimate child (*walad sharʿī*).[122] At the same time, the adopted person remains part of his or her original family (*ʿāʾila aṣliyya*) and is entitled to all of the associated rights and is also obliged to fulfil his or her obligations toward the original family.[123] However, the person who has adopted the child exercises parental authority (*al-sulṭa*

113 See Article 104 (paragraph a) of the Greek Catholic Family Law.

114 See Article 104 (paragraph b) of the Greek Catholic Family Law.

115 See Article 112 of the Greek Catholic Family Law.

116 See Article 101 of the Greek Catholic Family Law. According to Bassam Shahatit this includes Greek Catholics, Roman Catholics, Armenian Catholics, or Maronites.

117 See Article 99 of the Greek Catholic Family Law.

118 See Article 100 of the Greek Catholic Family Law. A "lay person" is a member of the community but not a priest. The law puts emphasis on "lay person" because priests cannot adopt children. In Roman Catholicism priests cannot get married. However, priests in the Greek Catholic church can. Bassam Shahatit emphasized that the adoption ban extends to married as well as unmarried priests.

119 See Article 102 of the Greek Catholic Family Law.

120 Engelcke, "Jordan," in Yassari, Möller, and Najm, *Filiation and the Protection of Parentless Children*, 137.

121 See Article 108 of the Greek Catholic Family Law.

122 See Article 106 of the Greek Catholic Family Law.

123 Bassam Shahatit explained that this includes mutual inheritance and maintenance rights. It is thus obvious that an adopted child is not completely cut off from his natal family. This provision might be influenced by Roman law. In Roman law, in the Institutes of Justinian, the inheritance rights of an adopted child were modified. Justinian modified the law to allow adopted children to inherit from their natal family as well as from members of their adoptive family. Before, an adopted child lost the right to inherit from his natal family upon adoption. If the adoptive father decided to emancipate his adoptive son, the child would no longer inherit from anyone. The reform was likely intended to cure this social ill. It also meant that adoptive children could potentially inherit from their natal as well as their adoptive families. See Powers, *Muḥammad*, 21–22.

https://doi.org/10.1017/jlr.2019.45 Published online by Cambridge University Press

al-wālidiyya) over the child. When the adoptive parent dies or loses his legal capacity, parental authority reverts to the father (*wālid*) of the adopted child.[124]

Adoption establishes inheritance rights according to the Greek Catholic Family Law. If the adoptive parent passes away and does not leave any descendants or antecedents (*furūʿ aw uṣūl*), the inheritance share of the adopted person is the same as the share of a legitimate child.[125] But if the adoptive parent leaves antecedents, descendants, brothers or sisters, then the adopted person receives half the share of the legitimate child.[126] If the adopted person passes away without legal descendants (*furūʿ sharʿiyyīn*), everything he received from his adoptive parent returns to the adoptive parent or the adoptive parent's heirs. All of his other funds (*amwāl*) are divided according to the general religious law of Islam (*al-sharʿ al-ʿāmm*).[127] Jordanian inheritance law is not interreligiously divided. The estate of any Jordanian, Christian or Muslim, is divided according to Islamic inheritance law.

The annulment of *tabannī* is possible for serious reasons (*asbāb khaṭīra*) and happens by court order.[128] Serious reasons that allow for the annulment of *tabannī* include physical abuse by the adoptive parent or the adopted child, or the infliction of moral or material damage by one of the two parties on the other. Leaving the Catholic faith also constitutes a reason for the revocation of *tabannī*.[129] Any person who was adopted as a minor has the right within one year of reaching the age of legal majority (*sinn al-rushd*) to ask the court to annul the adoption, and the court is obliged to comply.[130]

Some of the provisions on adoption of the Greek Catholic Family Law are similar to the Jordanian *iḥtiḍān* provisions, but there are also important differences that can be seen as a violation of Islamic law. The Greek Catholic Family Law explicitly states that adoption creates filiation as well as inheritance rights and that the adopted child carries the name of the adoptive parent.[131] The content of the adoption provisions of the Greek Catholic Family Law makes it more likely that this form of adoption will be seen as a violation of public policy in Jordan.

