



Custody Regulations in the United Arab Emirates: Legal Reforms and Social Realities

Lena-Maria Möller

Abstract:

One major area of discussion during the 2005 process of initially codifying Muslim personal status law in the United Arab Emirates (UAE) were regulations regarding the divorced mother's right to custody of her minor children. The new rules regarding the allocation and duration of female custodianship are the outcome of fiery debates among various actors involved in the codification process. The new codified custody rules differ from traditional Islamic law and concede large discretionary powers to the judiciary. The courts' discretion in allocating custody is verbalized in the term "*maṣlaḥat al-maḥḍūn*" (the welfare of the child under custody). At the same time, courts in the UAE have thus far refrained from defining in clear terms what actually constitutes the child's welfare. While one of the major aims of the codification of Muslim personal status law in the UAE was to guarantee legal certainty, the reformed custody regulations do not serve this purpose. They rather point towards the legislator's will to put in force more flexible rules on custody which allow for the accommodation of changing societal needs and values.

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Custody Regulations in the United Arab Emirates

Legal Reforms and Social Realities

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Contents

I. Introduction	1
II. Pre-Codification Custody Rules in the UAE	3
III. Debates on the Codification of Custody Rules.....	5
IV. Custody Regulations in the 2005 Code of Personal Status	6
V. Legal Practice and Social Realities	9
1. General Tendencies in Emirati Jurisdictions on Custody.....	9
2. Emirati Courts’ Interpretation of the Welfare of the Child	12
VI. Conclusion.....	14
Summary.....	15

I. Introduction

The three Arab Gulf states of Bahrain, Qatar and the United Arab Emirates (UAE) codified their Muslim law of personal status for the first time in the previous decade, leaving Saudi-Arabia as the only Muslim country in the region without a codified family

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law. The UAE were the first to codify in 2005¹, followed by Qatar in 2006², and Bahrain in 2009^{3, 4}. Despite differences in the denominations of the local populations in Bahrain, Qatar and the UAE, the three new codes resemble each other in many regards. This is, for one, due to the comparative legal research undertaken during the codification processes. Moreover, all three legislators used the “Draft Code of Personal Status”⁵ issued by the Gulf Cooperation Council in 1997 as a common frame of reference.

One major area of discussion during the codification process in the UAE were regulations regarding the *hiḍāna*, the divorced mother’s right to custody of her minor children. The 2005 Code of Personal Status is, in general, largely based on the Sunni Maliki School of law, and to a lesser extent on the Hanbali School of law. Regulations on the duration of female custodianship (whether the mother or some other eligible woman – see below, II) as well as on the eligibility for custody differ from traditional Maliki and Hanbali law.

The age limits established in respect of the mother’s custody of her minor children are the outcome of fiery debates among government representatives, religious scholars, legal practitioners, and women’s rights groups during the codification process. Moreover,

¹ UAE Federal Law of Personal Status No. 28/2005 [*qānūn al-aḥwāl al-shakhṣiyya*], Official Gazette no. 439 of 11/30/2005, 9-118 (hereafter: 2005 Code of Personal Status).

² Qatar Family Law No. 22/2006 [*qānūn al-usra*], Official Gazette no. 8 of 8/28/2006, 31-99 (hereafter: 2006 Family Code).

³ Bahrain Family Law No. 19/2009 [*qānūn al-usra (al-qism al-awwal)*], Official Gazette no. 2898 of 6/4/2009, 5-30. The law applies to Bahrain’s Sunni Muslims only. The second part of the law which was to codify Shi’i family law was rejected by parliament. For the codification process and its debates see Lynn Welchman, *Women and Muslim Family Laws in Arab States* (Amsterdam: Amsterdam Univ. Press, 2007), 22-4.

⁴ For a comparative analysis of the statutory provisions of all three codes see Lena-Maria Möller, “Die neuen Familienrechtskodifikationen in den arabischen Golfstaaten Bahrain, Katar und Vereinigte Arabische Emirate,” *StAZ* 64, No. 11 (2011): 325-32 and Lynn Welchman, “First Time Family Law Codifications in Three Gulf States,” in: *The International Survey of Family Law*, ed. Bill Atkin, (Bristol: Jordan Publ., 2010), 163-78.

