Pre-publication text: published in the *International Survey of Family Law* 2010 edition (gen. Ed Bill Atkin (July 2010) pp.163-178.

Bahrain, Qatar, UAE: First time Family Law Codifications in Three Gulf States

Lynn Welchman

In the last five years, three Arab states in the Gulf have issued Muslim family codifications for the first time – the United Arab Emirates (2005), Qatar (2006) and most recently Bahrain, where in May 2009 a codified family law was passed for the Sunni section of Bahraini society.[1] These developments leave Saudi Arabia the only Arab Gulf state not to have issued such a law. The first codification in the Gulf came in Kuwait in 1984, while others have followed the adoption, in 1996, of the 'Muscat Document' by the state members of the Gulf Cooperation Council. The Muscat document (the "Muscat Document of the GCC Common Law of Personal Status") was adopted "as a reference" for an initial four years, extended for another four years in 2000.[2] It is one of two inter-governmental 'model texts' produced in the Arab region on Muslim personal status law; the earlier was drawn up by the League of Arab States (the Draft Unified Arab Law of Personal Status) in the late 1980s.

The three recent Gulf state laws differ in their identification of the residual reference to which the judge is directed in the event of a specific subject not being covered in the text. The 2005 United Arab Emirates (UAE) law includes a detailed provision stressing that "the provisions in this law are taken from and to be interpreted according to Islamic jurisprudence and its principles", with interpretative recourse to the jurisprudential school to which any particular provision is sourced, and in the event of there being no text, ruling to be made in accordance with the prevailing opinion in the four Sunni schools in the following hierarchy: Maliki, Hanbali, Shafi`i and Hanafi. The Qatari law offers the first codification to have the dominant opinion of the Hanbali school as the residual source, "unless the court decides to apply a different opinion for reasons set out in its ruling;" in the absence of Hanbali text, the court is directed to "another of the four schools" and failing this to the "general principles of the Islamic *shari`a."* The Bahraini Sunni law directs the judge to prevalent Maliki opinion, thence to the other Sunni schools and then the general jurisprudential principles of the *shari`a.*[3]

Another point of difference lies in the identification of those subject to the provisions of the law. Here, a somewhat distinctive feature in two of these laws is the

[1] UAE Federal Law no.28 of 2005 on Personal Status of 19 November 2005, *Official Gazette* no.439 (35th year) November 2005, including Explanatory Memorandum; Qatari Law of the Family, Law no. 22 of 2006, *Official Gazette* no.8 of 28 August 2006; Bahraini Law no.19 of 2009 on the Promulgation of the Law of Family Rulings, First Part. See further Lynn Welchman, 'Gulf Women and the Codification of Family Law' (written for the Gulf Women's Project in Qatar) in Amira Sonbol (ed), *Retracing Footprints: Writing the History of Gulf Women* (forthcoming).

[2] The GCC website describes this document as consultative. It was adopted at the 7th session of the Supreme Council of the GCC in accordance with a recommendation from the GCC Justice Ministers, in October 1996. http://www.gccsg.org/eng/index.php?action=Sec-Show&ID=51

[3] Bahrain art.3; Qatar art.3; UAE art.2.

variation from the idea of a single national code to govern Muslim personal status matters. In Bahrain in 2009, after vigorous civil society debates, the government submitted a draft for the Sunni section for ratification in the lower house, after the latter rejected an earlier draft that included the Shi`i section; the Sunni law retains the title "First Part", in anticipation of a second part to eventually govern rulings in the Shi`i departments. In Qatar, the Law of the Family applies to "all those subject to the Hanbali school of law (*madhhab)"* and provides that along with non-Muslims, Muslims adhering to other schools of law may apply their own rules, or may opt for application of the state's codification. The UAE Personal Status code, on the other hand, applies "to all UAE citizens so long as the non-Muslims among them do not have special rulings of their sect and community (*milla)*; and to non-citizens in so far as one of them does not adhere to the application of his [personal] law."[4]

The codes of Qatar and the UAE are quite lengthy documents, and cover a wide range of issues considered to be within the jurisdiction of family law: marriage and divorce and issues arising within and after marriage, rules governing children and the maintenance of other family members, and the various rules governing disposal of property (gift, legacy, succession). The Bahraini Sunni law is shorter and does not cover these last issues. The following overview summarises provisions of the three laws in a set of different areas concerning marriage and children; it does not include the rules on wider family maintenance and disposal of property after death.[5] Also, I do not cover here the detailed rules on the wife's rights to dower (customarily split into that part which is paid upon marriage and that part which is deferred until the end of the marriage through death or divorce) or on the details of the maintenance of the wife and children; these are fairly standard elements in codifications across the region.

