Panel 20: **International Private Law and Migration: from the Middle East and North Africa to Europe and Back**

Friday 18, 9-10.45, Auditorium Giancarlo De Carlo

Convenors: **Katherine Elizabeth Hoffman** (Northwestern University); **Maaike Voorhoeve** (Forum Transregionale Studien, Berlin)

Discussant: **Susan F. Hirsch** (George Mason University)

Recently, the world's attention has been focused on the dramatic plight of destitute refugees fleeing the violence of the civil uprisings and political retributions in Libya, Syria, and beyond. While forced migration may challenge understandings of regional order in ways that capture headlines, North Africans and Middle Easterners have long undergone more quiet forms of movement towards Europe and North America through marriage, family regroupment, and the guardianship and adoption of orphans. At the same time, although in lesser numbers, Europeans and North Americans have migrated towards the MENA region. These vastly different motivations and directions of movement (South-North and North-South) may share certain qualities in their legal manifestations in ways that challenge the presumption that they are different phenomena. In this panel, we will examine the intersection of diverse forms of migration (forced, economic, or family regroupment) to Europe from or through the MENA region, and in the opposite direction. Contributions analyze in particular the ways in which, in the North, diverse European legal strategies allow for the maintenance of 'Islamic' personal status or instead refute its jurisdiction on Western soil, while in the South, allow for modified forms of Western jurisdiction. In doing so, we will pose interdisciplinary questions inspired by (but not limited to) anthropology, history, and legal studies about the legitimacy and acceptance, or rejection, of the 'Other' in nation-states in the West and the MENA region. Scholars writing from fieldwork observations have demonstrated that law in North African states cannot be filtered through the lens of Islam, and understood as a cultural distillation of social values, and that it is just as untenable to inherently oppose Islamic and Western laws per se (Rosen 1989, Dupret 2005). At the same time, both laypeople and judges in the West, even up to the European Court of Human Rights, have considered MENA state legislation in the field of marriage, divorce and custody to be immutable and dictated by the Islamic sources, and thus distinct from Western state laws. This perceived difference has important consequences: Western courts may think twice before applying 'Islamic' personal status on MENA nationals in their jurisdiction, or instead require it; Western migrants residing in the MENA region hesitate before entering a court in their country of residence. Points of conflict – where Islamic family law and Western civil laws become irreconcilable to the parties involved – are particularly fertile locations for examining the practices and strategies deployed by petitioners and legal specialists in their pursuit of conflict resolution. This tension is even more acute for mixed families and the diaspora.

Paper givers:

1) **Katherine E. Hoffman** (Northwestern University), *Regimes of Care: Islamic Guardianship (kafala) and Transnational Adoption of North African Children in Comparative Legal Perspective*

How is parental care for abandoned children shaped by legal regimes that frame understandings of protection and citizenship? This paper investigates the transnational fostering and adoption of orphans whose care originates under Islamic guardianship (kafala) in states with jurisprudence prohibiting adoption, particularly Morocco and Algeria in which around one-fourth of kafala guardianships involve European-descent and emigrant North African families. Sending states consider kafil parents mere guardians, but guardians abroad confront laws that may require the adoption of orphans, permit adoption, or prohibit adoption altogether. In particular, French appeals courts and the European Court for Human Rights have upheld lower court rulings prohibiting the conversion of guardianships into adoptions, claiming that the orphans' "original personal law" should be upheld and that Islamic guardianship provides "sufficient protection" as noted in the UN Convention on the Rights of the Child. Yet children's foreign citizenship, and their guardians' lack of parental rights, disqualifies these groupings from state resources to help overcome the effects of institutionalization on the young child's physical, socio-emotional, and cognitive development. Anthropologists have argued that "kinning" is crucial to the construction of abandoned children's subjectivities and socially-embedded selves. Behind the intimate issue of guardianship and adoption are questions about the salience of national origin throughout the lifecycle and across national borders.

