



Musawah Thematic Report on Article 16 & Muslim Family Law: Philippines

**64th CEDAW Session
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Musawah Thematic Report on Article 16 & Muslim Family Law: Philippines 64th CEDAW Session

I. INTRODUCTION

Musawah, the global movement for equality and justice in the Muslim family, submits its 14th Thematic Report on Article 16¹ and related concerns for consideration by the CEDAW Committee in its review of the Philippines, reporting before the 64th Session of the CEDAW Committee.²

This is the CEDAW Committee's fifth engagement with the Philippines, which signed the CEDAW Convention on 15 July 1980, and ratified it on 5 August 1981, with no reservations. It is the first ASEAN country to ratify the Convention.³

Despite the State party's noteworthy lack of reservations, and relative high ranking in global indicators on gender equality,⁴ Musawah is concerned by its **continued non-implementation of the Convention in areas concerning the marriage and family rights of Muslim women**, and the ways that this is contextualised within the ongoing conflict, displacement, and poverty the country's minority Muslim community faces.

Musawah's issues of concern and supplementary research take a critical look at the status of marriage and family relations, with regards to the use of religion, culture, and tradition (RCT) to justify discriminatory law and practice. Specifically, this report **examines and challenges the State party's 'minority rights' argument in the context of discriminatory interpretation of Muslim women's rights**.

In particular, this report examines Philippine laws and practices that enforce *de jure* and *de facto* discrimination against Muslim women in the following areas, discussed in order to relevant CEDAW Articles: *equal rights & responsibilities in marriage; early and forced marriage; polygamy; and divorce, maintenance, and custody of children*.⁵

Musawah hopes that the research, analysis, and recommendations in this report will provide critical information in (1) highlighting key concerns and identifying gaps in the State party report and the State party's reply to the list of issues; (2) providing alternative arguments *within* Muslim legal theory that challenge the ways the State party uses religion and idea of 'minority rights' to justify discrimination, including non-implementation of its international human rights treaty obligations; and (3) suggesting recommendations for reform based on good practices in Muslim contexts.⁶

Musawah notes its dismay at the lack of rigorous engagement with Muslim women's issues and concerns in

¹ Since the concerns of equality and justice in the family are crosscutting, issues in Article 2 (*implementation of non-discrimination*;

² Musawah: <http://www.musawah.org/>.

³ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#EndDec.

⁴ The Philippines ranked 5th on the Global Gender Gap Index of the 2013 World Economic Forum and 12th of 86 countries in the 2012 Social Institutions and Gender Index of the Organization for Economic Cooperation and Development (OECD). State Party Report 2015 (SPR 2015), para. 10.

⁵ We note that the order of the sections below emphasise the logic and patterns of discrimination in many Muslim Family Laws (MFLs), rather than the order of CEDAW Articles. Musawah hopes that this will support the Committee in identifying the necessary patterns, so as to formulate stronger questions towards productive engagement with the State party.

⁶ Musawah uses the term 'good' or 'promising' rather than 'best' practices to take into account the complex contextual framework of practices located in the wide spectrum of 'bad' to 'good.' Musawah also seeks to look at good practices that have been transformative in relation to eliminating discrimination against women in law and in practice in different contexts, and in the light of the different realities that women face. This use of terminology and definition builds on existing work on this issue by special procedure mandate holders, including the UN Working Group on the issue of discrimination against women in law and in practice. See: Human Right Council 20th Session, Annual Report of the Working Group on the issue of discrimination against women in law and in practice (April 2012), U.N. Doc. A/HRC/20/28, p. 5, available at: http://www.ohchr.org/Documents/Issues/Women/A-HRC-20-28_en.pdf.

both the dialogue between the State party and the CEDAW Committee in the documents directly leading to the current 64th CEDAW Session, as well as in CSO interventions (in Shadow Reports and Oral Statements) for the current session. Musawah hopes that the CEDAW Committee will utilise the content of this report as a key resource during its Constructive engagement with the State party, and in follow-up activities on the Concluding observations.

II. SOCIO-POLITICAL & LEGAL CONTEXT

- ❖ **About 5.6-11% of the population is Muslim.** Most Muslims live in parts of Mindanao, Palawan, and the Sulu Archipelago – an area known as Bangsamoro, or the Moro region.^{7 8}
- ❖ **The history of settler-colonialism, struggle for independence and ongoing conflict in Bangsamoro confronts Muslim women with multiple layers of oppression:** VAW within context of displacement and state violence; poverty and lack of education and social services; lack of meaningful participation in governance; denial of sexual and reproductive health rights; and legal and cultural discrimination in marriage and family relations— all of which keep Muslim women systematically and historically disadvantaged.^{9 10 11}
- ❖ Philippines is a secular state and all laws are made to conform to the 1987 Constitution that contains a gender equality provision. However, a **Code of Muslim Personal Laws (CMPL) was enacted in 1977 in order to appease the Muslim separatists.** By doing so, the government of Philippines legitimized traditions and practices that limit the rights of women in contrast to the constitution of Philippines.¹²
- ❖ **Mindanao has faced severe displacement crises** following the war between the Armed Forces of the Philippines and the Moro Islamic Liberation Front (MILF) that began in 2003: 70% of the displaced people are women and children.¹³ **Poverty and lack of opportunity in Mindanao link the feminization of poverty to the feminization of migration:** Females are pushed to migrate by their families partially due to the perception that females are more reliable in sending home remittances. The region is known for illegal recruitment and human trafficking.¹⁴

⁷ National Commission of Muslim Filipinos (NCMF). <http://www.ncmf.gov.ph/>

⁸ Moro, derived from the Spanish word meaning *Moors*, is the name inherited from the Spanish for the Filipino Muslims and indigenous groups of Mindanao. <https://en.wikipedia.org/wiki/Mindanao>.

⁹ p. 4. Shadow Report: 'CSO Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women, CEDAW,' Center for Migrant Advocacy Philippines (CMA) http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PHL/INT_CEDAW_NGO_PHL_21904_E.pdf.

¹⁰ Shadow Report: 'Shadow report submitted to the 64th and 66th sessions of the Committee on the Elimination of Discrimination Against Women (CEDAW) in relation to the participation of Non-Governmental Organizations (NGOs) on the implementation of UN Security Council Resolutions 1325 and 1820 by civil society in the Philippines.' Submitted by Women Engaged in Action on 1325 (WE Act 1325). http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PHL/INT_CEDAW_NGO_PHL_24223_E.pdf.

¹¹ Shadow Report: 'Asian Women's Indigenous Network Shadow Report.' Submitted by Asian Women's Indigenous Network. http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PHL/INT_CEDAW_NGO_PHL_24244_E.pdf.

¹² The Philippines government had intended the *Code of Muslim Personal Laws (CMPL)* to uphold "customs, traditions, beliefs, and interests of the national cultural communities in the formulation and implementation of state policies" (Sec.11, Art. XV Philippine Constitution 1986). <http://berkleycenter.georgetown.edu/posts/paradise-lies-at-the-feet-of-the-mother-muslim-women-s-rights-gender-roles-and-philippine-laws>

¹³ Department of Social Welfare and Development data as of 16 February 2003

¹⁴ p. 4. Shadow Report: 'CSO Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women, CEDAW,' Center for Migrant Advocacy Philippines (CMA) http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PHL/INT_CEDAW_NGO_PHL_21904_E.pdf.