Registration Procedures

All three laws establish the official document of marriage as the standard form of proof to establish marriage for the purposes of the courts, with various formulations allowing for establishment of a marriage by a ruling of the court in the event that the statutory administrative procedures have not been complied with but the marriage fulfils the *shar`i* (broadly, Islamic law) requirements of validity. Thus the UAE and Bahrain allow establishment of marriage by "*shar`i* proof" and Qatar allows establishment of marriage "exceptionally [...] in cases in the discretion of the judge".[6]

Furthermore, all three laws include the requirement that couples intending to marry submit medical certificates as part of the documentation needed by the official charged with registering or notarising the marriage. The tests on which such medical certificates are based may cover both physical and mental diseases and disorders and

[4] Bahrain art.4; Qatar art.4; UAE art. 1(2).

[5] All translations of the texts - and in the case of the UAE the accompanying Explanatory Memorandum - are my own from the Arabic. Fuller translations of selected extracts from the UAE and Qatari codes are published in the appendix in Lynn Welchman, *Women and Muslim Family Laws in Arab States. A Comparative Overview of Textual Development and Advocacy* (Amsterdam: Amsterdam University Press, 2007).

[6] Bahrain art.16; Qatar art.10; UAE art.27(1).

be regulated by detailed directives under the authority of government health agencies. In the UAE, the law requires attestation from the "appropriate committee established by the Ministry of Health" that the parties are free of "conditions on the basis of which this law allows a petition for judicial divorce" while the Explanatory Memorandum refers to genetic disorders, conditions preventing consummation, or those that stand to "affect future generations." In Qatar, the law makes tests for inherited conditions mandatory.[7] In Bahrain, a fine is stipulated for those violating the requirements of the 2004 law on medical tests for certain "hereditary and contagious diseases."[8] The texts require that the results of one party's tests are made known to the other. The objective is thus to ensure that one party does not marry in ignorance of a particular health condition existing in the other. Less common are texts that address what should happen in the event that the test results are potentially problematic; Qatar's law however states explicitly that the official documenting the marriage "is not permitted to refuse to document the contract because of the results of the medical test, in the event that the two parties desire to conclude it."

Age of capacity and marriage guardianship

All three Gulf laws under consideration here follow the pattern established in a number of other Arab personal status codes in setting an age of full capacity for marriage while allowing marriage below this age under certain conditions, including the achievement of puberty and the permission of the court as well as the family guardian (the closest male relative in an identified order, usually the father). The Qatari law thus stipulates actual puberty as a condition for capacity for marriage while documentation of marriage below the ages of sixteen for the female and eighteen for the male needs the consent of both the guardian and the court, with a stress on the need to ascertain consent. The UAE law sets a presumption of puberty at 18 lunar years for both parties, at which point a woman may seek the *qadi*'s (judge's) permission to marry in the event that her guardian is refusing permission; marriage is however allowed at the attainment of actual puberty with the permission of both judge and the guardian. As for the Bahraini Sunni law, the only explicit provision requires a female under sixteen to have the court's permission (as well as her guardian's) as to "the appropriateness of the marriage" – which will presumably include achievement of puberty.[9] A 2007 Regulation by the Minister of Justice and Islamic Affairs already provided that no marriage contract may be concluded for a female under fifteen or a male under eighteen, "unless an urgent necessity exists".[10]

All three laws maintain requirements for a male family guardian (*wali*) in the marriage of a female who is of the age of capacity for marriage; two of them

[7] Qatar art.18; UAE art. 27(2).
[8] Law no.11/2004 pertaining to Medical Tests for those of Both Sexes Intending to Marry, *Official Gazette* no. 2640 23rd June 2004; Minister of Heath Decision no.3/2004, *Official Gazette* no.2667 29th December 2004.
[9] Bahrain art.18; Qatar arts.14 and 17; UAE art.30
[10] Bahraini NGOs, 'The Shadow Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),' Sept. 2008, at p.22. Last accessed 5/5/2010 at http://www2.ohchr.org/english/bodies/cedaw/cedaws42.htm

explicitly require that the women's contract of marriage is carried out on her behalf by her guardian. The Qatari law provides that the guardian undertakes the contract with the permission of the bride. A woman who has no guardian is under the guardianship of the *qadi*, while otherwise the law provides that if her closest guardian is absent or is obstructing the marriage, she may be married by the *qadi* if a more distant guardian consents, or if several guardians of the same degree disagree among themselves.[11]

The 2005 UAE law justifies its requirement that a woman's marriage contract is carried out by her guardian on the majority juristic view and in view of the 'potential hazards' of a woman undertaking her own marriage; however, the Explanatory Memorandum stresses that the wife's consent is necessary and that it is to ensure that this consent has been given that the law requires the notary to have the wife sign the contract after its conclusion by her guardian. The UAE is unequivocal on the need for the guardian, voiding contracts concluded without the woman's *wali* and ordering the separation of the spouses, although establishing the paternity of any children from such a marriage to the husband; the "two contracting parties" to the marriage contract are "the husband and the *wali*".[12]