2) **Lena-Maria Möller** (Max Planck Institute for Comparative and International Private Law), *Syria's Political Disintegration and its Implications for European Private International Law in Matters of Personal Status: Some Preliminary Observations*

By now, almost five years of civil war in Syria have left the country politically fragmented. Its disintegration into separate political entities with shifting borders and various degrees of de facto independent political rule has implications far beyond the Middle East. Currently, hundreds of thousands of Syrians are not only fleeing to neighboring states, but are also seeking refuge further away from home in many European countries. As one of the many consequences, public authorities are now faced with a range of foreign documents attesting to the civil and personal status of those having fled to Europe. While private international law still treats state law as the norm and main focal point, the Syrian case poses new challenges as public institutions (from embassies to courts) are faced with documents issued by non-state actors, such as the Syrian Opposition Government or the so-called "Islamic State" (IS or Daesh). Using marriage documents issued in different Syrian political entities as a case study, my paper will explore questions and issues that have already arisen in recent legal practice in Germany and that are likely to increase in the months and years to come. With family reunification being a central aspect of international and domestic refugee law, civil and personal statuses have to be proven and verified by multiple public authorities before spouses, children, and parents may also migrate to Europe. This paper will offer both preliminary academic observations as well as tangible practical recommendations.

3) **Iris Sportel** (Georg-August University, Göttingen),*Who's Afraid of Islamic Family Law? Dutch lawyers and courts dealing with cases of private international law involving shari'a-based family law systems*

Through private international law, courts can come into contact with a wide range of "foreign" family laws and concepts. When migrants aim to register their marriage, divorce, or take family disputes to court, courts in the country of residence may apply the laws of their country of origin. In the context of increasing migration from the Middle East to Europe, European courts are confronted with a growing number of disputes which involve aspects of Islamic family law. In the Netherlands, where views of Muslims and Islamic family law are highly politicised, the application by Dutch courts of sharia-based family law systems is especially controversial. This paper is based on an analysis of court cases, as well as on interviews with Dutch judges, lawyers, translators, NGOs, and other professionals involved in court cases of migrant minorities. I focus on Dutch courts dealing with shari'a-based legal concepts in family law cases. How do professional actors see Islamic family law, and what does this mean for contested topics as polygamy, mahr (dower) and talaq (repudiation)? What is the role of legal expertise? If and how do actors in the legal system take into account the effects of Dutch court cases on the legal situations of family members in the country of origin? And how can this be connected to general discourses on Islam, Muslims, family law and rights in the Netherlands?

4) **Maaike Voorhoeve** (Forum Transregionale Studien, Berlin), *Mixed marriage in Tunisia and the rights of non-Tunisian women*

Despite the 'modernist' and 'secularist' reputation of the Tunisian Personal Status Code, there is a tendency among Tunisian legal scholars to be pessimistic about judicial practice, deeming judges 'conservative' and even misogynist. Only in the field of mixed marriage, Tunisian writings have been optimistic: since the years 2000, authors have hailed a development charaterised by the application of international human rights law in order to grant foreign women certain rights. Several courts including the Court of Cassation have granted non-Tunisian women child custody and inheritance rights. After the regime change in 2011, however, pessimism has returned: Tunisian lawyer and feminist Monia Ben Jemia talks about a return of conservative practice when commenting on an appeal verdict denying a foreign woman to take part in her husband's inheritance (2014). This recent development is generally blamed on the change in mentality following the rise to power of the Islamist movement Ennahda. On the basis of field work conducted in 2008 and 2009, this paper examines the practices of two family chambers at the Court of First Instance in Tunis, the largest family court in Tunisia. It aims to demonstrate that the development that was hailed in the years before the uprisings was not as generalised as the legal scholars wished to think. On the contrary, empirical data consisting of court decisions, interviews and the observation of court sessions show that judicial practice in the field of mixed marriage was very casuistic and depended highly on the circumstances of the case. This finding has consequences for the hypothesis that after the uprisings and under the influence of Islamists, the protection of women's rights became worse.