⁵ Muscat Document of the GCC Common Law of Personal Status 1997 [*al-nizām (al-qānūn) al-muwahḥad al-aḥwāl al-shakhṣiyya li-duwal majlis ta’āwun li-duwal al-khalīj al-‘arabiyya*], see Middle East Partnership Initiative, www.maktabatmepi.org/node/1222, last accessed: 12/26/2012 (hereafter: Muscat Document). Until 1997, Kuwait was the only Arab Gulf state to have codified its Muslim law of personal status, Kuwait Law of Personal Status No. 51/1984 [*qānūn al-aḥwāl al-shakhṣiyya*], Official Gazette no. 1570 of 7/23/1984, 1-33; Oman codified shortly after the Muscat Document was passed, Royal Decree No. 32/1997 on the Law of Personal Status [*qānūn al-aḥwāl al-shakhṣiyya*], Official Gazette no. 601 of 6/10/1997, 6-56.

discussions regarding legal reforms in this area are still ongoing. They represent the major concern of (mostly governmental) women's rights organizations⁶.

Custody rights represent one area of the new law in which courts still wield substantial discretionary powers. This discretion is verbalized in the term "*maṣlaḥat al-maḥḍūn*", the welfare of the child whose custody is at issue. According to the new law, the welfare of the child is to be taken into consideration when determining eligibility for custody as well as its duration. This makes an analysis of statutory provisions and judgments regarding the mother's custody of her children in the UAE especially interesting. Judgments in custody cases allude to the broader topic of social and moral values in the UAE as expressed through the courts' interpretation of what determines the welfare of the child. While one of the major aims of the codification of Muslim personal status law in the UAE was to guarantee legal certainty in matters of family law, the new rules on custody do not necessarily serve this purpose. By conceding large discretionary powers to the judiciary whenever the welfare of the child is concerned, the new custody regulations in the 2005 Code of Personal Status diverge from that particular aim.

In what follows, the UAE's pre-codification custody rules will be summarized briefly. Thereafter, the debates which gave rise to the custody regulations currently in force will be outlined. The outcome of the UAE's codification efforts will then be compared to the legal realities that are being created through court rulings in custody cases. Emphasis will also be placed on the question of how UAE appellate court judgments (both intermediate and high courts) in custody cases have closed gaps in the 2005 Code of Personal Status and how these judgments have led to a further development of the statutory provisions on custody.⁷

II. Pre-Codification Custody Rules in the UAE

The local population of the UAE, which is almost exclusively Sunni Muslim, does not adhere to one single school of law. While the larger emirates of Abu Dhabi and Dubai predominantly observe the Maliki School of law, the Hanbali School of law prevails in the five smaller emirates of the UAE.⁸ Due to the constitutional guarantee of

⁶ Note that non-governmental women's rights organizations do not exist in the UAE. The General Women's Union [*al-ittihād al-nisā'ī al-ʿām*] is the official governmental umbrella organization of all organizations concerned with women and family issues in the UAE.

⁷ The paper at hand is mainly based on findings made by the author during a two-month period of field research in the UAE and other Arab Gulf states in the spring of 2012.

⁸ Dawoud El Alami and Doreen Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World* (London et al.: Kluwer Law Intl. 1996), 4. In addition to the emirates of Abu Dhabi and Dubai, Maliki law is also dominantly followed by the Sunni (minority) population in Bahrain.

independence in judicial affairs⁹, there has never been one single court system in the UAE. Ras al-Khaimah and Dubai have had independent courts since the formation of the union. In 2006, Abu Dhabi also established its own court system, leaving only four smaller emirates¹⁰ to form the federal court system.¹¹ Independence in judicial affairs has helped local denominations to prevail in matters of family law.

Hanbali and Maliki law differ with regard to the person entitled to custody and the duration of female custodianship. All Islamic schools of law hold that the mother, whether living with her husband or divorced, has the first claim to custody of her infant child¹² up to a certain age.¹³ If the mother is dead or not suitable, the schools differ widely on the question of who is to follow her in rank.

Failing the mother, the Hanbali School gives priority to the mother's mother how high so ever. Failing the female line of the maternal grandmother, the father is entitled to custody of his infant child.¹⁴ As opposed to these Hanbali rules, the Maliki School of law prefers most female relatives of the child to his/her own father when the mother cannot serve as custodian. The father will only gain custody of his child failing most female maternal relatives as well as some of his own kinswomen, such as his mother and grandmothers.¹⁵

With regard to the duration of a mother's custodianship, traditional Hanbali and Maliki law differ as well. The Hanbali proponents maintain that female custody runs from birth

Hanbali law has historically been prevalent on the Arabian Peninsula. Its recent dominance can be mainly attributed to Saudi Arabia's religious and political influence on neighboring states, such as Qatar and some of the smaller emirates that were to form the UAE, since the early twentieth century. While Hanbali rules as interpreted by Wahhābī scholars have also found their way into neighboring legal systems, the Wahhābī doctrine is of less influence on Hanbali law in the UAE and Qatar.