- ❖ **The area most disproportionately affected by poverty is the Autonomous Region of Muslim Mindanao (ARMM) region in Mindanao,**¹⁵ which has historically registered the lowest ratings in the socioeconomic indicators.¹⁶ According to the UNDP, all of the provinces in ARMM, except for Basilan, have the lowest Human Development Indicator (HDI) levels in the country.¹⁷ Disparities are present in education levels and poverty rates. In 2013, the ARMM region had the largest number of children out of school. While females generally are more educated than males in the Philippines, this is not true for the ARMM region: 18.5% of females aged six to twenty-four were not in school, compared to 10.3% of males.¹⁸ More disturbing, is that the provinces of Lanao del Sur, Maguindanao, Sulu, and Tawi-Tawi continue to be characterized by declining levels of income,¹⁹ while poverty rates overall in the ARMM region are as high as 73.8%. Females are disproportionately impacted by this.

III. OVERVIEW OF STATE'S ARGUMENTS ON ISLAM & 'MINORITY RIGHTS'

1. *The Philippines claims it is committed to upholding human rights, including Muslim women's rights.*

- ❖ The Magna Carta for Women (MCW), equivalent to the national legislative translation of CEDAW, **'prioritises marginalized groups of women and children**, including rural, indigenous, and Muslim women.²²

2. *The Philippines maintains that it respects the cultural rights of Muslims, and that there is no conflict between the civil Magna Carta for Women (MCW) and the Code of Muslim Personal Laws (CMPL).*

- ❖ The State party holds that the MCW **respects the 'cultural identity and integrity of women'**,²³ and mandates that '**customary laws related to marital relations shall be respected**', provided that they not discriminate against women.²⁴
- ❖ In response to the CEDAW Committee's query on reconciling conflicting provisions of the MCW and CMPL, the State party replies: '**There is no conflict between the two laws.**'²⁵

¹⁵ p. 4. Shadow Report: 'CSO Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women, CEDAW;' Center for Migrant Advocacy Philippines (CMA) http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PHL/INT_CEDAW_NGO_PHL_21904_E.pdf.

¹⁶ SPR2015 para.152.

¹⁷ UNDP, "Human development index highlights inequality, slow pace of growth,"

<http://www.ph.undp.org/content/philippines/en/home/presscenter/pressreleases/2013/07/29/human-development-indexhighlights-inequality-slow-pace-of-progress.html>

¹⁸ Philippine Statistics Authority, Out-of-school Children and youth in the Philippines: Results from the 2013 functional literacy, education and mass media survey <https://psa.gov.ph/content/out-school-children-and-youthphilippines-results-2013-functional-literacy-education-and>.

¹⁹ UNDP, "Human development index highlights inequality, slow pace of growth,"

<http://www.ph.undp.org/content/philippines/en/home/presscenter/pressreleases/2013/07/29/human-development-indexhighlights-inequality-slow-pace-of-progress.html>

²⁰ p. 4. Shadow Report: 'CSO Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women, CEDAW;' Center for Migrant Advocacy Philippines (CMA) http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PHL/INT_CEDAW_NGO_PHL_21904_E.pdf.

²¹ Shadow Report: 'Shadow report submitted to the 64th and 66th sessions of the Committee on the Elimination of Discrimination Against Women (CEDAW) in relation to the participation of Non-Governmental Organizations (NGOs) on the implementation of UN Security Council Resolutions 1325 and 1820 by civil society in the Philippines.' Submitted by Women Engaged in Action on 1325 (WE Act 1325).

http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PHL/INT_CEDAW_NGO_PHL_24223_E.pdf.

²² SPR 2015, para. 150.

²³ Response to List of Issues & Questions 2016, para. 2.1.

²⁴ SPR 2015, para. 23.

²⁵ Response to List of Issues & Questions 2016, para. 2.1.

3. *However, the Philippines also notes that the CMPL is discriminatory towards women, and that the Muslim population holds the CMPL above the MCW, due to its 'Islamic basis.'*

- ❖ The State party notes that the CMPL ‘contains discriminatory provisions relating to early marriage, polygamy, and divorce as well as unequal inheritance rights.’²⁶ Likewise, the State party contends that its efforts in reforming discriminatory laws ‘challenge traditional belief systems and patriarchal attitudes’.²⁷
- ❖ The State party also notes that the Muslim population views the CMPL as ‘having primacy over civil law due to its basis in the Qur'an’.²⁸

4. *The Philippines maintains that the Muslim community is not ready for reform, and that Muslim women themselves are preventing change from occurring.*

- ❖ The State party formulated a Women’s Priority Legislative Agenda (WPLA), but did not include strengthening the CMPL (including amending discriminatory provisions on early and arranged marriages), due to the ‘lack of common position among and strong support from the stakeholders’.²⁹
- ❖ The State party, through the Philippine Commission on Women (PCW), organized a consultation among Muslim women and men to discuss discrimination in the CMPL. The State claims that it was ‘difficult to agree on measures acceptable to all,’ and that Muslim women ‘do not necessarily question discriminatory provisions [early marriage, polygamy, divorce, and inheritance] because they are provided under Qur'an.’ Similarly, the State notes that Muslim men and religious leaders argued that CEDAW provisions on marriage and family relations ‘do not apply to them.’³⁰
- ❖ The State party maintains that legal reform of the CMPL rests on ‘changing mindsets’,³¹ that there is need for ‘further consensus building and advocacy among concerned groups’,³² and finally, that ‘it may take some time for any agreements on revisions that have to be made.’³³

5. *The Philippines notes that while the CMPL permits harmful practices, they are rare.*

- ❖ In response to the CEDAW Committee on reconciling conflicting provisions of MCW and the CMPL, the State party claims that practices including polygamy and child marriage ‘are now strongly discouraged and have been regarded as exception to the general rule.’³⁴

IV. RESPONSES TO STATE’S ARGUMENTS ON ISLAM + ‘MINORITY RIGHTS’³⁵

1. *Summary of State Party Arguments:*

- a) **Culture, customs, or traditions prevent full implementation, and take time to change:** States parties argue that in the face of powerful local customs and traditions, often intertwined with religion, change is difficult and takes time (e.g.: Benin, Lebanon, Mali, Togo). This argument can function to limit responsibility for treaty implementation by pointing to the role of culture, customs, traditions, and patriarchal society in discriminating against women. In many cases, the

²⁶ SPR 2015, para. 23.

²⁷ SPR 2015, para. 22.

²⁸ Response to List of Issues & Questions 2016, para. 2.1.

²⁹ SPR 2015, para. 19.

³⁰ SPR 2015, para. 24.

³¹ SPR 2015, para. 26.

³² SPR 2015, para. 19.

³³ SPR 2015, para. 26.

³⁴ Response to List of Issues & Questions 2016, para. 2.1.

