

Differences in Islamic family laws

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Sharia is a system of duties and conduct for Muslim people, and applies to their public and private lives. The Quran sets out these basic standards of conduct. Sharia is applied in a number of countries including Afghanistan, Egypt, Iran, Iraq, certain regions in Indonesia, the Maldives, Malaysia, Saudi Arabia, Sudan, the UAE and the Yemen, amongst others.

Islamic law is derived from 5 sources, these are the Quran itself, the Hadith (sayings of the Holy Prophet), Ijma (consensus), Qisas (analogy) and Ijtehad (independent reasoning).

'Fiqh' is the understanding and interpretation of Islamic Sharia. Sharia is

interpreted more or less strictly in different countries, and sometimes within countries. This is due to the different 'schools' of interpretation of Sunni Islam called Hanbali, Maliki, Shaf'i and Hanafi. Hanbali school is the strict traditionalist school of jurisprudence in Sunni Islam. It is found primarily in the countries of Saudi Arabia, Kuwait and Qatar, where it is the official fiqh.

Sharia-based criminal and family laws apply to Muslims and non-Muslims in certain countries. For example, adultery, same sex relationships and relationships outside marriage are against the law in the UAE. These laws apply to Muslim and non-muslim expatriates and nationals of the UAE. The sanctions for some criminal offences (eg adultery) can be imprisonment followed by deportation.

This article will address laws of Pakistan and the UAE that and issues in those jurisdictions that practitioners advising expat families should be aware of.

Family laws in the UAE

The United Arab Emirates is made up of 7 'Emirates'. Dubai is one of these Emirate, the others being Sharjah, Abu Dhabi, Fujeirah, Ras Al Khaimah, Um al Quwaim and Ajman. There is no border between each Emirate. Federal legislation is applied within each Emirate, but some Emirates apply a different school of Islamic interpretation of this legislation.

The laws of the UAE are codified. In addition, judgments from the Court of Cassation in Abu Dhabi (the final court for the whole of the UAE) constitute precedents binding in other Emirates. These cases assist with the interpretation of the statutory provisions.

The UAE statutory provisions apply to Emirati nationals as well as expatriates (the latter make up approximately 90% of the population in the UAE). The main UAE family laws are set out in the Federal Law 28 of 2005 concerning Personal Status matters (the 'Personal Status Law'). The Personal Status Law was developed from traditional Shari'a laws and principles, but importantly has taken into account the changing times and modern society of the UAE.

Expats living in the UAE can and do make use of the UAE courts; although proceedings are conducted in Arabic, translators are available. It is possible for non-Muslim expatriates to ask for the laws of their home countries to be applied by the courts of the UAE. However in practice, foreign laws are very rarely applied within contested cases where the applicable law is from a common law system, as the application of foreign laws is a time-consuming and difficult procedure. It is necessary to have all the possibly relevant laws of that country translated into Arabic and put before the Court. The application of precedents from certain jurisdictions makes this an overwhelmingly onerous task. Foreign laws will also not be applied if they are contrary to public order, morals or Islamic Shari'a (Art 27 Law of Civil Transactions).

Divorce and financial remedies in the UAE

Expatriate couples living in Dubai can divorce through the local courts whether they are Muslim or non-Muslim. Muslim couples can divorce using the 'talaq' process, but to be recognized in Dubai this must be registered with the court. The Judge will determine that the talaq has been correctly pronounced and witnessed. Muslim expatriates should note that their conduct post talaq divorce is important. In the matter of *Radseresht v Radseresht-Spain* [2017] EWHC 2932 (Fam), [2018] 1 FLR 1443, it was determined that the parties conduct post-divorce (the parties stayed in the same house together on occasion) was sufficient to have 'revoked' the divorce under Islamic law.

Non-Muslims can apply to the court for a divorce. The initial stage is attendance at the Family Guidance Committee. Both parties will receive notice of their requirement to attend the meeting, and this notice is served on the parties by the court. If an agreement, or reconciliation cannot be reached at this meeting, the matter is then listed for hearing before a judge.