The Adjudication of tabannī *by the Greek Catholic Court of First Instance*

Christian communities are not allowed to apply the respective *tabannī* provisions of their family law, and non-Muslims are also unable to foster a child under the *iḥtiḍān* program, as has been explained above. However, there is one known case in which a child, a foundling, was ordered to be adopted by a church court ruling, and this adoption was registered with the state within

124 See Article 107 of the Greek Catholic Family Law.

125 See Article 109 (paragraph a) of the Greek Catholic Family Law. According to Bassam Shahatit, the terms *furūʿ aw uṣūl* do not include distant relatives here. However, this provision was not clear to him as it had never been applied.

126 See Article 109 (paragraph b) of the Greek Catholic Family Law.

127 See Article 110 (paragraph a) of the Greek Catholic Family Law. Adoption creates inheritance rights between the adopted person and his adoptive parent, but not the family of the adoptive parent. See Article 110 (paragraph b) of the Greek Catholic Family Law. According to Bassam Shahatit the legal descendant (*furūʿ sharʿiyyīn*) are those who are appointed by virtue of church law (*al-qānūn al-kanasī*). Christians in Jordan apply the Islamic inheritance provisions. However, a draft of a Christian inheritance law is currently being discussed among Christian communities.

128 See Article 114 (paragraph b) of the Greek Catholic Family Law.

129 See Article 115 of the Greek Catholic Family Law. The article refers to *madhhab kāthūlīkī*. *Madhhab* is the term used for Islamic legal school.

130 See Article 104 (paragraph c) of the Greek Catholic Family Law.

131 The Islamic family law states that adoption does not create *nasab*. See Article 162 of the 2019 law.

https://doi.org/10.1017/jlr.2019.45 Published online by Cambridge University Press

the framework of the *iḥtiḍān* program. The details of the case are instructive regarding state engagement in the matter of *tabannī* and will therefore be outlined below. The case suggests that the system allows for a certain degree of flexibility.

In February 2015, the Greek Catholic Church Court of First Instance in Amman issued a decision on adoption (*qarār tabannī*).[132] The facts are as follows: A married Christian couple who did not have children themselves asked the church court through their lawyer for a decision of *tabannī* for a child whose parents were unknown. The child had been found in front of the church with a cross around its neck, which was seen as an indication that the parents and, by default, the child were of the Christian faith. This was unusual given that the Civil Status Law states that the foundling's religion is the state religion, which is Islam.[133] At the time of the court case, the child was seventeen months old. The Department of Civil Status and Passports had given the child a first name but no family name, a national number (*raqm waṭanī*), and a Jordanian passport, as foundlings automatically receive Jordanian citizenship. The foundling was thereby automatically claimed as a Jordanian citizen.

The couple had first obtained a decision over the right to care for the child (*ḥaqq riʿāyat al-ṭifl*) as issued by the juvenile court. This decision included the right to travel with the child outside the country. They then obtained a decision from the juvenile court in Amman for *iḥtiḍān*. This was despite the fact that the provisions that regulate the *iḥtiḍān* program stipulate that non-Muslims are excluded from the program.[134] Even though the *iḥtiḍān* provisions do not stipulate that *iḥtiḍān* is allocated for a limited period of time, in this case the juvenile court limited the period to five years. The later judgment of the church court specified that the couple had been providing full care for the child since the issuance of the first judgment of the juvenile court.

The ruling of the church court specified that the couple wanted the child to be considered their son and had therefore asked for a decision of adoption (*tabannī*). The church court based its ruling on the adoption provisions of the Greek Catholic Family Law. The court also based its ruling on international law, referring to the Convention on the Rights of the Child, which Jordan had ratified in 1991 and which recognizes adoption. The child was given the adoptive father's name, which was registered at the Department of Civil Status and Passports, and the husband and the wife were registered as the parents with the Department, a state institution. The church court ruling stipulates that the child was thereby deemed their adopted child and that full inheritance rights materialized.[135]