In the Bahraini Sunni law, the agreement of the female's *wali* is a condition for the validity of the contract. The law stresses the woman's consent and is quick to pass guardianship to the *qadi* in cases where the guardian's permission is not forthcoming for various reasons. However, the requirement of the recognized *wali* in the marriage of a Bahraini woman is underlined in rather unusual rules addressing the establishment in Bahraini courts of a marriage concluded without the involvement of the *wali*. This provision firstly sets a general rule that such a marriage "will be considered established by consummation provided the contract is valid under the law of the place where it was concluded"; then it adds that if the wife is Bahraini, the consent of her guardian is required to establish the contract of marriage.[13]

Other powers of scrutiny given to the court in the Bahraini law involve issues of nationality and age groups and clearly reflect particular interests or concerns of the national legislature. Thus the court's consent is needed for the documentation of a marriage between a man aged over 60 and a woman who is not a citizen of a GCC state; and for the marriage of a Bahraini female aged under 20 to a non-Bahraini aged over 50 (in both cases, "to ensure realization of benefit and adequacy of guarantees").[14]

Polygyny

The three codes demonstrate a cautious approach towards statutory regulation of polygyny in ways followed in a number of other states in the region – most notably in recent years in Morocco (2004). This is particularly the case with the UAE code, where the focus of the only provisions regulating polygyny is the requirement of 'equity' or

[11] Arts. 28-30.
[12] Art.39.
[13] Arts 12, 23,.26(1),
[14] Art.21.

'just treatment' with co-wives, which includes not obliging co-wives to share accommodation.[15] In Qatar, an initial draft which had omitted any regulation of polygyny was amended after public consultations and interventions to require the notary 'to ensure that the wife is aware of the husband's financial circumstances if the husband's situation suggests that financial capacity is not fulfilled', although the notary is 'not permitted to refuse to document the contract if the parties wish to conclude it.' It also requires that 'in all cases the wife or wives shall be informed of this marriage after it has been documented.'[16] Objections were reportedly made by the Legal Committee of the Qatari legislature to this requirement in the draft that that an existing wife (or wives) be notified of a husband's polygynous marriage after it is documented, declaring that it could find no *shar`i* basis for this requirement, that it was not local practice, and that such a requirement "could lead to problems".[17] The requirement remained in the law, but the objections resonate with those made elsewhere in the region to similar requirements.[18] The Bahraini law has a limited construction of this requirement, whereby a man who is already married must provide the names and addresses of his existing wife (or wives) in the statement of his 'social status' and is required to notify his existing wife of his subsequent marriage (by registered letter, within 60 days) if that wife has inserted a stipulation in their marriage contract against such a marriage.[19] This seems to place the Bahraini text midway between the UAE and Qatari provisions on this particular issue; presumably a wife who has not inserted such a stipulation would not be so notified. The Bahraini law also reiterates 'classical' Islamic law entitlements regarding maintenance entitlements and to a just share of the husband's night-times in the event of a polygymous marriage.[20]

Spousal relationship

When the laws turn to articulate the nature of the relationship between husband and wife, all three laws present lists of rights and duties: one list relates to those shared by the spouses, one to the rights of the wife and one to the rights of the husband.[21] Those listed as mutual include lawful sexual relations, cohabitation, mutual respect and care for and bringing up of children from the marriage. Qatar and Bahrain also include each spouse's respect for the other spouse's parents and relatives. The wife's rights due from her husband include maintenance, the protection of her property, and the right not to be injured physically or mentally by the husband. The husband's rights, due from his wife, include his wife's 'obedience' ('as is customary'/'in kindness', the Bahraini provision adding 'in considering him head of the family') and her stewardship of the marital home and its contents. The Bahraini and Qatari laws include that the wife will "preserve her person and his property" (Qatar) or in the Bahraini phrasing, "preserve him in her person, his property and his

[15] Arts. 55(6) and 77.
[16] Art. 14.
[17] From www.awfarab.org/page/qt/2004/pl.htm.
[18] See Welchman, supra note 4, p.82.
[19] Art.17.
[20] Art. 37(d).
[21] Bahrain arts.36-38; Qatar arts.55-58; UAE arts.54-56.

house whether he be present or absent".[22] The Bahraini and UAE laws explicitly rule out the forcible implementation of rulings for obedience.[23]

All three laws address the issue of the wife's employment outside the home.[24] The Qatari law includes this in a negative provision when dealing with situations when the wife is to be held disobedient (*nashiz*), including "if she goes out to work without the approval of her husband", although adding "so long as the husband is not being arbitrary in forbidding her". In something of a contrast, the UAE law has a longer clause on this, regulating the wife's right to go out to work without being held 'disobedient', "if she was working when she got married, or if [her husband] consented to her work after the marriage, or if she stipulated this in the contract". Unusually, the law instructs the marriage notary to 'inquire about' the insertion of a stipulation into the marriage contract on this matter – although it does subject even the implementation of such a stipulation to the 'interest of the family'. The Bahraini law has a lengthy article in similar vein. The UAE and Qatari codifications also address the wife's education; in the UAE law this is included in the list of the wife's rights, "not being prevented from completing her education". The Qatari code has a separate article on this, requiring the husband to provide his wife the opportunity to complete the mandatory stage of her education and to facilitate her pursuit of university education "inside the country, in so far as this does not conflict with her family duties." [25]

