

**Refugee Review Tribunal
AUSTRALIA**

RRT RESEARCH RESPONSE

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This response was prepared by the Country Research Section of the Refugee Review Tribunal (RRT) after researching publicly accessible information currently available to the RRT within time constraints. This response is not, and does not purport to be, conclusive as to the merit of any particular claim to refugee status or asylum.

Questions

1. Please provide information on Sharia Law in Lebanon in relation to matrimonial and custody issues, in particular whether at a young age, a court would award custody to the father and whether under that law, the father could gain custody at an earlier date.

RESPONSE

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Sharia Law in Lebanon in relation to matrimonial and custody issues – general information

The US Department of State report on religious freedom in Lebanon for 2006 refers to Shari'a applying "to personal status matters of Muslims" in Lebanon. The report indicates that "The Government permits recognized religious groups to exercise authority over matters pertaining to personal status, such as marriage, divorce, child custody, and inheritance. The "Twelver" Shi'a, Sunni, Christian, and Druze confessions have state-appointed, government-subsidized clerical courts that administer family and personal status law." The report also notes that "In most cases, religious groups administer their own family and personal status laws. Many of these laws discriminate against women. For example, Sunni inheritance law provides a son twice the inheritance of a daughter. Although Muslim men may divorce easily, Muslim women may do so only with the concurrence of their husbands" (US Department of State 2006, *International Religious Freedom Report 2006 – Lebanon*, September, Section II – Attachment 1).

A chapter on Lebanon in a book about Islamic marriage and divorce laws in the Arab world, published in 1996, indicates that "Lebanese law recognises the three major religions, Islam, Judaism and Christianity, and the various denominations within these. The main Islamic sects

found in Lebanon are the Sunnis, the Ja'fari Shi'a, the Alawi Shi'a, the Ismailis and the Druze." According to the book:

The Shari'a Courts have jurisdiction with regard to the Sunni and Ja'fari sects. The Law of the Rights of the Family of 1962 stipulates, in the same manner as the 1942 Law No. 241 which it replaced, that the Sunni Judge shall give judgment according to Hanafi doctrine, except in cases specified in the Ottoman Family Rights Act of 1917, and that the Ja'fari Judge shall give judgment according to Ja'fari doctrine and the relevant provisions of the Family Rights Act. The Druze have a Codified Personal Status Law of 1948, amended in 1959.

A copy of 'The Law of the Rights of the Family of 16 July 1962' is set out in the book (El Alami, Dawoud & Hinchcliffe, Doreen 1996, *Islamic Marriage and Divorce Laws of the Arab World*, Kluwer Law International, London, p. 147 – Attachment 2).

An article dated January 2004 refers to Shari'a as "the Arabic term for Islamic law" and indicates that of the Sunni Islamic Juristic schools in Islamic societies, "the Hanafi school is the most widespread and widely applied in modern Shari'a-based legislation." The article refers to other Sunni schools, being the Hanbali, the Maliki and the Shafii schools and indicates that "The Shafii school has a following in... Lebanon" (UmHani, Kristine Uhlman 2004, 'Overview of Shari'a and prevalent customs in Islamic societies – divorce and child custody', Expert Law.com website, January – Attachment 3).

A book on Islamic family law published in 2002, notes that "The Ja'fari and Hanafi schools are the predominant *madhahib* [Muslim schools of law] in Lebanon. There are also Druze, Ismai'li and 'Alawi/Nusayri minorities." The book includes a legal profile regarding personal status laws in Lebanon (An-Na'im, Abdullahi A. (ed) 2002, *Islamic Family Law in a Changing World: A Global Resource Book*, Zed Books Ltd, London, pp. 126-129 – Attachment 4).

A report dated 7 July 2006 submitted by Lebanon to the United Nations Committee on the Elimination of Discrimination against Women provides information on Lebanon's religious communities and personal status laws. The report notes that the personal status laws pertaining to Sunni and Shi'i denominations are:

the law of 16 July 1962 regulating the Sunni and Ja'fari judiciaries and the Family Rights Law promulgated on 25 October 1917, which is still in force with respect to the Sunni denomination and, in some cases, the Shi'i. In respect of matters not provided for in these two laws, the provisions of the Hanafi school of jurisprudence are applied to Sunnis and the Ja'fari to Shi'is.