³⁵ These rebuttals are sourced from Musawah’s published research on CEDAW and OIC states justifications on treaty non-implementation. Musawah. *CEDAW and Muslim Family Laws*. Pp. 17-18, and 28-29:

http://www.musawah.org/sites/default/files/CEDAWMFLReport2012Edition_1.pdf.

State claims that the people are not ready, and women themselves are preventing the change from occurring.

- b) **Respect for minority rights prevents full implementation:** State parties also often claim that when law permits a harmful practice, justified through tradition or culture, the practice is rare. Some States parties with Muslim minorities justify their failure to amend discriminatory provisions in family laws that apply only to Muslims because they recognise and respect cultural and religious diversity and the rights of minorities to their own cultures or customs.

2. Possible Rebuttals based on Musawah Framework for Action:

- a) **The consequence of the above two arguments is that women's rights are sacrificed in favour of a vague notion of 'culture,' fueling a false dichotomization of culture and women's rights, and often results in discrimination and inequality before the law.** While acknowledging that human rights are universal, there is nevertheless scope within the existing standards for a more nuanced understanding of the rights and culture debate. However, these approaches need to be applied more consistently, including in addressing Muslim family laws.
- b) **In the majority of cases, what lies behind the State's refusal to act are political considerations rather than regard for religious principles, and there is actually room for recognition of women's rights within the culture and tradition.**
- c) **The fact that customs are dynamic, and that Muslim jurisprudence can change in accordance with the changing realities of time and place, provides an opportunity for change in laws and practices towards greater fulfilment of rights.** The Musawah Framework argues that a multi-pronged approach is the most effective way to ensure equality and justice: It is essential to see religion, human rights standards, constitutional guarantees, and lived realities as complementary, rather than separate. It is not acceptable to reject CEDAW principles based on a patriarchal understanding of a verse from the Qur'an, or to ignore the devastating effects resulting from a modern social phenomenon using respect for a traditional practice as a justification. One needs to approach these issues holistically, integrating human rights and Islamic principles in a dynamic and constantly evolving process.
- d) **It is therefore important for the CEDAW Committee to continue to recommend broad-based consultation among all those who have a stake in and influence on the development of national laws and policies.** The issue of representation is crucial, as Muslim governments very often tend to regard only those in religious authority as having the right to engage on matters of religion. Musawah asserts that in any country that uses religion as a source of law and public policy, every citizen has the right to engage in the discourse and in the search for solutions towards a more fair, just, and compassionate society. Not only must active steps be taken to include women's voices in this engagement, such engagement must be made in a manner that addresses power imbalances that have historically excluded women's voices so they can take part in dialogue on an equal footing with men.

There are several active women's rights organisations in the ARMM that have been engaged with Musawah and other women's groups living in Muslim contexts globally; they have been demanding for reform towards equality and justice for Muslim women for decades. It is clear that their voices have not been reflected in the government's assessment of the wishes of the Muslim community to end discrimination against women.

V. KEY ISSUES: CRITICAL INFORMATION, MUSLIM JURISPRUDENCE, & RECOMMENDATIONS

This section identifies critical issues of discrimination against Muslim women under Articles 2, 5, 15, and 16. The section also presents research from secondary sources, to assist the CEDAW Committee's Constructive Engagement process with the State party. In addition, each section provides justification for reform based on arguments that affirm the possibility and necessity of change within Muslim contexts. The section further provides recommendations and a listing of good practices in member countries of the OIC to illustrate that reform is possible in Muslim contexts.

(A) EQUAL RIGHTS & RESPONSIBILITIES

(1) CRITICAL INFORMATION:

- ❖ The Code of Muslim Personal Law (CMPL) mandates that the husband holds authority to choose the family residence.³⁶
- ❖ The CMPL mandates that the husband can deny his permission to his wife to practice a profession or occupation of her choice.³⁷

(2) MUSAWAH JUSTIFICATION FOR REFORM:

- ❖ Challenging the husband's right to authority.³⁸ The concept of male authority (*qiwamah*) over women plays a central role in institutionalising, justifying, and sustaining a patriarchal model of families in Muslim contexts; and it justifies and perpetuates numerous specific discriminatory provisions and practices, including key critical issues examined in this report. There is a disconnect between this discriminatory legal framework and women's lived realities and family life today.

Musawah believes that several verses in the Qur'an that dwell on the values of love, compassion, closeness, and protection between men and women and the general principles of equality and justice should form the basis of marriage and family in Islam. Repealing the codification of unequal and discriminatory rights and responsibilities within the marriage is not against Islam—it is in fact consistent with Qur'anic principles of justice ('*adl*), equality (*musawah*), dignity (*karamah*), and love and compassion (*mawaddah wa rahmah*).³⁹

- ❖ Addressing the disconnect between law and reality: The Government of the Philippines is proud of and has actively encouraged women's active participation in the workforce, and touts national employment programmes and initiatives for women as one of the cornerstones of the country's economic model.⁴⁰

There is a deep disconnect between the logic of the Code of Muslim Personal Law and the reality of women's work and lives on the ground, as well as between the logic of the law and the Government's own rhetoric and initiatives regarding women's access to employment.

(3) RECOMMENDATIONS:

- ❖ Accord husband and wife equal rights and responsibilities in marriage, within a legal

³⁶ p. 7. Shadow Report: 'Gender-based Violence, Marriage, and Family Relations Report for the 64th CEDAW Session (Review on the Philippines);' EnGendeRights, Inc., http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PHL/INT_CEDAW_NGO_PHL_24309_E.pdf.

³⁷ p. 7. Shadow Report: 'Gender-based Violence, Marriage, and Family Relations Report for the 64th CEDAW Session (Review on the Philippines);' EnGendeRights, Inc., http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PHL/INT_CEDAW_NGO_PHL_24309_E.pdf.

³⁸ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, pp. 26-28.

³⁹ Musawah, *Men in Charge? Rethinking Authority in Muslim Legal Tradition*, 2014, *supra* note 38.

⁴⁰ SPR 2015, paras 96-116.

framework that recognises marriage as a partnership of equals.

- ❖ Engage with local women's rights groups in the ARMM, who have for years campaigned for reform of the CMPL, and developed religious and evidence-based arguments to support their specific demands.⁴¹

(4) GOOD PRACTICES:⁴²

- ❖ **Kyrgyz Republic:** Article 22 of the Family Code stipulates that women and men have the same rights and duties in marriage, and spouses should care for each other and develop their own abilities.
- ❖ **Morocco:** The *Moudawana* specifies the 'mutual rights and duties' between spouses, including both the wife and the husband assuming the responsibility of managing and protecting household affairs, and the children's education and consultation on decisions.
- ❖ **Turkey:** Under the Constitution, the family is based on equality between spouses.
- ❖ **Uzbekistan:** The Family Law Code envisages family relations based on mutuality and equality, with mutual support and responsibility of all family members, and the unhindered enjoyment by family members of their rights.