As already noted, the three codifications explicitly allow for stipulations to be inserted in the contract of marriage by either spouse,[26] a facility that is referred to in later provisions regarding notably the wife's employment outside the home, and in the Bahraini law, a subsequent polygynous marriage. In addition, in Bahrain the marriage contract document has been amended, according to a speech by the head of delegation to the UN CEDAW Committee, to ensure that stipulations could be included at the request of the parties.[27] Scholars and activists in the last decades of the twentieth century focussed considerable efforts on the option of the insertion of stipulations in the marriage contract, on the basis that the parameters of the marital relationship could be negotiated and clarified between the spouses, with the prospect of legal remedy in the event of breach.

Finally, another issue that has been of concern specifically in the Gulf is that of *misyar* marriage. While various women's rights activists have advocated the inclusion of stipulations as a mechanism through which particular rights can be protected for the wife, the institution of *misyar* marriage rests on mutually agreed

[22] Bahrain art.38(1); Qatar art.58(2).
[23] Bahrain art.54; UAE art.158.
[24] Bahrain art.55; Qatar art. 69(5); UAE art.72(2).
[25] Art.68.
[26] Bahrain art. 5; Qatar art.53; UAE art.20.
[27] 'Speech by: Her Excellency Dr Shaikha Mariam bint Hassan Al Khalifa, Deputy President of the Supreme Council for Women, Head of the Kingdom of Bahrain's delegation, to discuss Bahrain's report of the Convention on the Elimination of all forms of Discrimination against Women,' Geneva 30th October 2008

binding conditions that are regarded by such activists as compromising the rights of the wife and more broadly the institution of marriage. Specifically, the wife waives her rights to maintenance, accommodation and cohabitation, and generally accepts a condition requiring lack of publicity to the marriage, a sort of 'strategic secrecy' that is often aimed at concealing a man's polygynous marriage from his existing wife and family. The husband 'visits' his wife by day or night, without setting up home with her.

Women's rights activists in the Gulf have been vocal in their opposition to the apparent spread of this institution and its accommodation in law. In the UAE, it appears that their concerns were heeded; the Arab Women's Forum reported that the 2003 draft of the personal status codification originally made specific provision for the formal registration of *misyar* marriages, requiring 'limited publicity' or declaration of the marriage and noting that 'full publicity' was not essential for validity. The limited publicity stood to protect the roles of the wife's family, involving the knowledge of the guardian (who was to conclude the marriage) and family of the woman involved, but not requiring notification of anyone on the husband's side – meaning that the existing wife would not be made aware through formal procedures that her husband had contracted this type of marriage with another woman.[28] This proposal did not survive into the final text of the 2005 law. The Explanatory Memorandum declares as void any stipulation that "conflicts with the requirements of the contract"; among the examples of such stipulations are included those to the effect that the husband stipulates he will not pay maintenance.

Divorce

Across the region, making divorce a wholly judicial procedure remains an aim for many women's rights activists in the region, with considerable success in this area in states in North Africa but little in the Gulf states in the recent laws, which broadly retain the husband's right of unilateral divorce (*talaq*) alongside procedures for judicial divorce on a set of identified grounds. The UAE codification states that '*talaq* occurs by declaration from the husband and is documented by the judge'. The Qatari and Bahraini laws have the same wording, although adding a requirement for the *qadi* to attempt reconciliation prior to hearing the husband's divorce pronouncement. All three laws then provide that a *talaq* pronounced out of court can be established by means of acknowledgement or proof. [29] Other than this, the codes in Qatar, the UAE and Bahrain follow practice elsewhere in Arab states by regulating the effects of *talaq* pronounced by the husband in certain physical and psychological circumstances, which mostly go to undermining the presumption of intent on the part of the husband. In such circumstances, the statutory laws provide that either no divorce takes effect, or a single revocable divorce is effected in place of what dominant Sunni *fiqh* (with some differences among the schools) would have ruled a three-fold and irrevocable *talaq*. The laws disallow *talaq* postponed to a future date or pronounced as an oath or another form of suspended or conditional *talaq* actually intended to have someone do

[28] From www.awfarab.org/page/mrt/2004/lo.htm (last accessed 11 August 2005).
[29] Bahrain art.91; Qatar art.113; UAE art.106.

or not do something (rather than actually intended to effect a divorce), and take up the generally codified position that a *talaq* accompanied in word or sign by a number gives rise only to a single revocable *talaq*. They also provide that no divorce occurs when pronounced under duress, and the Qatari law and Bahraini texts add another widely codified position to the effect that no divorce occurs if a man pronounces it when intoxicated or overwhelmed by rage. The UAE law differs slightly but significantly here, providing that *talaq* does occur when pronounced by a man who has voluntarily lost his power of reason through a forbidden means. The Explanatory Memorandum explains this as a "penalty for [the husband's] intentional violation of the prohibition [on drink]." [30]