Limited capital claims can be made within divorce proceedings in the UAE. The culture in Muslim families in the region is generally that a wife will be supported by her father or brother in the event of divorce. Laws therefore do not exist for the allocation of assets on divorce. Each party will retain the assets held in their own names on divorce. If one has contributed financially to another party's property, then a claim can be made to court to release that investment but this is not a family law claim.

Spousal maintenance is available to wives for 3 months post-divorce. Other claims can potentially be made for compensation for the moral damage resulting from the divorce, or for lack of financial support in the lead up to the separation. However no ongoing spousal maintenance is possible. Child maintenance is paid to a mother on a generous level, to meet the day to day needs of the children including clothing, schooling and childcare. It is important to note that no forms of maintenance, child or spousal would be ordered to be paid to a father.

Custody and Guardianship in the UAE

An interesting facet of custody laws in the UAE is that parents do not have equal parental responsibility for children following separation. There are different roles assigned to mothers and fathers, being that of the 'custodian' or 'guardian'. The role of custodian is usually assigned to a mother (Art 146 Personal Status Law) and the role of guardian to a father (Art 178 Personal Status Law). A guardian of a child financially maintains the child, makes important decisions about the child's education and upbringing, and generally takes care of the child's affairs. The

custodian, on the other hand, is concerned with the child's day to day life. The custodian has actual, physical custody of the child on a day to day basis, and must raise and take care of the child. It is possible for one parent to play both roles.

The UAE statutory provision set out that mothers will likely have custody of female children until the age of 13, and male children until the age of 11. However, the court has discretion to make orders that are in the child's best interests.

As set out at Art 143 and 144 of the Personal Status Law, a custodian must amongst other things be 'rational', honest, be able to bring up and take care of a child, be free from infectious disease and not have been sentenced for a crime of 'honour'. If the custodian is the mother, she must not re-marry unless the court decides it is in the best interests of the child; and she must share the same religion as the child. If the custodian is the father, he must have a suitable woman living within his home to care for the child (such as a female relative) and share the same religion as the child.

When determining custody issues, the court will consider the welfare of the child as the primary concern and make a decision based on the child's best interests in each particular case. It is common these days for the court to be flexible in respect of the custody criteria to ensure that the child's best interests are met. The Dubai Court of Cassation Judgment 252/2006 on 28/11/2006 states that 'seeing a child is a right of both parents. However such a right must not conflict with the right of a child or the interest of a child, since the interest of a child comes before the interest of parents'.

The custodian of the child may not permanently settle the child in another country if it would cause 'harm' to the other parent or if the distance between the two countries prevented the non-resident parent from visiting the child and returning home in a day (Art 151 Personal Status Law). The guardian and the custodian of a child must seek the other's permission in writing if they intend to take the child out of his/her home

country (Art 151). The mother may lose her right to custody of the children if she settles in another country and the distance makes it difficult for the father to fulfil his duties as guardian (Art 152).

If either parent feared that their child would be taken from the UAE by the other parent without their consent (as required by Art 151 Personal Status Law), they may apply to the court for a 'travel ban'. A travel ban is registered on a central system, preventing a child from passing through passport control in Dubai if a ban is in place. A travel ban can only be removed by order of the court or agreement of the parties, and can take time to remove.

Divorce and family laws in Pakistan

In the area of family law in Pakistan, the religious laws of each religious community (termed as 'personal laws') tend to govern in matters concerning the family alongside statutes and judicial precedents. Muslims comprise about 97% of the population in Pakistan and the rules for recognition of marriages and divorce for Muslims are based on Islamic principles. In children matters courts follow the principle of welfare as their primary consideration.

In practice and procedure the legal system in Pakistan, being a former British colony, resembles the English legal system. Family Courts have jurisdiction to decide children and matrimonial cases. There are some exceptions: the High Court could directly entertain a petition of restoring custody of a child to the parent who lost it through illegal means or where it considers it to be in the welfare of the child under its inherent jurisdiction.