(B) EARLY & FORCED MARRIAGE

(1) CRITICAL INFORMATION:

- ❖ In the CMPL, the minimum marrying age is 15 for both males and females. However, upon petition of a male guardian, the Shari'a District Court may order the solemnization of the marriage of a female who has attained puberty if she is younger than 15, but not below 12.⁴³ ⁴⁴ The recent Gender and Development Code (GAD) of the Autonomous Region of Muslim Mindanao discourages marriage to a child, defined as below 18 years of age.⁴⁵
- ❖ The CMPL allows arranged marriage for females aged 12-14.⁴⁶ ⁴⁷ This is despite the fact that the CMPL mandates that mutual consent of both spouses is required, and that consent of the woman is not presumed by the offer of the marriage guardian (*wali*).⁴⁸ In some indigenous communities, polygamy and abduction for forced cohabitation are still practiced.⁴⁹

⁴¹ Musawah, *Home Truths: A Global Report on Equality in the Muslim Family*. <http://www.musawah.org/home-truths-global-report-equality-muslim-family-english>. pp.42-43.

⁴² Musawah, CEDAW and Muslim Family Laws, *supra* note 55, p. 45.

⁴³ Presidential Decree No. 1083 (February 4, 1977), art. 16(2). See: National Human Rights Institution Report: 'COMMENTS ON THE CONCLUDING OBSERVATIONS OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN.' http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PHL/INT_CEDAW_IFN_PHL_24271_E.pdf.

⁴⁴ <http://www.irinnews.org/report/87873/phillippines-early-marriage-puts-girls-at-risk>

⁴⁵ List of Issues and Questions 2015, para. 21.

⁴⁶ p. 6. Shadow Report: 'Gender-based Violence, Marriage, and Family Relations Report for the 64th CEDAW Session (Review on the Philippines);' EnGendeRights, Inc., http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PHL/INT_CEDAW NGO_PHL_24309_E.pdf.

⁴⁷ Oral Statement: Conservative Religious Beliefs Violate Women's Rights, EnGendeRights, Inc.

⁴⁸ 'Determinants and Impact of Early Marriage on Moro Women,' by Nisa in March 2009. <http://www.irinnews.org/report/87873/phillippines-early-marriage-puts-girls-at-risk>

⁴⁹ p. 7. Shadow Report: 'Gender-based Violence, Marriage, and Family Relations Report for the 64th CEDAW Session (Review on the Philippines);' EnGendeRights, Inc., http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PHL/INT_CEDAW NGO_PHL_24309_E.pdf.

- ❖ **Conflict increases rate of forced marriage.** Individuals and families often reside in evacuation centers during outbreaks of fighting between the State and the Moro separatists.⁵⁰ The combination of dense residence and idle time encourage many youth to explore romantic and sexual relationships; young Muslims are sometimes forced into marriage by their families to preserve their chastity. Of course, there is also an economic incentive: In evacuation centers, each family is entitled to only one food coupon for basic relief goods; girls and boys are married off by their parents to create new families, and thus qualify for more food coupons.⁵¹
- ❖ **Marriage registration is not common.** Many do not find the registration of marriages, births and deaths relevant unless they seek employment. The process and costs entailed further discourage registration, and thus data on early marriage is difficult to collect.⁵²

On secondary effects of discrimination:

- ❖ **Early marriage infringes on women and girls' physical and mental integrity.** Research indicates that early and forced marriage often leads to physical, sexual, and mental violence; and increased reproductive health risks, including maternal and other pregnancy-related complications.^{53 54} Younger women often have less knowledge of their bodies and rights, and are in a weaker position to stand up to their husbands if they are sick, hurt, or face domestic violence.⁵⁵
- ❖ **Early marriage limits women and girls' right to education, employment, and financial independence.**⁵⁶ This contradicts the State party's own emphasis on women's fundamental rights to education and employment. A woman's financial independence affects both her decision-making powers within the family,^{57 58 59} her decision and ability to divorce, and her financial and physical vulnerability in the case of divorce. Furthermore, women's access to education and employment affects the well-being of communities and society.^{60 61}
- ❖ **Early marriage challenges family peace and well-being.** Research indicates that early and forced marriage often leads to difficulties in marriage—including divorce and health risks, such as HIV/AIDS—and has greater impact on the general level of violence in families.⁶²

(2) MUSAWAH JUSTIFICATION FOR REFORM:

- ❖ **Challenging arguments for early marriage:**⁶³ Attempts to set and strictly enforce the minimum age of marriage at 18 for both men and women are often met with resistance from conservative religious authorities, who claim that this is 'un-Islamic.' Commonly, the example of the Prophet Muhammad's marriage to Aishah is used to justify child marriage. Reportedly, Aishah was six years old when she was betrothed, and nine when the marriage was consummated. However, there are new studies

⁵⁰ In August 2008, an estimated 126,225 individuals were living in evacuation centres since the outbreak of renewed fighting between the government and the Muslim separatist group, the Moro Islamic Liberation Front. The Department of Social Welfare and Development

⁵¹ Laisa Alamia, programme manager for Nisa Ul-Haqq Fi. <http://www.irinnews.org/report/87873/phillippines-early-marriage-puts-girls-at-risk>.

⁵² Determinants and Impact of Early Marriage on Moro Women, by Nisa in March 2009. <http://www.irinnews.org/report/87873/phillippines-early-marriage-puts-girls-at-risk>

⁵³ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 55, p. 31.

⁵⁴ The Beijing Platform for Action (BPFA), available at: <http://www.un.org/womenwatch/daw/beijing/platform/plat1.htm>; and CEDAW Committee General Recommendation No. 21: Equality in marriage and family relations (1994), available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>.

⁵⁵ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 55, p. 31.

⁵⁶ The Beijing Platform for Action (BPFA), *supra* note 17; and CEDAW Committee General Recommendation No. 21, *supra* note 42.

⁵⁷ Ziba Mir-Hosseini and Zainah Anwar, "Decoding the 'DNA of Patriarchy' in Muslim family laws" (21 May 2012), available at: <http://opendemocracy.net/print/65974>.

⁵⁸ CEDAW Committee General Recommendation No. 21, *supra* note 17.

⁵⁹ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 55, p. 31.

⁶⁰ *Ibid.*

⁶¹ CEDAW Committee General Recommendation No. 21, *supra* note 17.

⁶² Musawah, *CEDAW and Muslim Family Laws*, *supra* note 55, pp. 32-33.

⁶³ *Ibid.* pp. 30-31. Also see *Musawah Statement to OHCHR on Child, Early and Forced Marriage*, available at: <http://www.musawah.org/musawah-to-OHCHR-child-marriage>.

asserting that Aishah was likely to have been 19 at the time of her marriage.⁶⁴ More importantly, the question arises as to why the Prophet's marriage to Aishah is used as a model, while his marriage to Khadijah, a widow 15 years older than him, or his marriage to other widows and divorcees, are ignored as exemplary practices. The justification for child marriage quoting the precedent of Aishah's marriage to the Prophet must be challenged.

While the Qur'an does not provide any specification for the age of marriage, *Surah an-Nisa'* 4:6 requires that orphans should be of sound judgment before they marry. This indicates that a person must have sufficient judgment and maturity to marry. Equating the age of majority with the age of puberty and/or rationality (*baligh*), as is traditionally done, fixes adulthood on children under 18, even onto those who start menstruating at the age of nine or ten. The onset of puberty is no indication of sufficient maturity for marriage.