⁹ Articles 102-5 Constitution of the United Arab Emirates.

¹⁰ These are: Ajman, Fujairah, Sharjah, and Umm al-Quwain.

¹¹ Butti S. Muhairi, "United Arab Emirates," in: *Legal Systems of the World* 4, ed. Herbert M. Kritzer (Santa Barbara: ABC Clio, 2002), 1692; Essam al-Tamimi, *Practical Guide to Litigation and Arbitration in the United Arab Emirates* (The Hague et al.: Kluwer Law Intl., 2003), 90; Abu Dhabi established its own independent court system through law no. 23/2006 [*qānūn bi-sha'n da'ira al-qaḍā' fi imārat abū zabī*], Official Gazette Abu Dhabi no. 36 of 05/10/2007, pp. 7-22.

¹² The various Islamic schools of law differ with regard to the duration of female custodianship and infancy is not always defined in terms of age limits. The shortest duration of female custodianship can be found in the Jaafari School of law, which rules that the mother's custody of her male child ends with the weaning of the infant boy.

¹³ Muḥammad Ṣuwaynī, *Aḥkām al-ḥiḍāna* [On custody] (Dubai: Ma'had dubay al-qaḍā'ī, 2009), 40.

¹⁴ Laleh B. Bakhtiar, *Encyclopedia of Islamic Law* (Chicago: ABC Intl., 1996), 470; Jamal J.A. Nasir, *The Islamic Law of Personal Status* (3rd ed.) (Leiden & Boston: Brill, 2009), 161; Ṣuwaynī (above n. 13), 48-50.

¹⁵ Bakhtiar (above n. 14), 470; Nasir (above n. 14), 160, 161; Ṣuwaynī (above n. 13), 43-6.

to the age of seven for both, boys and girls. At the age of seven, the Hanbali School gives the child the right to choose which parent he/she wants to live with.¹⁶ In contrast, Maliki law distinguishes between the male and the female child. A son will remain in the custody of his mother until he reaches puberty (*bulūġ*).¹⁷ A girl will remain in her mother's custody until she consummates her marriage (*dukhūl al-zawāj*). Malikis do not confer a right of choice upon the child.¹⁸

Traditional Maliki and Hanbali doctrines concur with regard to certain marriage restrictions which the female custodian has to abide by. Both schools (and, in fact, all Sunni and Shi'ci schools of law) hold that the female custodian will lose the right to custody should she marry a person who would not be prohibited from marrying the child. The requirement further applies to all children under the custody of a female, regardless of their respective sex¹⁹. Should the female custodian marry a person who is prohibited from marrying the child under custody, she will however retain custody of the child.²⁰

As for the custody rights of Christian or Jewish mothers of a Muslim child, the Sunni schools of law differ considerably. While the Shafi'i and (in the case of apostates) the Hanafi rules deny a non-Muslim any right to the custody of a child, the Maliki and Hanbali schools do not consider the religious affiliation of the mother a condition for the allocation of custody.²¹

Judgments from the pre-codification period, i.e. until 2005, show that courts in the UAE largely relied on the locally dominant Sunni school of law.

III. Debates on the Codification of Custody Rules

After years of discussion and lobbying by women's rights organizations, the UAE put their first codified family law into force in 2005. On several occasions between the first drafts and the final version, legal scholars, legal practitioners, and the General Women's

¹⁶ Mājid Abū Rakhīyya and °Abdallah M. Jabūrī, *Fiqh al-zawāj wa-l-ṭalāq* [The law of marriage and divorce] (Sharjah: Maktabat jāmi'a 2006), 271; Bakhtiar (above n. 14), 472; Nasir (above n. 14), 170, 171.

¹⁷ Maliki law does not define "bulūġ" in terms of a particular age. As opposed to Hanbali law, Maliki law identifies phases in the lives of male and female children to determine the duration of female custody.

¹⁸ Abū Rakhīyya/Jabūrī (above n. 16), 270, 271; Nasir (above n. 14), 171; F.H.R. Ruxton, *Maliki Law*, (London: Luzac & Co., 1916), 155.

¹⁹ This means that the female custodian of a boy will lose custody too if she marries a man who is not prohibited from (theoretically) marrying the child if the child were a girl.

²⁰ Abū Rakhīyya/Jabūrī (above n. 16), 267, Nasir (above n. 14), 163.

²¹ Bakhtiar (above no. 14), 471; Nasir (above n. 14), 164, 165.