In relation to the powers that are "accorded to the confessions in matters of personal status", it is stated in the report that:

The law of 16 July 1962 relating to the Sunni, Shi'i and Alawi denominations, and the law of 24 February 1948 relating to the Druze denomination define issues falling within the competence of the Islamic denominations. These also related basically to issues of marriage and children but within wider parameters than those within the jurisdiction of the courts of the Christian denominations. In addition, issues of inheritance and testamentary disposition fall within the jurisdiction of the Islamic denominations.

The report looks at areas subject to "personal status laws of the religious communities and the position of women therein", including marriageable age, choice of spouse, witnessing of the

marriage contract, the dowry, the marital relationship, the wife's name, maintenance of wife and children, jurisdiction to impose and estimate maintenance, discharge of maintenance, parental authority, custody, including age of custody and the mother's forfeit of the right to custody, polygamy, divorce and the right of inheritance (United Nations Committee on the Elimination of Discrimination against Women 2006, 'Consideration of reports submitted by States Parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women – Third periodic report of States Parties – Lebanon', United Nations Division for the Advancement of Women website, CEDAW/C/LBN/3, 7 July, pp. 15, 86-99 <http://www.un.org/womenwatch/daw/cedaw/reports.htm> – Accessed 15 March 2007 – Attachment 5).

Information on the situation for Muslims in Lebanon regarding divorce is also provided in RRT research responses dated 21 July 2004 (RRT Country Research 2004, *Research Response LBN23405*, 21 July – Attachment 6) and 11 May 2001 (RRT Country Research 2001, *Research Response LBN14646*, 11 May – Attachment 7).

Sharia law on custody – general information

The previously mentioned article dated January 2004 includes information on Shari'a and child custody in Islamic societies. The article indicates that under Shari'a the "father is the natural guardian (al waley) of his children's persons and property." According to the article, following a divorce, "A mother generally has a right to physical, not legal, custody of her child until the child reaches the age of custodial transfer, at which time the child is returned to the physical custody of the father or the father's family." To have physical custody of a child, "a parent must fulfill certain conditions. Firstly, the father or mother seeking custody must have reached majority and must be sane. He or she must also be capable of raising the child, looking after its interests, and protecting its physical and moral interests. Aside from these basic requirements, there are specific requirements based on the parent's gender". The article notes that "by definition, Muslim fathers satisfy the specific requirements of a male custodian". In relation to the requirements placed on a mother custodian, it is stated in the article that:

To have physical custody, most juristic schools maintain that a mother must not be married to a stranger (a non-relative) or to a relative who is not in a prohibited degree of relation to the child... The Shias, however, prohibit a mother from retaining custody if she marries any other man as long as the child's father is alive and eligible for custody... While only the Shafii and Shia schools require a mother to be Muslim in order to have physical custody over a Muslim child born to a Muslim father, the Hanafi school considers denouncement of Islam (apostasy) a sufficient ground for denying a mother who was previously Muslim her right to custody... Jurists of the other Sunni schools generally only require that the mother raise the child in the Islamic faith. However, the Sunni schools maintain that a mother loses her right to custody if there is reason to believe that she would influence the child's religious beliefs so as to compromise his or her Islamic upbringing. Examples of this would be the mother taking the child to church, teaching the child the articles of another religion, or performing the rites of another religion in front of him or her... Certain other requirements also must be satisfied for a mother to have custody, such as the requirement that the mother not house the child in a home where he or she is disliked...

8.2 – A Mother's Right to Physical Custody

In recognition of an infant's need for female care, all the juristic schools give first preference to a mother's claim to physical custody of her young child provided that she satisfies all the

requirements for a female custodian... After divorce during the period of the mother's custody, she is generally entitled to receive custody wages from the father to help her maintain the child... However, the period of female custody ends once the child reaches a certain age of custodial transfer. The Hanbali and Shafii schools do not distinguish between girls and boys regarding the duration of female custody. The Hanbalis maintain that the female custodian should have custody from birth until the child reaches the age of seven, at which point he or she may choose between parents. The Shafiis allow female custody until the child reaches the age of discretion and may choose either parent as custodian. The Malikis rule that female custody of a boy shall last until he reaches puberty, and for a girl until she marries... Under the Hanafi school, female custody of a boy ends when he is able to feed, clothe, and cleanse himself. Most Hanafi jurists set this age of independence at seven years, although some set it at nine. Hanafi jurists differ on when a mother's custody of her daughter ends. Most maintain that the mother's custody ends when the girl reaches puberty, set at either nine or eleven years of age. However, others allow the mother's custody to last until the girl reaches the age of womanhood...