(3) RECOMMENDATIONS:

- ❖ Ensure that the minimum age of marriage is 18 for both men and women; amend the law to disallow all legal exceptions to the minimum age of marriage.
- ❖ Exercise due diligence to prevent, investigate, and punish acts that are aimed at coercing children into early marriage.
- ❖ Provide reparation to victims and survivors of early and forced marriage, including allowing girls and women forced into marriage the retroactive right to invalidate the marriage, or the right to divorce.
- ❖ Enforce mandatory registration of marriage, and improve existing registration mechanisms.
- ❖ Engage with local women's rights groups in the ARMM, who have for years campaigned for reform of the CMPL, and developed religious and evidence-based arguments to support their specific demands.⁶⁵

(4) BETTER PRACTICES:

Available information shows while many OIC countries have established minimum age of marriage, none has made it illegal for children to be married under the age of 18. Some countries that allow exceptions have also set an absolute minimum age:

- ❖ **Uzbekistan & Kyrgyz Republic:** The minimum age of marriage is 18, but the court may authorise marriage at 17 for exceptional reasons, with parental permission.
- ❖ **Turkey:** Minimum age of marriage is 18. It can be lowered to 16 under exceptional circumstances and with court permission.

(C) POLYGAMY

(1) CRITICAL INFORMATION:

- ❖ **The CMPL allows men to marry up to four wives.** However, the Code restricts the right of polygamy to 'exceptional circumstances' and only if the husband can ensure 'equal companionship and just treatment as enjoined by Islamic law.'^{66 67}

⁶⁴ Muhammad Khalid Masud (trans), 'Prophet Muhammad's wife A'isha: How Old was she at the Time of her Marriage?' available at: <http://www.sistersinislam.org.my/news.php?item.997.41>.

⁶⁵ Musawah, *Home Truths: A Global Report on Equality in the Muslim Family*. <http://www.musawah.org/home-truths-global-report-equality-muslim-family-english>. pp.42-43.

⁶⁶ CMPL, Art. 27. See: National Human Rights Institution Report: 'COMMENTS ON THE CONCLUDING OBSERVATIONS OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN.'

http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PHL/INT_CEDAW_IFN_PHL_24271_E.pdf.

- ❖ **Restrictions to polygamy are often ignored.** Women claim that men contracting subsequent marriages often disregard legal conditions.⁶⁸ As there are limited grounds to access divorce in the CMPL, wives of men who decide to re-marry are often forced to live in polygamous relationships.⁶⁹
- ❖ **Polygamy poses significant emotional, financial, and physical harm to women and families.** Polygamy often results in inequality between wives; harmful emotional consequences for first and successive wives, as well as their children; economic difficulties; and greater levels of conflict and violence within families.⁷⁰⁷¹ Furthermore, the threat of polygamy can be used as a powerful means of control of the wife by the husband.⁷² The CEDAW Committee has raised polygamy as a serious concern in the Philippines, in both its last Concluding Observations and List of Issues & Questions.⁷³

(2) MUSAWAH JUSTIFICATION FOR REFORM:

- ❖ **Challenging polygamy.**⁷⁴ Musawah maintains that Islam promotes monogamy, as can be seen in *Surah an-Nisa' 4:3*: 'If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two, three or four; but if you fear that you shall not be able to deal justly [with your wives], then marry only one [...] That will be more suitable, to prevent you from doing injustice.' Some Muslim countries have also prohibited polygamy. In other countries, women are entitled to add a stipulation in their marriage contracts that their husbands cannot take other wives without their permission, and that polygamy could constitute grounds for divorce. We recommend that this clause becomes a standard stipulation in marriage contracts. In this manner, States may discourage or prohibit polygamy, as recommended by the CEDAW Committee under General Recommendation number 21.

Although the Prophet had multiple wives, he was monogamous for more than 25 years—i.e. throughout the lifetime of his first wife, Khadijah. This practice could be used as a source to emulate. There is also an authentic Tradition that the Prophet forbade his son-in-law, Ali ibn Abi Talib, from marrying another woman, unless Ali first divorced the Prophet's daughter, Fatimah, his existing wife. A great-granddaughter of the Prophet, Sakinah binti Hussayn, the granddaughter of Ali and Fatimah, included the condition in her marriage contract that her husband would have no right to take another wife during their marriage.

Polygamy is not intrinsically 'Islamic.' It was an institution that was practiced in most parts of the world at one time, and continues to exist in many African, Asian, and Middle Eastern countries and among Mormon Christians in the USA.

(3) RECOMMENDATIONS:

- ❖ **Abolish polygamy and in law and in practice.**

⁶⁷ p. 7. Shadow Report: 'Gender-based Violence, Marriage, and Family Relations Report for the 64th CEDAW Session (Review on the Philippines);' EnGendeRights, Inc., http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PHL/INT_CEDAW_NGO_PHL_24309_E.pdf.

⁶⁸ SPR 2015, para. 23.

⁶⁹ p. 7. Shadow Report: 'Gender-based Violence, Marriage, and Family Relations Report for the 64th CEDAW Session (Review on the Philippines);' EnGendeRights, Inc., http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PHL/INT_CEDAW_NGO_PHL_24309_E.pdf.

⁷⁰ CEDAW Committee General Recommendation No. 21, *supra* note 17.

⁷¹ The serious emotional and financial consequences of polygamy have been documented in ground-breaking 5-year research project conducted by the NGO Sisters in Islam (Malaysia) and partner universities, between 2008 and 2010 (*Musawah, CEDAW and Muslim Family Laws*, *supra* note 6, p. 35). For one of the outputs of the project documenting the myths and realities of polygamy for women and children, see this 6-minute short video produced by Sisters in Islam: <https://www.youtube.com/watch?v=kTbg3d9OSYo> (Malay with English subtitles).

⁷² *Musawah, CEDAW and Muslim Family Laws*, *supra* note 6, p. 35.

⁷³ Paras 47 and 48 of its COBs.

⁷⁴ *Ibid*, pp. 33-36.

- ❖ As a gradual step, consider allowing parties to a marriage the right to include in the marriage contract the right to divorce should the husband engage in polygamy.
- ❖ Engage with local women's rights groups in the ARMM, who have for years campaigned for reform of the CMPL, and developed religious and evidence-based arguments to support their specific demands.⁷⁵

(4) GOOD PRACTICES:⁷⁶

- ❖ Tunisia, Turkey, Kyrgyz Republic, Tajikistan, Uzbekistan: Polygamy is prohibited.
- ❖ Saudi Arabia, Syria, Jordan, Egypt, Lebanon: A woman can stipulate in the marriage contract that her husband cannot take another wife. If the husband breaches this term of the marriage contract, the woman has the right to divorce.