Union²² (GWU) were asked to comment on the various draft versions. One area of conflict was the duration of maternal custodianship. The first draft maintained that the custody of a divorced mother ended at the age of eight years for her son and eleven years for her daughter, at which time the children had to be transferred to the custody of their father.

The GWU and some of the family lawyers and judges who were asked to review the draft and comment on it demanded an extension of these age limits. The GWU wished to adapt the traditional Maliki rules: female custody until the onset of puberty for sons and the consummation of marriage for girls. Other legal practitioners did not go as far but nonetheless argued for a raising of the age limits. The discussion was mainly based on the argument that children, both boys and girls, were in need of their mother's care for a longer period of time than what the first draft contained. All actors involved in the codification process who demanded a revision of the first draft argued that raising the age limits for female custody was primarily in the interest of the child. Among them, the (exclusively female) GWU demanded the longest duration of female custody. The legal practitioners who were asked to review the draft and who demanded extended age limits, but not necessarily in line with Maliki rules as requested by the GWU, were mostly male lawyers and judges. In the end, supporters of an extension of female custodianship won insofar as Article 156 of the 2005 Code of Personal Status raised the current age limits to eleven years for a boy and thirteen years for a girl. However, broader demands of the GWU were not met and the GWU continues to lobby for a reform of the current law and a revision of the rules regarding the duration of female custodianship.

It is noteworthy that during the codification process, the GWU especially hoped to strengthen the divorced mother's custodial rights by extending the duration of female custodianship. Even though this was done with reference to safeguarding the interests of children, the GWU did not argue for an abolishment of fixed age limits for custody altogether. They did not demand an allocation of custody based on an assessment of the child's best interests alone. The GWU thus seems to have accepted the assumption that fixed age limits are an integral part of both traditional Islamic custody rules – as developed in historical *fiqh* works – and statutory provisions in this area of the new law.

IV. Custody Regulations in the 2005 Code of Personal Status

Regulations regarding custody are dealt with only in Book 2 of the new code, i.e. within the context of the dissolution of marriage. Allocation of custody is considered an effect of divorce. Therefore, the code does not deal with questions of custody within an existing

22

See above n. 6.

marriage except in Article 54 of the 2005 Code of Personal Status, where the care for the children and their education²³ is listed as a mutual obligation of the spouses.

Article 142 of the 2005 Code of Personal Status defines custody as providing for the care, education and protection of the child in a way that does not contradict the right(s) of the child's guardian (*haq al-walī*). Welchman notes that the UAE law thus follows the general approach of many Arab-Muslim states of “[...] dividing the functions of parenting between those of custodian and guardian, and identifying the former with the mother and the latter with the father, in the first instance”.²⁴ This distinction of female custody and male guardianship reflects, as Welchman points out, “[...] gendered assumptions of ‘ideal-type’ social and familial roles in the upbringing of children [...]”.²⁵

As mentioned earlier, Article 156 of the 2005 Code of Personal Status regulates the duration of female custodianship. Accordingly, the divorced mother's custody ends upon her son reaching the age of eleven and her daughter the age of thirteen. However, in the interest of the child, the court has authority to extend the custody of the mother until the son reaches puberty/maturity (*bulūḡ*) and the daughter consummates her marriage. The legislator has thus chosen an age limit slightly above that of the Hanbali School of law with a possible extension up to the age which traditional Maliki law commonly maintained.

Regarding the eligibility for custody, the 2005 Code of Personal Status differs from both the Hanbali and the Maliki schools of law. By providing that it is the father who is to follow the mother in rank as entitled custodian, the code focuses on the nuclear family rather than on the presumption that even remote female relatives are to be given priority over the father. At the same time, the wording of Article 146 of the 2005 Code of Personal Status is somewhat confusing. While the father comes second in a long list of entitled custodians, the text of the article is less than clear in this regard, stating that:

“Custody is the right of the mother and then that of females within a prohibited degree of kinship [*muḥāram*], whereby maternal relatives have priority over paternal relatives

²³ “*al-ʿināya bi-l-awlād wa tarbiyyatahum*”. It should be noted that Article 54 of the 2005 Code of Personal Status does not use the term “*hiḍāna*”. Defining the care and upbringing as a mutual obligation of both parents while they are cohabiting as a married couple is a common approach of current personal status laws in the Muslim world. This does, however, not affect the authority of guardianship or the allocation of custody once the marriage is terminated; see Welchman (above n. 3), 133. Other Arab Gulf states with a similar provision are Bahrain (Article 36), Oman (Article 36), and Qatar (Article 56) as well as the Muscat Document (Article 37).

²⁴ Lynn Welchman, “Gulf Women and the Codification of Muslim Family Law,” in: *Gulf Women*, ed. Amira El-Azhary Sonbol, (Doha: Bloomsbury Qatar Found., 2012), 396.