The importance of the early nurturing and physical custody of the mother is emphasized and protected in many Islamic countries. Preserving the bond between mothers and their young children is so important that it may result in the children accompanying their mother to prison (UmHani, Kristine Uhlman 2004, 'Overview of Shari'a and prevalent customs in Islamic societies – divorce and child custody', Expert Law.com website, January – Attachment 3).

The Oxford Dictionary of Islam provides the following information on Hadana, being "Care of a child by the mother":

Custody of a child belongs to the mother or other women relatives until the child no longer needs a woman's care, can drink and eat unassisted, can learn about other bodily functions, and can perform ablutions or purification unassisted. For a boy this is estimated at seven years of age. A girl remains under the custody of women relatives until she reaches puberty (hadd al-shahwa), when she must move to the protection of men; this is estimated to be from nine to eleven years of age, in the opinion of various legal authorities. When boys reach seven and girls nine to eleven, they are handed over to their father (or the closest male relative, according to their order of inheritance) to begin the second stage of custody, known as damm. This is according to the Hanafi code applied in most Islamic countries today. Other schools of law differ; for example, the Malikis allow a boy to remain with the mother until he reaches puberty and a girl to remain with her mother until she is married. Hadana belongs primarily to the mother, but if she remarries, she loses custody over her daughter unless the court decides otherwise. If a mother loses hadana, the child moves to the maternal grandmother; if that is not possible, then to the paternal grandmother, the maternal aunts, the paternal aunts or sisters, and so on. Damm belongs to male relatives: first the father, then the grandfather, uncle, and so on. Damm, which is enforced by the authorities if the mother refuses to surrender her children, is rationalized on the basis of a boy's need for male discipline and a girl's need for male protection at a vulnerable age before her marriage ('Hadana' in Esposito, John L. (ed) 2003, *The Oxford Dictionary of Islam*, Oxford University Press, New York – Attachment 8).

A section on custody in the book *Muslim Family Law* published in 1998 notes that "Muslim law makes a basic distinction between custody and guardianship. Custody has more to do with practical matters, such as care and control of the child and therefore the rights and obligations of mothers and persons who might take their place, while guardianship centres on the legal rights and obligations of the child's father and his representatives." In relation to custody, it is stated that "Custody is defined as the caring for the infant during the period when it is in many ways dependent on women and their services for the child". The book sets out the different rules of the schools of traditional Islamic law regarding "when the period of

a child's custody comes to an end" and indicates that "The traditional rules about age limits in custody cases are unimportant in an undivided family where the husband and wife live together. In a divided family, however, problems are bound to occur. In cases of conflict, the general rule is clearly that the father, who has rights over the child as the guardian (wali), retains the overall rights and indeed powers of guardianship. However, this right of the father must be seen in perspective, since especially the older child has been given a voice in such matters. As we saw, this is a principle coming from the Hanbali and Shafi'i school traditions, matching closely with the concept of the 'best interests of the child'" (Pearl, David and Menski, Werner 1998, *Muslim Family Law*, Sweet & Maxwell Limited, London, pp. 410-412 – Attachment 9).

Sharia law on custody – Lebanon

A search of the sources consulted found reports that indicate that among the Sunnis in Lebanon, a mother has custody of a child until a boy is seven years of age and a girl nine years of age. There was also reference found to an earlier report from 1994 that indicates that for Sunni and Shi'a Muslims, custody of children at divorce was awarded to the father when a boy was nine years of age and a girl eleven years of age.

The report dated 7 July 2006 submitted by Lebanon to the United Nations Committee on the Elimination of Discrimination against Women notes that "The recognized period of custody by the mother differs from one denomination to another and also differs depending on whether the child is male or female." A table showing the age to which a mother has custody of a child, by denomination and age indicates that with the Sunnis and the Druze, a mother has custody until a boy is seven years of age and a girl nine years of age, and with the Shi'I, the mother has custody of a boy until the age of two and a girl until the age of seven (United Nations Committee on the Elimination of Discrimination against Women 2006, 'Consideration of reports submitted by States Parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women – Third periodic report of States Parties – Lebanon', United Nations Division for the Advancement of Women website, CEDAW/C/LBN/3, 7 July, p. 94 <http://www.un.org/womenwatch/daw/cedaw/reports.htm> – Accessed 15 March 2007 – Attachment 5).

According to an article in the *Daily Star* in Beirut dated 21 March 2006, "Sunni law says that boys stay with their mother until the age of seven. After that and until they are 13 and can choose for themselves, they belong to the father" (Lutz, Meris 2006, 'Women's battle for equal custody continues, *Daily Star*, 21 March – Attachment 10).