As for judicial divorce, based on grounds that must be proven in court, the codes follow general patterns in specifying circumstances that are considered to cause harm or injury under the existing description of the husband's obligations: the wife can thus petition for divorce on the specific grounds of the husband's failure to pay maintenance, his disappearance or his unjustified absence or effective (and sexual) desertion of his wife for a specified period, and his being sentenced to a custodial term of more than a specified period. Both spouses may petition for divorce on the grounds of breach of a stipulation in the marriage contract, and having or later developing a chronic mental or physical illness or condition that would (or could) cause harm were the marriage to continue, or preventing consummation or sexual relations. The UAE law is rare in referring explicitly to 'AIDS and similar illnesses' requiring that the judge divorce a couple where such a condition is established in one spouse and there is a fear that it will be passed to the other, or to offspring. The wording here implies that the judge is not to attempt to reconcile the couple or otherwise seek continuation of the marriage, but is obliged to rule for the divorce. The same article deals explicitly with the issue of infertility of either spouse as grounds for divorce, allowing a wife or husband aged under forty and without her or his own children to seek dissolution in the event that the other spouse, in a marriage that has lasted more than five years, has been medically established to be infertile and has already undergone possible treatment for the condition.[31]

At the time of the drafting of the codifications, the debate on the statutory regulation of 'judicial *khul*`' was ongoing in the region. A common form of divorce is consensual *khul*`, whereby the two parties agree to a *talaq* by the husband pronounced in exchange for certain compensation (often the waiving of remaining financial rights – notably the deferred dower) by the wife. The difference in the new statutory provisions on judicial *khul*` lies in the court having the authority, after the various attempts at reconciliation, to pronounce *talaq* for the set compensation without the consent of the husband. A few texts already allowed a procedure similar to judicial *khul*` in a marriage before consummation, in provisions that in essence allow a wife to withdraw unilaterally from the contract before cohabitation has commenced. This provision is taken up in all three of the laws under examination here.

[30] Bahrain arts.86-88; Qatar arts. 108-110; UAE arts.101-103
[31] Art. 114.

The perspective changes substantially however when at issue is a consummated marriage where the wife seeks divorce without applying on a specified and statutorily recognised ground for her petition. In the UAE, it was reported that lawyers working around the draft law had lobbied for the inclusion of a provision for judicial *khul`*, and there appeared to be some confusion over the result. In the end, the 2005 text establishes the mutual consent of the spouses to *khul`* as the norm, with the Explanatory Memorandum noting explicitly that "this law has not taken up what certain Arab personal status codes have done – such as Egypt and Jordan – in considering *khul`* an individual act from the wife." Nevertheless, in a final clause in the same article, the law does in fact allow the court to rule for *khul`* for an appropriate exchange in the event that the husband is being vexacious in his refusal and where there is "fear that they [husband and wife] will not live in the limits of God". Here, the UAE Explanatory Memorandum stresses that this provision applies where there is a fear regarding the conduct of both spouses "if the relationship continues despite there being no desire on the part of either spouses for it to continue". The Bahraini law adopts similar wording although disallowing an exchange greater than the dower, while by contrast, and despite some reported opposition to this provision, the Qatari law stays somewhat closer to the original model first legislated in Egypt in 2000.[32] If the spouses fail to agree on divorce by *khul`*, the court appoints arbitrators to seek to reconcile them for a period of not more than six months. If this attempt is unsuccessful "and the wife seeks *khul`* in exchange for her renunciation of all her *shar`i* financial rights, and returns to him the dower that he gave her, the court shall rule for their divorce." [33]

A final issue in the matter of divorce is compensation for the wife divorced injuriously. Statutory protection of compensation for a divorcée divorced unilaterally by her husband without 'cause' from her side was first included in the Syrian codification of 1953, and it has become a standard feature of Arab state codifications, sometimes termed '*ta`wid*' and sometimes *mut`a* from the provision in Islamic jurisprudential texts of a 'gift of consolation' for a divorced wife. Differences among the various texts include whether there are maximum of minimum limits on the amount of compensation that may be awarded, and how it is to be paid; whether the provision applies only to cases of unilateral *talaq* by the husband or also applies to injury by the husband established in claim for divorce initiated by the wife; and whether the text focuses on the husband's abuse of his power of divorce, the wife's subsequent material position, or indeed the husband's financial circumstances, and/or specifically requires the court to take into consideration the length of the marriage. The variable here can make a substantial difference to the wife divorced against her will and arbitrarily.