²⁵ Welchman (above n. 24), 396.

taking into consideration the closest degree of kinship, with the father being the exception. [...]”.

The wording of Article 146 thus seems to aim at combining traditional Islamic rules regarding the allocation of custody with the legislator’s will to strengthen the father’s position as custodian of his child.

Article 143 of the 2005 Code of Personal Status stipulates requirements to be fulfilled by every custodian, such as puberty/maturity, sanity and health. In addition, Article 144 of the 2005 Code of Personal Status contains two separate lists of requirements for women and men. These are to be fulfilled in order to be granted custody of a child. Accordingly, women are prohibited from living with a husband who would not be legally impeded from marrying the child whose custody is at issue. This requirement not only applies in all cases in which the child under custodial care is female, but it also covers boys in the custody of their mother.²⁶ Moreover, the requirement for the mother to not re-marry (or otherwise lose her right to custody) is frequently inserted as a stipulation in out-of-court custody agreements between spouses seeking a divorce.²⁷ A similar requirement does not, however, apply to men. Men are only barred from having custody of a girl to whom they do not have a prohibited degree of kinship. When codifying the new custody rules, the legislator did however depart from traditional Islamic law’s assumption that there is no exception to the marriage restriction for female custodians. The requirement that a female custodian not be married to a man who, in turn, is not prohibited from marrying the child is not absolute; rather it can be waived whenever a continuation of female custody is considered to be in the best interest of the child. Article 144 also requires a male custodian to be accompanied by a female to support him with the caretaking of the child. Such a woman does not necessarily have to be the wife of the custodian.

An exception to the rules regarding the mother’s priority in matters of custody can be found in Article 145 of the 2005 Code of Personal Status. Article 145 discusses the rules of allocation and duration of custody in all cases in which the mother does not have the same religion as the child. Since the new code applies solely to Muslim personal status matters, the only possible constellation will be that of a Christian or Jewish mother and her child from a Muslim father. In these cases, the mother is in principle denied custody altogether. Once again taking into consideration the welfare of the child, the court can grant her custody until the child reaches the age of five. At the same time, the allocation of custody by court decree applies only to a non-Muslim *mother*. Other females are already barred from serving as a custodian through the general rule of Article 144, requiring women to have the same religion as the child under their custody.

²⁶

Also see pp. 5, 6 above.

²⁷

See explanations on pp. 10, 11 below.

V. Legal Practice and Social Realities

1. General Tendencies in Emirati Jurisdictions on Custody

Judgments from the pre-codification period show that personal status courts in the different emirates of the UAE did in fact generally adhere to the principles of their respective school of law.²⁸ At the same time, judges were not bound to one particular school of law and would as well pass judgments in accordance with whatever rules of Islamic law they saw fit for the case.²⁹

Among the reforms introduced in the 2005 Code of Personal Status was the establishment of a so-called “Family Guidance Committee” [*lajnat tawjīh al-usrī*]. According to Article 16 of the 2005 Code of Personal Status, certain lawsuits in matters of personal status are not admitted before the court unless the case has previously been submitted to the Family Guidance Committee. Lawsuits regarding divorce and its effects fall into this category. They cannot be brought before the court unless the committee has tried to reconcile the couple. The sessions before the Family Guidance Committee can be used to draft an agreement to be issued by the judge, fixing the women’s alimony and settling questions of custody. Where spouses divorce by mutual consent, they sometimes do agree on assigning custody to one of them in a manner beyond what is provided for by the law. Such agreements might, for example, stipulate the mother’s custody until the child, whether a boy or a girl, is of full legal age. If, however, an agreement cannot be reached, the case is submitted to the court and the judge will issue an order based on the statutory provisions for custody.

While the 2005 Code of Personal Status does not go into detail regarding the custody of children within an existing marriage, the courts have clarified this issue. In 2009, the Dubai Court of Cassation ruled that custody of minor children within an existing

²⁸ See e.g. Dubai Court of Cassation (personal status chamber) judgment of 2/15/2004 (appeal no. 72/2003); Dubai Court of Cassation (personal status chamber) judgment of 5/15/2006 (appeal no. 66/2005); Federal High Court (personal status chamber) judgment of 6/18/2006 (appeal no. 241/27). Even though the latter two cases were decided by the courts after the 2005 Code of Personal Status entered into force, the judgments are based on traditional Maliki law as this was applicable when the cases were initially tried.