The ruling was then formalized by the Jordanian Ministry of Social Development. However, the documents issued by the Ministry do not contain the term *tabannī*. In a letter addressed to the Department of Civil Status and Passports, the Ministry of Social Development informed the Department that the Christian family had obtained the permission of the Ministry to care for the child as a foster family (*usra riʿāya badīla*). The letter states that the couple is Christian and that the child was of unknown filiation and of the Christian faith. Before foster care, it was cared for at the Al Hussein Social Foundation for Orphans, a state institution. The Ministry then asked the Department to issue the necessary documents. The document is signed by the representative of the Minister of Social Development, a lawyer (likely the lawyer of the Christian

132 I obtained the documents related to the case at the Greek Catholic Court of First Instance in Amman.

133 Engelcke, "Jordan," in Yassari, Möller, and Najm, *Filiation and the Protection of Parentless Children*, 155.

134 See Art. 4 (2) of the *iḥtiḍān* instructions.

135 Decision of the First Instance Greek Catholic Church Court in Amman, no. 15/15/31 of February 14, 2015 (on file with author). The discussion of the inheritance rights of an adopted child above demonstrates that the adoptive child does not in all cases have the same inheritance rights as a (biological) child.

https://doi.org/10.1017/jlr.2019.45 Published online by Cambridge University Press

couple), and the director of the Department for Family and Childhood at the Ministry of Social Development.[136]

The Al Hussein Social Foundation for Orphans, a state institution that provides care for orphans and children from disjoined families, also issued a document, which is called a certificate of receipt of the children (*istilām al-aṭfāl*) for foster families. It stipulates the names of the foster parents and the date when they received the child. It states that the foster family pledges to protect and care for the child and not to harm the child, and that the Al Hussein Social Foundation for Orphans is no longer responsible for the child from this date onward.[137] The form is a generic document, and the caretaker's personal information is filled into the blanks. It can therefore be assumed that this is a standard procedure for all resident children of the Al Hussein Social Foundation for Orphans who are entering the foster care system.

An analysis of this only known case in which a church court in Jordan issued a judgment on *tabannī* demonstrates that the different state institutions did not refer to the *tabannī* judgment issued by the church court, nor did they use the term *tabannī*. The state thus did not formally recognize either *tabannī* or the jurisdiction of the church courts in cases of *tabannī*. The Ministry of Social Development referred to the parents as a foster family (*usra riʿāya badīla*), not as adoptive parents. However, the child was allowed to take the father's name, and the Christian couple was registered as the child's parents at the Department of Civil Status and Passports, which would normally not have been the case in the context of *iḥtiḍān*. The case demonstrates the ways through which one Christian family had a child placed into their home through *iḥtiḍān*, despite the *iḥtiḍān* provisions formally excluding them as eligible caretakers. It also demonstrates that the state, at least in some cases, still applies the "Ottoman neighborhood policy," which means that the religious affiliation of a child depends on where the foundling was discovered. The Ministry of Social Development had declared that the foundling was Christian even though the Jordanian Civil Status Law stipulates that foundlings have the state religion and are thus automatically considered Muslim. In this case, state institutions allowed for the desired outcome without adopting the legal terminology of the Greek Catholic Family Law. It will be interesting to observe in the future whether this practice will become more common and whether it will be challenged on the basis of violation of Islamic law.

CONCLUSION

All of the states examined in this study have facilitated the creation of new families regardless of biology by operating legal schemes that allow for the placement of children into new families. One visible trend is that the pool of caretakers has been expanded, in the course of which unmarried women have become eligible caretakers. At the same time, states rarely allow the creation of new families across religious lines. Religion continues to be a marker of belonging and a line of separation that determines who is eligible to *claim* a child. Normally the religion of the caregiver and the child has to coincide, and inter-religious mixing is avoided. As a result, foreigners are seldom allowed to have a child placed into their homes. The process of claiming a child as a member of a religious or national community is a highly politicized process. Since the nineteenth century, religion has increasingly become part of identity politics, and contemporary policies should be read against this historical backdrop.

136 Document no. 61585 of December 24, 2013 (on file with author).

137 Document on file with author.

While to date unified national family laws remain rare, states have increasingly created national legal schemes that allow for the placement of children into new families and that are open to all citizens regardless of religious affiliation. While neither India nor Israel have national family laws that apply to all citizens, both have national laws that allow for the placement of children into new families and that are open to all citizens regardless of their religious affiliation. Opening up new avenues to opt out of religious law is, thus, one broader observable trend in this study. Future research should investigate whether and (if so) when citizens actually make use of these provisions.