The UAE and Bahraini Sunni codes are less generous to the divorcée on these matters than the Qatari. Both limit the maximum amount of any award to the sum of one year's maintenance. In the UAE, the provision appears to constrain the entitlement to cases of *talaq* only, and subjects the entitlement to the circumstances of

[32] Lynn Welchman, 'Egypt: New Deal on Divorce,' *The International Survey of Family Law*, 2004 edition, pp.123-142.
[33] Bahrain art.97; Qatar art.122; UAE art.110.

the husband, while requiring the 'prejudice suffered by the woman' to be taken into account in the assessment. Bahrain adds the length of the marriage and the circumstances of the *talaq* as factors to be taken into account along with the financial situation of the divorcer. The Qatari code however allows an entitlement to *mut`a* to every woman divorced by reason from the husband, with the exception of divorce for lack of maintenance by reason of the husband's poverty, and sets an upper limit of three years' maintenance. [34]

Child custody

The Gulf laws follow the approach of dividing the functions of parenting into those of custodian and guardian, and identifying the former with the mother and the latter with the father, in the first instance. In this description of the relationship, the custodian has duties of physical care and bringing up of minor children, while the guardian has duties and authorities in regard to their financial affairs, their education, travel and other areas where the ward meets the 'public' world outside the home, as well as being financially responsible for them. The distinct duties of mother (custodian) and father (guardian) reflect gendered assumptions of 'ideal-type' social and familial roles in the upbringing of children, during marriage as well as after divorce, although as already noted, the duty of caring for children and providing them with a 'sound upbringing' is duty shared by husband and wife in the Qatari and Bahraini laws. The UAE law reflects these assumptions in its description of custody as "caring for the child and bringing him [/her] up and looking after him [/her] to the extent that this does not conflict with the guardian's right in guardianship over the person [of the ward]". The Qatari law, after a similar description of the function of custody, adds, significantly, that "custody is a right shared between the custodian and the minor, and the minor's right is the stronger."[35]

Developments in personal status laws in the region have tended generally to extend the period of custody normally assigned to a woman over her children following divorce beyond the age limits contemplated in the majority of the *fiqh* rules. In addition, they have increasingly included statutory references to the concept of the 'interest of the child' on which the judge may modify this and other related parts of the law, including primary allocation of custody rights. The three new Gulf laws are part of more recent patterns in this direction. In the draft UAE codification approved by cabinet in 2005, a provision ending the mother's custody over girls at thirteen and boys at eleven provoked public condemnation by lawyers who had consulted on previous drafts and held these ages to be a curtailment of existing custody rights. The intervention appears to have had some impact: while the text of the law as passed maintained this position, it allows the court to extend a woman's custody until the male ward reaches puberty and the female marries. The UAE law allows the set extensions beyond these ages to made by the court in consideration of the ward's interest. The Qatari law provides for a woman's custody to end in the case of male children at thirteen and females at fifteen, while allowing extension (in the ward's interest) to fifteen for males and until a female's consummation of her marriage. The

[34] Bahrain art.52(d) and 93(d); Qatar art.115; UAE art.140.
[35] Bahrain art. 127; Qatar art. 165, 166; UAE art.142.

Bahraini law sets women's custody to end at fifteen for the male ward and for the female at seventeen or consummation of marriage, with wards who have reached those ages – and in the female's case have not married – allowed to choose to be under the care (*damm*) of either parent or another person with the right of custody. The UAE and the Qatari codes also provide that the woman's custody continues indefinitely if the ward is mentally or physically disabled, again subject to the best interest of the child. [36]

The court's consideration of the interest of the child is also increasingly required in codifications across the region in assessing the otherwise normative assignment of the function – or right – of custody to an identified succession of relatives. The Qatari law is unusual in setting out what qualities the *qadi* is to consider in making such an assessment of the interest of the child. These include the custodian's affection for the child and ability to raise him or her, the provision of a sound environment in which the child can be brought up and 'protected from delinquency', the ability to provide the best education and medical care, and the ability to prepare the child in terms of morals and customs for the time that he or she is ready to 'leave the custody of women'.[37]

The three laws follow earlier Arab state codifications in requiring that in the event that custody is assigned to a man, he must have "a woman with him who can undertake the functions of custody". However, the UAE and Qatari laws are also part of a quite recent trend of establishing the father as following the mother in the presumptive order of entitled custodians, before the maternal (or in the Qatari case paternal) grandmother and other female relatives. The UAE law explicitly provides that the succession of relatives to custody is followed "unless the judge decides otherwise in the interest of the child"; the Qatari code is more constrained here, allowing the interest of the child to be considered in the case that a closer relative waives the right of custody (giving reasons for this) in favour of a more distant custodian. However, as noted above, the Qatari treatment of custody already establishes that the interest of the child is paramount: even in regard to the parents it notes that even if the parents have separated and not divorced, the mother is first entitled to custody of a minor child, unless the *qadi* decides differently in the interest of the child. Apart from this, both these codes take a detailed 'listing' approach, with some seventeen individuals or categories of relatives successively entitled to claim custody of a minor child under the UAE law, and eighteen under the Qatari law. The Bahraini law normatively assigns custody to the mother followed by maternal and paternal grandmothers and ascendants, only then followed by the father and other relatives. It specifically allows the court to "seek assistance from experts in psychology and sociology in determining [assignment of] custody, taking into account the best interest of the child".[38]