For Muslims a valid marriage takes place through entering into a nikahnama which is in the form of a civil contract between the husband and the wife. A nikahnama is signed by both parties entering into a marriage and is witnessed by two persons. The nikahnama sets out certain terms and conditions upon which an Islamic marriage is based including conditions upon divorce

or financial remedies which is known as dower. These conditions can be enforced in the event of a divorce.

The registration of marriage is compulsory and is prescribed under statute. But failure to register or comply with a formality does not render a marriage invalid. Generally, there is a presumption in law that if a man and woman cohabit and hold themselves out as married then there is a valid marriage. For a Muslim marriage to be valid it must be performed in accordance with principles of Shari'a. Hence even an oral Nikah/marriage ceremony performed at one sitting where there is an offer of marriage and an acceptance of marriage with free consent and witnessed by two adults is considered to be a valid marriage. Courts recognize un-registered or oral marriages as to not do so means that the couple can be charged with Zina (extra-marital sex) which is a crime and can have serious penal consequences.

A man and a woman do not have the same right to divorce. A husband can give Tallaq. A Tallaq in Pakistan must be registered with the Union Council (a local government body). There is no set form but only requires signature of two witnesses. After 3 months and three reconciliation meetings the Union Council will finalise the Tallaq. Judicial precedents have held that reconciliation meetings are not necessary for a Tallaq to be effective as under Islamic principles a man has an unfettered right to divorce his wife at will.

A wife can give Tallaq in the same way as the husband provided she has the delegated right of divorce in the Nikkahnama. Very few women are granted the delegated right in Pakistan as it is widely seen as against the cultural norm. Thus, the most common form of divorce initiated by a wife is khula. The wife has to apply to the court for khula on the basis that she is unable to live with her husband within the limits prescribed by Allah. Khula became available to women through judicial precedent in the Supreme Court case of Mst Khurshid Bibi in 1967 where the court confirmed that a wife is entitled to khula as of right, if she satisfies

the conscience of the court that it will otherwise mean forcing her into a hateful union. The court mentioned hateful union without going into the reasons of whether the wife was reasonable or not in disliking her husband. Prior to this Muslim women had an arduous struggle to obtain divorce as they would have to satisfy the court on narrow based grounds of cruelty or desertion. There are horrifying judgements from as late as 1950's and 60's where judges are weighing how much violence amounts to cruelty.

There is no concept of matrimonial property in Pakistan. Upon a divorce a wife is only allowed to claim her dower as stipulated in the nikkahnama, maintenance for 3 months until the divorce is finalised and past maintenance for a period of 6 years in the event the husband has not provided her proper maintenance and she has not been 'disobedient'. A husband can never make a financial claim against the wife as Islamic principles stipulate that it is the obligation of the husband to maintain his wife and not vice versa. Women's commissions over the years have observed that the inability of women to make a financial claim upon a divorce adds to their vulnerability and keeps them tied into abusive marriages.

In the area of child custody, guardianship and visitation rights, courts consider welfare rather than Islamic principles as the guiding rule. Welfare guidelines are found in various decisions of the Superior Courts as well as in the legislation. In deciding questions of welfare, the Court will look at the religious laws of the child but where there is a conflict, courts will override personal laws in the interest of welfare. For example, Islamic principles are that the custody of a Sunni Muslim boy aged above 7 years and a Sunni Muslim girl above puberty (interpreted as 15 years by courts) is preferred with the father. However, courts usually grant custody of young children to the mothers and for older children, courts are in favour of consistency and must pay regard to the child's own views. There is no concept of 'shared custody' although courts are becoming more generous with visitation rights.

In Practice

As in the UAE the physical custody of young children is preferred with the mother and guardianship is retained by the father. However courts do grant mother's guardianship also and do allow mothers to relocate with their children if it is in the best interest of the child. Pakistani courts also respect the principle of comity and generally in abduction cases courts order return of children who are not resident in Pakistan.

There are many judicial precedents where returns have been ordered on this basis and even in cross cultural marriages where fathers have argued that the children should be brought up in an Islamic environment. However Superior Courts have not laid down clear principles of habitual residence which would provide more certainty in this area.