A report dated 25 October 2005 submitted by Lebanon to the United Nations Committee on the Rights of the Child notes that under the "Sunni Hanafi" law:

156. The Mother has the right for custody for her children during marriage and after separation if conditions of eligibility are ensured (Article 380 of the Shariaa' Law). In the case of dispute over custody, the mother is eligible for custody for the male child until 7 years old, whereas for the female child until 9 years of age.

157. Alimony in its three categories are to be provided by the father until the male child becomes productive financially and the female child gets married (Article 395 of the Shariaa' Law).

In relation to the “Jaafari Shiaa” law, where there is a “dispute over custody, the mother is eligible for custody for the male child until 2 years old” and for the female child until seven years old, “given that the mother does not remarry”. For the “Mowahiddine Druze”, a “Mother has the right for custody for her children during marriage and after separation if conditions of eligibility are ensured” (United Nations Committee on the Rights of the Child 2005, ‘Consideration of reports submitted by States Parties under Article 44 of the Convention – Third periodic reports of States parties due in 2003 – Lebanon’, Office of the United Nations High Commissioner for Human Rights website, CRC/C/129/Add.7, 25 October, pp. 49-50

[http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/f41bd308098869ec12570fb0034dfc7/\\$FILE/G0544441.DOC](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/f41bd308098869ec12570fb0034dfc7/$FILE/G0544441.DOC) – Accessed 15 March 2007 – Attachment 11).

The previously mentioned book on Islamic family law edited by Abdullahi A. An-Na’im indicates that in Lebanon, a “divorced mother’s right to custody ends at seven years for boys and nine for girls” among Sunnis, “at two years for boys and seven for girls for the Shi’a (unless the mother remarries) subject to the wards’ best interests; and at seven years for males and nine for females for the Druze” (An-Na’im, Abdullahi A. (ed) 2002, *Islamic Family Law in a Changing World: A Global Resource Book*, Zed Books Ltd, London, p. 128 – Attachment 4).

However, there was also reference found to an earlier advice dated 8 December 1994 from the Senior Migration Officer in Lebanon that indicates that for Sunni and Shi’a Muslims, custody of children at divorce was awarded to the father when a boy was nine years of age and a girl eleven years of age. According to the advice:

Under the Shariha (Islamic law) for both Sunni Muslims and Shiit Muslims custody of children at divorce is awarded according to the age of the children.

It was until a few years ago: boys under 7 years old and girls under 9 years to the mother. From 7 and 9 respectively went to the father.

The age is now 9 years for boys and 11 years for girls.

If a father can prove to the court that the mother is unfit to care for the children, then custody under those ages can be awarded to him (‘Custody in Lebanon (custody of children at divorce)’ 1994, Telememo from SMO Lebanon, 8 December – Attachment 12).

In relation to the jurisdiction of the Sharia courts in Lebanon regarding custody, the report dated 25 October 2005 submitted by Lebanon to the United Nations Committee on the Rights of the Child notes that:

The Spiritual and Shariaa’ courts are the competent authorities to decide for issues related to custody and care of the child, and to decide what would lead to the best interest of the child. Article 17 of the Shariaa’ Law under the section on Judicial Regulation stipulates for the jurisdiction of the Shariaa’ courts in deciding on issues of child care, like alimony for the child (Article 395) Custody and visiting rights (Article 331) and deciding on the child’s place of residence, and where custody is to be established. These courts also have the right to decide on reuniting girls and boys with their legal guardians when they reach the age of puberty until the legal term of custody is terminated. This is true in the following cases:

- (a) When parents are separated (Divorce, desertion);
- (b) Where a parent is not eligible for custody, the innocent parent raises the child unless the court decides otherwise;

- (c) When the court decides to separate the child from one or both of the parents, custody is to be given to the person eligible.

In all these cases, the child's opinion is not heard.

The report also sets out the circumstances under which a judge, pursuant to "some articles of the Law of the regulation of the Shariaa' courts", must decide "to separate the child from his/her parents and place the child under medical supervision or at one of the institutions for childcare to protect the best interest of the child". The report notes that there had been "Some improvement" regarding "the presence of the social worker in some Shariaa' and spiritual courts to assist the judge in clarifying the situation of the child and the result of his/her separation from his/her family and the implementation of the court decisions and their legal impact" (United Nations Committee on the Rights of the Child 2005, 'Consideration of reports submitted by States Parties under Article 44 of the Convention – Third periodic reports of States parties due in 2003 – Lebanon', Office of the United Nations High Commissioner for Human Rights website, CRC/C/129/Add.7, 25 October, pp. 53-54 [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/f41bd308098869ec12570fb0034dfc7/\\$FILE/G0544441.DOC](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/f41bd308098869ec12570fb0034dfc7/$FILE/G0544441.DOC) – Accessed 15 March 2007 – Attachment 11).