On another contested issue, all three legislatures address the general rule that a mother loses her right to custody if she remarries a man who is not a close relative of

[36] Bahrain art.128, 129; Qatar art. 173; UAE art.106.
[37] Art. 170
[38] Bahrain art. 132-4; Qatar art.169; UAE art.146,

the ward. The specific issue of remarriage remains an advocacy target in different countries, *inter alia* on the grounds of discrimination (the father not being subject to such restrictions) and on the choice it imposes on women, whose ability to remarry may be constrained by the threat of losing custody of their children, as well as on the grounds of the rights and best interest of the child. The three laws explicitly allow the judge to consider the interest of the child in allowing custody to remain with the mother (or other female custodian) in the event that she has consummated a new marriage with a man who is not a close relative of the ward.[39]

Finally, another regional pattern of codifications with which the three Gulf laws under consideration here have tended to remain consistent is the different rules applying to the non-Muslim custodian of the children of Muslim fathers. Here, the texts tend to set shorter periods of custody – particularly if the custodian is not the mother – or not to allow the extension of the statutory period, sometimes subjecting this to the best interest of the child; they may explicitly allow for custody to be terminated if it is established that she is bringing the child up to believe in a different faith. Thus the UAE law stipulates that a mother of a different religion loses custody of her child unless the *qadi* decides otherwise in the interest of the child, and in all cases that her custody ends when the child is five years old. The Qatari law allows a non-Muslim mother to have custody until the child is seven, provided she is not an apostate from Islam, and unless there is fear that the ward is acquiring a different religion. The Bahraini law does not address this explicitly, but unusually includes 'Islam' as a quality that is stipulated in the custodian along with other more standard qualities such as sanity and majority; if this were applied to deny a non-Muslim mother custody of her minor Muslim children, it would be a restriction unfamiliar both in the regional codes and in contemporary Sunni jurisprudence. Specific consideration is again given to the issue of citizenship, with the law providing residency rights during the period of custody for the (non-Bahraini) custodian of a Bahraini ward.[40]

Paternity/Maternity

The Gulf state laws follow established patterns in the region in the rules governing paternity and the legal affiliation (*nasab*) of a child to her or his father (and thus the establishment of the child's paternal lineage) and those governing adoption. Established jurisprudence (*fiqh)* principles assume that 'the child is [affiliated] to the conjugal bed' and award legitimate filiation to the husband of the woman who has given birth to the child, unless it is otherwise claimed by the husband and proven through the traditional process of *li`an*, where the man denies on oath that the child is his and the woman denies his allegation and the process results in a final divorce between the couple with paternity not established. The three laws codify rules on *li`an*; the UAE law in a final clause allows the court to "seek the assistance of scientific methods for refutation of *nasab* provided that it has not been previously established", although the Explanatory Memorandum subjects this procedure to the

[39] Bahrain art. 130 and 131; Qatar art. 168; UAE art.144(a).
[40] Bahrain art.139 Qatar art.175; UAE art.145.

previous clauses of the paragraph describing the *li`an* procedure. The Bahraini Sunni law requires DNA tests to be carried out on all parties before the process of *li`an*, and disallows the refutation of *nasab* by *li`an* in the event that paternity is established.[41]

The Gulf codes under consideration here follow – as do other Arab codifications – established *fiqh* rules in requiring that to have a 'legitimate' *nasab*, the child must be not only born but also conceived in the framework of marriage or of what the couple believed to be a marriage. The jurists thus looked to minimum and maximum periods of gestation to uphold or undermine the presumption of legitimacy of children born to a married couple. While there was generally consensus on the minimum period of gestation at six months, the jurists differed as to the maximum. Failing the presumption of paternity through a known marriage, paternity and *nasab* (and indeed maternity for a child of unknown parentage) can also be established by acknowledgement, providing certain conditions of feasibility are met, and '*shar`i* evidence'.

All three new Gulf codifications establish one year as the maximum period of gestation and six months as the minimum as a substantive rule, although the UAE adds "unless a medical committee established for this purpose decides otherwise." The key issue here is the difference made in the laws between a father's paternity and a child's 'lineage' (*nasab*). If paternity is a biological fact, 'lineage' denotes the legally established filiation of the child to the parents and the subsequent establishment of legal rights and claims. In the case of the mother, *nasab* is established by the fact of her giving birth to the child. For the father, on the other hand, in the event of the putative father's denial, the laws generally require proof of an established *shar`i* relationship (that is, legitimate under the rulings of Islamic jurisprudence) between the parents; and as the Explanatory Memorandum to the UAE law notes (p.200) 'this is the fundamental [relationship] because the child follows his [/her] father in *nasab*'. The UAE, Qatari and Bahraini Sunni laws follow the dominant pattern in that biological paternity alone does not give rise to the father's legal and financial responsibilities towards his child; biological maternity, on the other hand, gives rise to a mother's duties to her child whether the child was born in or out of a recognised marital relationship. This brings in the matter of statutory rules for the recognition of marriages. In general, the establishment of paternity and *nasab* is an exception to rules that might otherwise exclude state recognition of rights and claims arising from a marriage not conforming with the procedures legislated as mandatory by the state. In an undocumented and unregistered marriage, for example, the couple may decide to regularise their status in regard to the central authorities when the time comes to register children from the marriage; the principle generally holds that establishing lineage works to establish the marriage, rather than having to establish the formalities of the marriage in order to establish lineage. However, serious problems arise when one party, usually the man, denies the existence of the marriage, and the other is unable to prove it to the satisfaction of the state. The Bahraini law includes a provision explicitly regarding circumstances in which the parties have become 'engaged' with the knowledge of their families and agreement of the wife's guardian but the marriage has not been documented and the woman becomes