²⁹ It can be assumed that litigants would frequent a judge of their respective school of law and that judges would generally apply the rules of the particular school of law to which the litigants belonged. At the same time, the absence of codified (procedural) law did allow for more flexibility in this regard.

marriage rests on the mother. If her husband deems her unsuitable, it is upon him to establish that claim before the court.³⁰

As opposed to the aforementioned judgment, which deals with the question of custody within an existing marriage, a first review of judgments collected from intermediate and final instance appellate courts in the UAE shows that the majority of custody cases tried in court concern the custodial rights of divorced mothers. Among these, the most frequent are cases concerning a mother remarried to a man who is not related to the child and the extension of female custodianship beyond the statutory age limits.³¹

Regarding the duration of female custodianship, the Abu Dhabi Court of Cassation emphasized that Article 156 of the 2005 Code of Personal Status is not to be understood in line with traditional Hanbali custody rules. Thus, the child – upon reaching the age of eleven and thirteen years, respective of its sex – does not have a choice with regard to the parent he/she wishes to live with. It is only for the competent court to decide what is in the best interest of the child.³² This reasoning is consistent with the commentary on Article 156 as contained in the Explanatory Memorandum to the 2005 Code of Personal Status. Accordingly, it is not advisable to bestow a right of choice upon a child at such a young age as the child cannot foresee all the consequences of his/her decision.³³

At the same time, the commentary does not explain why the particular ages at which children are to be transferred into the custody of their father were chosen. It is however stated that the legislator “did not intend to decide which school of law best reflects the love of the mother or the love of the father”. Instead, the legislator settled upon the custodian according to what it considers best for the social upbringing and the education of boys and girls respectively. The commentary goes on to explain that it would not be fair to assume that the father is always cruel and oppressive while the mother is loving and caring.³⁴ This reasoning can be regarded as a small step toward the Tunisian approach. Tunisia is the only Arab-Muslim country which distanced itself from the assumption of the mother being the “natural custodian of her children”³⁵. Instead, the

³⁰ Dubai Court of Cassation (personal status chamber) judgment of 5/26/2009 (appeal no. 29/2009).

³¹ Such cases are mostly initiated by mothers requesting an extension of custody.

³² Abu Dhabi Court of Cassation (personal status chamber) judgment of 11/19/2007 (appeal no. 4/2007).

³³ Notes to Article 156, Explanatory Memorandum on the UAE Code of Personal Status [*al-mudhakkira al-īdāhiyya li-qānūn al-aḥwāl al-shakḥiyya*], Official Gazette no. 439 of 11/30/2005, 119-478.

³⁴ Notes to Article 156, Explanatory Memorandum on the UAE Code of Personal Status [*al-mudhakkira al-īdāhiyya li-qānūn al-aḥwāl al-shakḥiyya*], Official Gazette no. 439 of 11/30/2005, 119-478.

³⁵ Welchman (above n. 3), 138.

Tunisian Code of Personal Status maintains that the decision about who is to be assigned custody should be based exclusively on the interest of the child.³⁶

Judgments regarding the extension of female custodianship indicate that courts are indeed willing to extend the statutory age limits whenever *the mother* is the custodian. It is also noteworthy that when the custody of the mother is extended, it is usually up to the very limits of the law, i.e. puberty for boys and consummation of marriage for girls. The author did not come across a single judgment that ordered a termination of female custody at an age between the two statutory guidelines. The Abu Dhabi Court of Cassation also clarified at which age puberty/maturity is to be assumed. In a judgment on the extension of the mother's custody for her son, the court ruled that puberty is to be understood as meaning 18 years of age.³⁷ This is in conformity to Article 30 of the 2005 Code of Personal Status which – in line with international agreements to which the UAE is a signatory state³⁸ – establishes 18 (lunar) years as the age at which puberty can be assumed as a prerequisite for entering into marriage.

While the 2005 Code of Personal Status predetermines the exact priority for custody in Article 146, courts in the UAE have not always adhered to that statutory progression. In 2006 – just one year after the new code entered into force – the Dubai Court of Cassation pointed out that courts do in fact have authority to assign custody according to traditional Maliki (and Hanbali) law, i.e. with the maternal grandmother following the mother immediately in rank.³⁹ This judgment serves as an example of how legal reform initiated by the legislator does not always immediately resonate with the judiciary.

Thus far, there have been no cases in which the courts have had to decide on custody of child *vis-a-vis* a non-Muslim mother and a Muslim father. Research in this particular area of the law has to wait for the first cases to be tried according to Article 145 of the 2005 Code of Personal Status. These judgments throw valuable light on the law in practice and the significance that is placed upon religious affiliation and religious education when determining the welfare of the child.