In relation "to the transference of the right of custody from the mother to the father," the report dated 7 July 2006 submitted by Lebanon to the United Nations Committee on the Elimination of Discrimination against Women indicates that "For the Sunni denomination, in the event of the absence of the mother, custody does not transfer to the father but to the closest female relatives; if the degrees of relationship of these women are equal with respect to the mother's and father's families, the mother's family is preferred." For the Shi'a, the "remarriage of the mother" is "a reason for forfeiture of her right to custody."

In relation to "guardianship over the person of the minor and his assets", the report notes that "Primary authority belongs to the father and, thereafter, the rightful guardians". For the Sunni denomination, guardianship of the person of the child is with the father, followed by the grandfather, while guardianship of assets is with the father, followed by a trustee chosen by the father, then a trustee of the trustee. For the Shi'I, guardianship of the person of the child and assets is with the father, followed by the paternal grandfather, then a trustee authorised by the father or paternal grandfather, then a Shari'a court judge. For the Druze, guardianship of the person of the child and assets is with the father, followed by a trustee chosen by the father, then a trustee appointed by a judge. The report also comments that in relation to the Druze, "Guardianship may pass to the wife, the mother and other women, and to one or other of the heirs."

The report also notes that "among Sunnis, a husband has the right to have his children from a previous marriage below the age of discretion live with him, without the consent of his wife, while this is not possible for a wife without the consent of her husband (article 72 of the Family Rights Law)."

The report also indicates that progress had been achieved "in terms of court rulings." In relation to custody, the report refers to "a number of courts" having "ruled in favour of the child remaining with the mother, sometimes until the age of majority", even when "the letter of the law gives the father the right to regain the children at a certain age". However, the report does not specify whether the courts in question are courts of the Islamic denominations. According to the report:

On the issue of custody, to take one example, the spiritual courts have, in many cases, moved beyond the literal wording of the text toward considering the interests of the child, holding that the subject of custody and care principally concerns the minor. Even if the letter of the law gives the father the right to regain the children at a certain age, a number of courts have ruled in favour of the child remaining with the mother, sometimes until the age of majority. Some spiritual courts have begun to seek the assistance of social workers and psychologists and charged them with examining the children during disputes (United Nations Committee on the Elimination of Discrimination against Women 2006, 'Consideration of reports submitted by States Parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women – Third periodic report of States Parties – Lebanon', United Nations Division for the Advancement of Women website, CEDAW/C/LBN/3, 7 July, pp. 90, 92-95 & 98 <http://www.un.org/womenwatch/daw/cedaw/reports.htm> – Accessed 15 March 2007 – Attachment 5).

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US Department of State <http://www.state.gov/>

United Nations (UN)

UN High Commissioner for Refugees (UNHCR) website

<http://www.unhcr.org/cgi-bin/tehis/vtx/rsd>

United Nations Division for the Advancement of Women website

<http://www.un.org/womenwatch/daw/>

Office of the United Nations High Commissioner for Human Rights website

<http://www.ohchr.org>

Non-Government Organisations

Human Rights Watch <http://www.hrw.org/>

Amnesty International <http://www.amnesty.org>

International News & Politics

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Databases:

FACTIVA (news database)

BACIS (DIMA Country Information database)

REFINFO (IRBDC (Canada) Country Information database)

ISYS (RRT Country Research database, including Amnesty International, Human Rights Watch, US Department of State Reports)

RRT Library Catalogue

List of Attachments

1. US Department of State 2006, *International Religious Freedom Report 2006 – Lebanon*, September.
2. El Alami, Dawoud & Hinchcliffe, Doreen 1996, *Islamic Marriage and Divorce Laws of the Arab World*, Kluwer Law International, London. (Library)
3. UmHani, Kristine Uhlman 2004, 'Overview of Shari'a and prevalent customs in Islamic societies – divorce and child custody', Expert Law.com website, January. (CISNET Lebanon CX98177)
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5. United Nations Committee on the Elimination of Discrimination against Women 2006, 'Consideration of reports submitted by States Parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women – Third periodic report of States Parties – Lebanon', United Nations Division for the Advancement of Women website, CEDAW/C/LBN/3, 7 July <http://www.un.org/womenwatch/daw/cedaw/reports.htm> – Accessed 15 March 2007.
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