(D) DIVORCE & MAINTENANCE

(1) CRITICAL INFORMATION:

- ❖ Non-availability of absolute divorce in Civil Law. There is no absolute divorce or no-fault divorce in the Philippines. In the Family Code under Civil Law, married couples can seek legal separation or annulment of marriage. However, annulment cases are costly and often inaccessible to many women, while court decisions nullifying marriages are difficult to obtain due to varying judicial interpretations.⁷⁷⁷⁸⁷⁹ The Civil Law also allows the nationals to remarry if their foreign spouse obtains a divorce.⁸⁰
- ❖ Bill seeking to legalize divorce under Civil Law is pending. Members of Congress and the Senate are divided on the issue of divorce. The bill was filed in the 15th Congress by Gabriela Women's Party (HB 1799) and did not pass, but was re-filed under the 16th Congress. Under the proposed legislation, grounds for divorce are premised on the irreparable breakdown of the marriage and the total non-performance of marital obligations.⁸¹⁸²⁸³
- ❖ Divorce is allowed under the CMPL, but Muslim men have greater rights. Certain rights to divorce are given to both spouses by under the CMPL. There are seven ways a divorce can be effected—namely repudiation of the wife by the husband (*talaq*); vow of continence by the husband (*iila*); injurious assimilation of the wife by the husband, that is, an insult by a husband to his wife which likens her to a female relation of his who is sexually prohibited to him (*zihar*); acts of imprecation (*li'an*); redemption by the wife (*khul'*); exercise by the wife of the delegated right to repudiate (*tafwid*); or judicial decree (*faskh*).⁸⁴ In most cases women must seek arbitration by an Agama (religious) council; only men have the right to declare unilateral divorce through verbal

⁷⁵ Musawah, *Home Truths: A Global Report on Equality in the Muslim Family*. <http://www.musawah.org/home-truths-global-report-equality-muslim-family-english>. pp.42-43.

⁷⁶ Ibid. p. 47.

⁷⁷ Quezon City Protection Center case reports of cases from December 2011 onwards; Clara Rita A. Padilla, A Call for Philippine Implementation of Women's Rights Under CEDAW, 53 ATENEO Law Journal 765-803 (2008)

⁷⁸ p. 6. Shadow Report: 'Gender-based Violence, Marriage, and Family Relations Report for the 64th CEDAW Session (Review on the Philippines);' EnGendeRights, Inc., [rehttp://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PHL/INT_CEDAW_NGO_PHL_24309_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PHL/INT_CEDAW_NGO_PHL_24309_E.pdf).

⁷⁹ SPR 2015, para. 146.

⁸⁰ SPR 2015, para. 146.

⁸¹ SPR 2015, para. 122.

⁸² SPR 2015, para. 148-149.

⁸³ Responses to List of Issues & Questions, 2016, para. 21.1.

⁸⁴ Articles 46-53 of CMPL, Accessed at: https://www.law.unimelb.edu.au/files/dmfile/Stephens_web2.pdf.

repudiation.⁸⁵ While women have the right to *khul'* in law, only those who have the financial means to redeem their freedom can access this right.⁸⁶ The lack of procedural regulation on divorce allows for vagueness in interpretation and implementation that is usually disadvantageous for women.⁸⁷

- ❖ **Men often fail to provide maintenance to children and ex-wives after divorce.** The CMPL mandates that husbands support former wives until the expiry of the waiting period or '*idda*' (four months + ten days post divorce). If the woman is pregnant, then support is required until delivery. If she is nursing, the man's obligation extends until the time of weaning.⁸⁸ However, execution of judicial orders to provide even this limited form of spousal and child maintenance is problematic: *Shari'ah* courts are often filled with cases of 'wives demanding support for themselves or for their children or both.' In addition, women lack the power to enforce compliance of divorce rulings.^{89 90}

(2) MUSAWAH JUSTIFICATION FOR REFORM:

- ❖ **On equal right to divorce.** The Qur'an calls on parties to the marriage to 'either hold together on equitable terms (*ma'ruf*), or separate with kindness (*ihsan*)' (*Surah al-Baqarah* 2:229). The proceedings for arbitration and mediation in *Surah an-Nisa'* 4:35 place both spouses on an equal footing: 'If you fear a breach between a married couple appoint (two) arbiters, one from among his people, and the other from among her people.'

The man's unilateral right to divorce his wife at will contradicts Qur'anic teachings, and specifically the message of kindness and equality.

Various *fiqh* schools have provided for more egalitarian access to divorce, and several Muslim countries provide equal right to divorce between men and women.

- ❖ **On paying court-orderend maintenance to women and children.** There are many good practices in several countries that could be followed to enforce maintenance orders. This may include setting up of a Child Support Agency, setting up a specialised Maintenance Court to expedite claims and ensure immediate enforcement, and effective punishments of ex-husbands and fathers who repeatedly fail to pay maintenance through imprisonment, or preventing them from renewing official documents, including passports, business licences and drivers' licences.

(3) RECOMMENDATIONS:

- ❖ **Legalize divorce in Civil Law.**
- ❖ **Abolish the husband's right to unilateral divorce in CMPL, and ensure both parties in a marriage are fully aware of its dissolution and its consequences.**
- ❖ **Equal rights and access for both men and women to matters related to the dissolution of marriage, including the grounds for divorce and standards of proof.**
- ❖ **Ensure that legal limit to dowry at the time of marriage is enforced, enabling women to initiate *khul'* divorce.**
- ❖ **Engage with local women's rights groups in the ARMM, who have for years campaigned for reform of the CMPL, and developed religious and evidence-based arguments to support their specific demands.**⁹¹

⁸⁵ SPR 2015, para. 23.

⁸⁶ Musawah, *Home Truths: A Global Report on Equality in the Muslim Family*. <http://www.musawah.org/home-truths-global-report-equality-muslim-family-english>. pp.42-43.

⁸⁷ Many Women also feel unable to seek divorce as the government of Philippines has constitutionally outlawed divorce.

⁸⁸ Articles 65 and 67 CMPL.

⁸⁹ Accessed at <http://kyotoreview.org/issue-5/women-islam-and-the-law/>

⁹⁰ Accessed at https://www.law.unimelb.edu.au/files/dmfile/Stephens_web2.pdf

⁹¹ Musawah, *Home Truths: A Global Report on Equality in the Muslim Family*. <http://www.musawah.org/home-truths-global-report-equality-muslim-family-english>. pp.42-43.

(4) GOOD PRACTICES:^{92 93}

Divorce

- ❖ **Indonesia:** The six grounds for divorce are available to both husbands and wives. All divorces must go through the court.
- ❖ **Morocco:** Dissolution of marriage is a prerogative that may be exercised equally by both husband and wife.
- ❖ **Tunisia:** There are equal grounds for divorce for husband and wife. Divorce shall only take place in court.

Maintenance of Children & Divorced Wives

- ❖ **Australia, New Zealand, United Kingdom, United States:** State agencies have been established to ensure all children are supported. Liable parents are assessed according to a formula and payments are compulsory, and the State is responsible for pursuing the non-paying parent.
- ❖ **Singapore:** A specialised court is established to deal solely with maintenance concerns, thus expediting claims and enforcement.