In all jurisdictions discussed here, filiation is (also) regulated by Islamic family law. Overall, states have been reluctant to amend provisions relating to *nasab* in Islamic family law, and the concept of the best interests of the child has not been introduced in provisions of family law that regulate *nasab*. Instead, states have widened the definition of marriage to bring children into the safety net of filiation. The introduction of DNA tests has made the inherent tension between the concept of *nasab* and biological filiation more visible. The use of DNA tests has been carefully limited. The fact that DNA tests are normally admissible only in the context of a valid marriage or in cases of mistaken sexual intercourse demonstrates the legislature's concern for avoiding apparent clashes with Islamic law. To reduce the number of cases of children who do not have *nasab*, legislators have expanded the definition of what constitutes a marriage. Overall, states have attempted to facilitate children's rights to filiation while remaining hesitant to question that (paternal) filiation is a result of marriage (*firāsh*). Sexual relationships outside of wedlock remain criminalized in many jurisdictions. A reform that would allow for the establishment of paternity outside of marriage would therefore have to be accompanied by a reform of the relevant provisions of the penal code. In the meantime, the filiation of children born out of wedlock remains in jeopardy.

The establishment of concurrent jurisdiction, as in Israel, Lebanon, and Indonesia, as it relates to *nasab* and the placement of children into new families presents another state strategy to shape religious law and to mitigate some of the effects of religious law on children's rights. Concurrent jurisdiction has enabled forum shopping. The literature has formulated several assumptions about the effects of concurrent jurisdiction, ranging from liberalization to internal reform as a result of competition; testing these assumptions is beyond the scope of this article. However, the freedom of choice that people can exercise in these situations should not be overestimated. Other factors such as culture and financial considerations, rather than legal preferences, very much determine an individual's choice of forum.[138] Overall, an individual's choice might be exaggerated. The capacity of concurrent jurisdiction to change (religious) law may thus be overstated.

State involvement does not affect all groups of the population in the same way, inviting us to rethink *the* role of the state. In settings of state law pluralism, such as Jordan, state involvement affects different religious communities in different ways and to different degrees. This leads to the unequal development of different bodies of religious law in Jordan and thereby to the unequal treatment of Muslim and Christian citizens. When we conceptualize the role of the state, we therefore need to take legal pluralism into consideration.

The issue of adoption among Christian communities in Muslim jurisdictions remains a grey area. In some countries like Iran, Lebanon and Palestine, Christian communities have the right to apply the adoption provisions of their family laws. In other countries like Jordan, Iraq or Syria they do not. However, the legal mechanisms through which adoption is prohibited often remain disputed and are sometimes bypassed in practice. Despite the ban on adoption, in 2015

138 Hacker, "Religious Tribunals in Democratic States," 65–70, 80.

https://doi.org/10.1017/jlr.2019.45 Published online by Cambridge University Press

the Greek Catholic Court of First Instance in Amman issued the only known adoption ruling in Jordan. The case demonstrates the informal ways through which Christian couples can have a child placed into their home. It also demonstrates that many of the provisions that govern adoption in the family laws applied by Christian communities remain grey areas for church court judges themselves, because they are not applied in practice. For the time being, the adoption provisions of the family laws applied by Christian communities across the region remain theoretical constructs and hypotheticals in most cases.

ACKNOWLEDGEMENTS

I thank the members of the Max Planck Working Group on Child Law, who gave generously of their time to this project. In Jordan, special thanks are due to Bassam Shahatit and Nizar Dayyat, who patiently answered my questions about adoption among Christians. I also thank Mark Erbel, Irene Schneider, and Nadjma Yassari, as well as M. Christian Green and an anonymous reviewer, for their constructive comments and feedback. I thank Tess Chemnitzer for providing editorial support.

SUPPLEMENTARY MATERIAL

To view supplementary material for this article, please visit https://doi.org/10.1017/jlr.2019.45.