³⁶ Article 67 Tunisian Code of Personal Status [*majallat al-aḥwāl al-shakḥsiyya*], Official Gazette no. 66 of 8/17/1956, 1544-54, as amended by Law No. 74/1993, Official Gazette no. 53 of 7/20/1993, 1004-5.

³⁷ Abu Dhabi Court of Cassation (personal status chamber) judgment of 10/6/30 (appeal no. 424/2010).

³⁸ The UAE ratified the Convention on the Rights of the Child (CRC) in 1997 and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 2004. CEDAW in particular prohibits child marriage and requires member states to specify a minimum age for marriage (Article 16(2) CEDAW). The CRC does not refer to child marriage explicitly, but calls for the abolishment of traditional practices prejudicial to the health of children in Article 24(3).

³⁹ Dubai Court of Cassation (personal status chamber) judgment of 10/3/2006 (appeal no. 28/2006).

2. Emirati Courts' Interpretation of the Welfare of the Child

Among the recent codifications in the Arab Gulf states, the Qatari Family Code of 2006 stands out in defining what constitutes the welfare of the child. According to Article 170 of the 2006 Family Code, the judge is to consider the custodian's affection for the child and the ability to raise him/her as well as to provide a sound environment, education and medical care.

Since the Emirati legislature did not elaborate on this issue in the 2005 Code of Personal Status itself, it is upon the courts to define the welfare of the child. When analyzing judgments from the past seven years since the codification of Muslim personal status law in the UAE, it becomes clear that the Emirati courts' definition of just what constitutes the welfare of the child is similar to the statutory provisions in Qatar. There are two recurring themes in these judgments: the question of what is harmful to the child and the custodian's affection for the child. At the same time, even high courts in the UAE have thus far refrained from defining – in clear terms – the welfare of the child.

Two cases have been selected and are presented below to illustrate how high courts use their discretion and decide in the best interest of the child without actually defining what constitutes the child's welfare.

While, according to Article 144 of the 2005 Code of Personal Status, a woman will in principle lose custody if she remarries a man who is not related to the child to a degree prohibiting marriage, the Abu Dhabi Court of Cassation decided to the contrary in a 2010 case. Pursuant to the judgment, the mother retained custody of her son as the court established that the existing marriage to the unrelated man did not cause harm to the boy. It was further determined that a continuation of the mother's custody was of greater benefit to the child's welfare than a transfer into his father's custody.⁴⁰ The former husband of the child's mother claimed custody of his son. As he had also remarried after their divorce, he had a woman to assist him with the upbringing of his son. His claim had previously been turned down by the Abu Dhabi Court of First Instance and the Abu Dhabi Court of Appeal. The Abu Dhabi Court of Cassation confirmed these two previous decisions. The court maintained that the mother's new husband treated the boy with care and did not cause any harm to the child's welfare. Interestingly enough, this was also confirmed by the child's father, who, nevertheless, claimed custody of his son. The Abu Dhabi Court of Cassation further explained that Article 144 of the 2005 Code of Personal Status does explicitly allow for the courts to confirm the mother's custody despite of her marriage to a man who would not be prohibited from marrying the child under custodial care. The court established the mother's strong affection for her child and her continued

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Abu Dhabi Court of Cassation (personal status chamber) judgment of 4/21/2010 (appeal no. 193/2010).

ability to raise him despite of the new marriage. Thus, in the interest of the child, the Abu Dhabi Court of Cassation ruled against a basic principle regarding the conditions for female custodianship and used its full discretion as granted in the 2005 Code of Personal Status.

A second case before the UAE High Court further illustrates the courts' use of judicial discretion with regard to the allocation of custody. In 2006, the UAE High Court granted custody of five minor children, all boys aged five to fourteen to a mother, although she had previously been convicted of a so-called "crime against honor."⁴¹ Specifically, her husband had divorced her in 2004 after he found her in private with an unrelated man in their marital home. After the divorce, the former husband initially took custody of his five minor children, some of whom had mental and physical disabilities. In order to care for the children properly, his mother, the children's paternal grandmother, took up residence with them. The children's mother filed a law suit against her former husband to have the children handed over into her custody. In order to establish the mother's ability to care for the children as well as her bond with them, the Court of First Instance had already interviewed employees at a facility for children with special needs that worked with the family. The facility's staff testified to the mother's strong affection for her children and her ability to raise them. The Court of First Instance held in favour of the mother; this ruling was later confirmed by the UAE High Court. The court maintained that it was within the Court of First Instance's competence to establish what was in the welfare of the child and that the court's reasoning was without flaw. A strong bond between the mother and the children was of utmost importance for their welfare. Since the mother had the ability to raise her children, as testified by the staff of the facility for children with special needs, the court did not see any reason to transfer the children back into their father's custody. The mother's custodianship was thus confirmed despite her previous conviction for a crime against honor. The court argued that the welfare of the child outweighed the father's legitimate claim for custody of his children.