VI. CONCLUSION

The Philippines noteworthy ranking in many international gender gap indices,⁹⁴ and its own publicized initiatives on the critical role of women's rights in the nation's development reveal a deep disconnect between the identity the nation is invested in building globally, and the reality of political, socio-economic, and legal discrimination that the country's female population faces. The CEDAW Committee and civil society must hold the Philippines accountable to its own international obligations, Constitutional guarantees, and official rhetoric.

Musawah notes that the full and sustainable implementation of the CEDAW Convention for the State party's minority Muslim female population is fundamentally linked to ending the ongoing conflict in the Mindanao region and multiple forms of State violence; addressing the region's poverty; and facilitating Muslim women's participation in how Islam is understood, practised, and codified into law. Increasingly today, Muslim women are claiming for themselves the right to shape the interpretations, norms, and laws that affect their lives. The intersection of Islam, politics, law, and gender in Muslim societies demands that a public culture of debate on these complex issues take place in order to transform discriminatory laws, practices, and discourses.

Meaningful reform of discriminatory Muslim family law and practice requires the political will and necessary resources from the State party to engage meaningfully with women's rights activists and groups in the ARMM who have for years campaigned for reform of discriminatory law and practice, and developed religious and evidence-based arguments to support their specific demands: Amendments drafted by these groups were submitted to the Lower House of Congress in 2000, but failed to pass; groups then went back to the drawing boards to develop arguments within the Islamic framework, gather more evidence on the impact of discrimination against women, and conduct trainings to raise women's awareness and ultimately build a bigger constituency to push for reform.⁹⁵

⁹² Musawah, *CEDAW and Muslim Family Laws*, *supra* note 55, p. 47.

⁹³ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 55, p. 48.

⁹⁴ The Philippines ranked 5th on the Global Gender Gap Index of the 2013 World Economic Forum and 12th of 86 countries in the 2012 Social Institutions and Gender Index of the Organization for Economic Cooperation and Development (OECD). State Party Report 2015 (SPR 2015), para. 10.

⁹⁵ Musawah, *Home Truths: A Global Report on Equality in the Muslim Family*. <http://www.musawah.org/home-truths-global-report-equality-muslim-family-english>. pp.42-43.

While there will always be conservative forces within the Muslim community opposed to reform to end discrimination against women, and while they will often use religious arguments to justify their position, Muslim women cannot continue to be deprived of their equal rights as citizens in a democratic country.

The State party must be held accountable to its promise to prioritise marginalised groups of women and children, not least Muslim women of the Philippines.

VII. MUSAWAH VISION

Musawah asserts that in the twenty-first century, there cannot be justice without equality. Many provisions in Muslim family laws, as defined by classical jurists and as reproduced in modern legal codes, are neither tenable in contemporary circumstances nor defensible on Islamic grounds. Not only do they fail to fulfill the *Shari'ah* requirements of justice, but they are being used to deny women rights and dignified choices in life. These elements lie at the root of marital disharmony and the breakdown of the family.

Musawah believes that Qur'anic teachings which encompass the principles of justice, equality, dignity, and love and compassion lay out a path towards reform of Muslim family laws and practices, in line with contemporary notions of justice, which includes equality between the sexes and equality before the law.⁹⁶

Musawah believes that Islamic teachings and universal human rights standards, including the CEDAW Convention, are fully compatible, and that both are dynamic and constantly evolving, based on changing times and circumstances.⁹⁷

It is our hope that the CEDAW Committee will encourage Governments everywhere, and particularly those purporting to speak for and in the name of Islam, to:

- ❖ Recognise the diversity of opinions, laws and practices in the Muslim world and the growing scholarship in Islam that recognises equality and justice and the possibility and necessity for reform of Muslim family laws today.
- ❖ Promote human rights standards as intrinsic to the teachings of Islam, national guarantees of equality and non-discrimination, and the lived realities of men and women today.
- ❖ Encourage open and inclusive public debate regarding diversity of opinion and interpretations in Muslim laws and principles relating to family laws and practices.
- ❖ Support civil society groups and individuals engaged in family law reform campaigns, moving the family towards relationships of equality, justice, dignity and mutual respect.

⁹⁶ Musawah Framework for Action, *supra* note 3.

⁹⁷ *Ibid.*

ANNEX 1: RESEARCH METHODOLOGY

This report draws on three methods of analysis that outline and challenge the structure of discrimination in Muslim family laws (MFL) and practices. These methods are derived from the *Musawah Framework for Action*, which advocates for reform from multiple approaches: Islamic sources, including Muslim jurisprudence; international human rights standards, national laws and constitutional guarantees of equality; and the lived realities of communities.⁹⁸

In particular, this report argues for reform of discriminatory law and practice, according to the provisions of the CEDAW Convention, by providing (1) sociological research on the effect of discriminatory law and practice on lived realities of communities, and (2) Muslim legal analysis that also draws on sociological evidence of harm to advocate for reform.

In this section, Musawah also presents the CEDAW Committee with (3) a useful framework for outlining the structure of discrimination in Muslim family laws and practices.

(1) Lived realities: Documenting evidence of discrimination and harm

Discriminatory laws and practices cause harm to women, families, and communities; and thus must be challenged to ensure equality and justice for women.

This report advocates for reform by first providing sociological research and analysis on the extent of discriminatory law and practice, and its effect on the lived realities of women and families.⁹⁹ In doing so, it measures the reality of key issues related to marriage and family relations against what the State party has stated, and against the standards of equality and non-discrimination required by the CEDAW Convention.

Research compiled is based on a close review of the Philippines' engagement with the CEDAW Committee.

An extensive review of the reality of critical issues on the ground, based on available and credible primary and secondary sources, including shadow reports submitted to the CEDAW Committee for its 64th Session. Every effort was made to find credible, varied and balanced information, and to use full citations throughout.

(2) Islamic Jurisprudence: Challenging discrimination justified in the name of religion

Discriminatory laws and practices cause harm to women, families, and communities; and thus—according to theories and methods within Muslim jurisprudence—must be challenged to ensure equality and justice for women.

Governments of countries with Muslim family law systems often argue that laws cannot be amended to allow for equality between men and women, because the law is 'divine Islamic law' (or '*Shari'ah*'), and therefore unchangeable.¹⁰⁰

This report further advocates for reform by drawing on a variety of theories and methods within Muslim jurisprudence that can be used to reform Muslim laws:¹⁰¹

- ❖ First, there is a distinction between *Shari'ah*, the revealed way, and *fiqh*, or human interpretation of the *Shari'ah*. Much of what is deemed to be 'Islamic law' today is *fiqh* and not divine law, and therefore is human, fallible and changeable.¹⁰²

⁹⁸ *Musawah Framework for Action*, available at: http://www.musawah.org/framework_action.asp.

⁹⁹ In particular, this report documents three kinds of gender-based discrimination: (1) Provisions of discriminatory laws and regulations; (2) consequences of legal discrimination; and (3) disconnect between existing egalitarian laws and discriminatory realities.

¹⁰⁰ For greater examination of state parties' use of Islam and *Shari'ah* to justify reservations and resist demands for legal reform, see Musawah, *CEDAW and Muslim Family Laws: In Search of Common Ground* (2011), available at:

http://www.musawah.org/sites/default/files/CEDAW%20%26%20Muslim%20Family%20Laws_0.pdf.