[41] Bahrain art.78; Qatar arts. 96, 151; UAE arts. 97 and 97.

pregnant; if the husband denies he is the father, "all lawful (*shar`i)* means may be resorted to in order to establish lineage." This wording is similar to that used in the 2004 Moroccan law as a result of advocacy from women's and child's rights activists, and has been used there to empower the court to impose DNA testing on a man in certain circumstances of disputed paternity.[42]

The UAE wording on how *nasab* is to be established to the father adds, after the conjugal bed, acknowledgement, and *[shar`i*] evidence, that this can be done "through scientific methods where the conjugal bed is established." The Explanatory Memorandum, quoted below, sets out the relationship between the envisaged use of methods such as DNA testing and the jurisprudential rules on "the existence of the conjugal bed." In the arguments for the need to establish *nasab* (rather than biological paternity), references are made not only to the range of rights and responsibilities that arise to individuals through filiation but also to the wider societal context:

> This article refers to establishing paternity through modern scientific methods such as DNA testing, which are scientific means of establishing the definite relationship between the child and his [/her] father; but in order not to make a mockery of the issues involved in establishment of paternity, by making it a matter simply of establishing this relationship through a medical test, the article has linked its ruling to the existence of the conjugal bed in accordance with article 90. This is to prevent what has happened in a number of cases, with sperm being taken from a man and implanted into a woman without there being any *shar`i* tie between them. Then medical tests establish the paternal relationship, while it is not possible for the child to be attributed to the father in terms of lineage (*nasab*) in such circumstances. These means have developed in our time, and now there are laboratories and sperm banks.[…] If we were to allow *nasab* to be established in such cases, it would be problematic in regard for example to inheritance, and the impediment of affinity. And the woman might be married to another man, so lineage is mixed and corruption appears...(pp.200-1)

Here, the need to properly assign lineage is linked to the entitlements of those related by *nasab* to proportions of each other's estate under the law of succession, and to the rules prohibiting marriage between a range of persons related through *nasab* and through marriage. The concerns raised at the prospect of 'mixing lineage' move from the more traditional requirement of a 'conjugal bed' and lawful sexual relations to reproductive technologies in so far as the latter involve sperm (or eggs) provided by third parties.

Similar preoccupations with the 'mixing of lineage' – as well as the established *fiqh* position - can be seen to underlie the general approaches to adoption in Arab states. This issue is not dealt with in the UAE or Qatari codes, while the Bahraini law clarifies that adoption may not give rise to the establishment of paternity

[42] Bahrain arts.77, 73; Qatar art.88; UAE art.89.

or its *shar`i* effects.[43] Elsewhere, some Arab codifications explicitly prohibit adoption, while the Algerian family law of 1984 is unusual in including a separate section on the Islamic institution of *kafala*. Broadly speaking, *kafala* is a system of care that allows a child to be looked after and brought up in a family not his or her own, with similar rights of maintenance, education and so on that pertain to minors but without key attributes of *nasab* (family name, fractional inheritance entitlements). The institution of *kafala* is explicitly referred to in the UN Convention on the Rights of the Child (CRC), in the same article as fostering placement and adoption, regarding the care of a child "temporarily or permanently deprived of his or her family environment". The UAE entered an explicit reservation to this article, stating that the UAE does not permit this system (adoption) "given its commitment to the principles of Islamic law." In the case of Qatar, prior to the announcement of a "partial withdrawal" of its general reservation to the CRC in 2009, Qatar had already clarified in its initial report to the CRC's monitoring body that it did not recognise adoption as a system.[44] Bahrain entered no reservations to the CRC but clarified in its first report in 2001 that while it does not apply the system of adoption as understood in the CRC, Bahrain's then Cabinet had approved "the Fosterage Act" (a law on *kafala*) to regulate this system of care.[45]

[43] Art.72.
[44] UN Doc CRC/C/51/Add.5 11th January 2001 (Qatar's initial report to the Committee on the Rights of the Child).
[45] UN Doc CRC/C/11/Add.24 23rd July 2001 (Bahrain's initial report to the Committee on the Rights of the Child).