⁴¹ UAE High Court (personal status chamber) judgment of 06/18/2006 (appeal no. 241/27). "Crimes against honor" (sing. *jarā'im wāqī'a ʿalā-l-ʿirḍ*) are defined in Articles 354-370 of the UAE Federal Penal Code No. 3/1987 [*qānūn al-ʿuqūbāt*], Official Gazette no. 182 of 12/20/1987, 7-217; also see Article 143 of the 2005 Code of Personal Status, which provides that a person must not have been previously convicted of a crime against honor in order to serve as custodian. In this particular case, the judgment simply states that a court in Fujairah convicted the mother after her husband found her in private with an unrelated man without her head being covered.

VI. Conclusion

Custody was and remains one of the most contested issues in the debates on codifying and, subsequently, reforming Muslim personal status law in the UAE. Women's rights groups continue to push for an extension of female custodianship.

Judgments of intermediate appellate and high courts in the UAE have closed some of the gaps which the 2005 Code of Personal Status contained. For example, the age at which puberty/maturity is to be assumed and the question of custody within an existing marriage have been clarified by the courts.

While the text of the code reflects a division of parenting functions along gender lines and a curtailment of the rights that traditional Islamic law granted mothers in the pre-codification period, the courts have shown considerable flexibility in applying the new law. An analysis of judgments suggests that judges make use of the large discretion that the code grants them. Thus, courts use all the statutory options afforded them, such as deviations from age limits for female custodianship and the approval of the mother's custody regardless of her subsequent marriage to a man who is not prohibited from marrying the child under custodial care.

What is noteworthy, though, is that the courts' definition of the welfare of the child mostly remains vague. Similar to the statutory provisions in the 2006 Family Code of Qatar, courts in the UAE frequently name the affection for the child as well as the ability to raise him/her as indicators of the child's welfare. These factors are, however, difficult to measure. Courts in the UAE have thus far refrained from defining a clear frame of reference for establishing the welfare of the child. Moreover, a review of court rulings in the area of custody proves that even after the codification, the large judicial discretion of the pre-codification period prevails. Thus, judgments in custody cases from the pre- and the post-codification period do not differ significantly.

The 2005 Code of Personal Status did establish fixed age limits as well as conditions to be fulfilled by the custodian, but the new law also grants the courts authority to decide to the contrary, mostly whenever such a deviating judgment is considered to be in the best interest of the child. The foregoing analysis showed that courts make use of their discretionary powers on a regular basis. Legal certainty is only achieved to the extent that one knows that the courts will necessarily have to resort to considering the welfare of the child when deciding on the allocation of custody. At the same time, it can be argued that by allowing for judicial discretion, the 2005 Code of Personal Status succeeds in retaining a distinctive feature of uncodified Islamic law, namely its flexibility. Within the context of custody, such flexibility allows the law to accommodate to changing societal needs and values. Only seven years after the codification of Muslim personal status law,

the Abu Dhabi Court of Cassation disagreed with one of the principles of traditional Islamic custody rules, i.e. the requirement that the female custodian not marry a man not related to the child to a degree prohibiting marriage, or else lose custody. This indicates that current custody rules as well as their application in the UAE do indeed adapt to changing social and moral values. Therefore, instead of arguing for raising the fixed age limits for a divorced mother's custody, allocating custody based entirely on the welfare of the child (an approach based on the Tunisian model) might eventually bring about more gender equality than a focus exclusively on strengthening the mother's position.

Summary

One major area of discussion during the 2005 process of initially codifying Muslim personal status law in the United Arab Emirates (UAE) were regulations regarding the divorced mother's right to custody of her minor children. The new rules regarding the allocation and duration of female custodianship are the outcome of fiery debates among various actors involved in the codification process. The new codified custody rules differ from traditional Islamic law and concede large discretionary powers to the judiciary. The courts' discretion in allocating custody is verbalized in the term "*maṣlaḥat al-maḥḍūn*" (the welfare of the child under custody). At the same time, courts in the UAE have thus far refrained from defining in clear terms what actually constitutes the child's welfare. While one of the major aims of the codification of Muslim personal status law in the UAE was to guarantee legal certainty, the reformed custody regulations do not serve this purpose. They rather point towards the legislator's will to put in force more flexible rules on custody which allow for the accommodation of changing societal needs and values.