¹⁰¹ For more information, see *Musawah Framework for Action*, *supra* note 7.

- ❖ **Second, Muslim jurists have always considered legal rulings related to marriage and family as social and contractual matters, rather than spiritual or devotional matters. As such these rulings have always been open to consideration and change.**
- ❖ **Third, diversity of opinion has always been accepted and celebrated in Islamic jurisprudence, which is why there are multiple schools of law. The fact that different countries have different laws demonstrates that there is no unified, monolithic ‘divine’ law. We must recognise that contemporary codified laws are not God-given, but were adopted by humans serving in legislatures or committees. Humans can thus change the laws to be more just and equal.**
- ❖ **Fourth, laws or amendments introduced in the name of *Shari‘ah* and Islam should reflect the values of equality, justice, love, compassion and mutual respect among all human beings. These values correspond with contemporary human rights principles.**

This methodological framework challenges the Islamic basis of discriminatory arguments used by the State party to justify reservations and non-compliance to the CEDAW Convention. Furthermore, it enables stakeholders to address noted discrimination and harm as violations of not only the CEDAW Convention, but the very spirit of equality and justice in Islam that the State party purports to uphold.

Since these interpretations and laws are human-made and concern relations between humans, they can change within the framework of Islamic principles, in conjunction with international human rights standards and constitutional guarantees of equality, and in accordance with the changing realities of time and place. Positive reforms in Muslim family laws and practices provide support for this possibility of change.

Reform of family laws from within Islamic traditions is both necessary and possible.

(3) ‘Complementary’ rights and responsibilities: Structural roots of inequality in MFL

Specific discriminatory laws and practices are rooted within a greater structure of discrimination that Musawah urges the CEDAW Committee to recognise and address.

Musawah draws the CEDAW Committee’s attention to the classical Muslim marriage contract, which was patterned by classical Muslim jurists on the contract of sale, and establishes the wife’s legal duty of obedience (*tamkin*) to the husband, and the husband’s legal duty of protection and maintenance (*nafaqa*) as the right of the wife, which she loses through disobedience (*nushuz*).¹⁰³

This construction of marriage as a relationship of ‘complementary’ rights and responsibilities forms the structural basis for discrimination, and informs specific discriminatory laws and practices in many Muslim family laws today. The model of male authority and female submission directly or indirectly justifies discrimination against women in a variety of ways, including: men’s right to sexual access, polygamy, unilateral divorce (*talaq*), and greater shares of inheritance over female siblings; women’s lack of choice and consent in marriage, financial security, decision-making power in family and society, and right to guardianship of children; and women’s inability to transmit nationality to children.

¹⁰² In Islamic theology, *Shari‘ah* (lit. the way, the path to a water source) is the sum total of religious values and principles as revealed to the Prophet Muhammad to direct human life. *Fiqh* (lit. understanding) is the process by which humans attempt to derive concrete legal rules from the two primary sources of Islamic thought and practice: the Qur'an and the *Sunnah* of the Prophet. As a concept, *Shari‘ah* cannot be reduced to a set of laws—it is closer to ethics than law. It embodies ethical values and principles that guide humans in the direction of justice and correct conduct. *Musawah Framework for Action*, *supra* note 7.

¹⁰³ Musawah is currently undertaking a long-term knowledge building initiative, including a participatory feminist research project, on the concepts of *qiwamah* and *wilayah*, which are commonly understood as male authority and guardianship over women and children. These concepts play a central role in institutionalising, justifying, and sustaining a patriarchal model of families in Muslim contexts, including the relationship of ‘complementary’ rights and responsibilities between men and women. For more information, see *Musawah’s Knowledge Building Initiative on Qiwamah and Wilayah*, at: <http://www.musawah.org/what-we-do/qiwamah-and-wilayah>; and Musawah’s latest publication, *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (eds. Ziba Mir-Hosseini, Mulki Al-Sharmani, and Jana Rumminger), London: Oneworld, 2015; see: <http://www.musawah.org/men-charge-rethinking-authority-muslim-legal-tradition>. Finally, see Musawah’s Oral Statement presented at the 9th Session of the UN Working Group on Discrimination against Women in Law and Practice, available at: <http://www.musawah.org/musawah-oral-statement-discrimination-against-women-law-and-practice>.

Marriage as defined by ‘complementary’ rights is inherently discriminatory, and thus contradicts universally accepted human rights norms. Furthermore, it is impossible to sustain such a marital construction in present day economic and social realities: Many men are unable or unwilling to protect and provide for their families, while women often serve as the protectors of their families, provide essential income for family survival, and contribute through unpaid labour.

ANNEX 2: GLOSSARY OF KEY TERMS¹⁰⁴

fasakh: The dissolution of a marriage for cause.

fiqh: (lit. understanding, knowledge) The science of understanding *Shari'ah*; also used to refer to the huge literature produced by Muslim jurists. It began with the opinions and doctrines of the jurists in leading Muslim cities in early Islam. These opinions shaped gradually into schools of law. Jurists never claimed that their doctrines were sacred. They always distinguished between divine and human; *fiqh* was human understanding. The contents of *fiqh* were further divided into two main divisions: *ibadat* (rituals, laws relating to relations between God and humans) and *mu'amalat* (laws relating to relations between humans). Human reasoning and experience plays a vital role in the case of *mu'amalat*, and hence remain open to change as human affairs evolve. Much of what constitute Muslim family laws today are derived from *fiqh* literature, in the category of *mu'amalat* rulings.

Hadith: *Hadith* is distinguished from *Sunnah*, which means normative practice. A *hadith* is a report about what Prophet Muhammad said about something, practiced or approved, or did not disapprove a certain thing. A science of *hadith* criticism was developed to examine the normative value of a *hadith* and about the reliability of a *hadith*. A *hadith* report consists of two parts; first gives a list of narrators of the *hadith*, and the second part the text. The jurists and the collectors of *hadith* differed in their criteria bout the normativity of a *hadith*.

ijbar: The power to compel an unmarried woman (of any age) to marry someone of equal status, as recognised by certain schools of law; the power usually resides in the father or paternal grandfather.

mufti: A specialist in religious law who is qualified to give an authoritative religious opinion (*fatwa*).

mahr: Dower, or the goods and/or cash due from the groom to the bride as part of the marriage contract. It may be given at the time of the marriage ceremony, or promised to be paid at a later date or to be paid upon divorce or the death of the husband, or divided into prompt and deferred portions.

nushuz: Disruption of marital harmony by either spouse.

Shari'ah: (lit. water source, the way, the path) The path or way given by God to human beings, the path by which human beings search God's Will. Commonly misinterpreted as 'Islamic law,' *Shari'ah* is not restricted to positive law *per se* but includes moral and ethical values and the jurisprudential process itself.

Sunnah: (lit., the way or course or conduct of life) The example of the Prophet embodied in his statement, actions and those matters that he silently approved or disapproved as reported in *hadith* literature. *Sunnah* is acknowledged as a primary source of Islamic law after the Qur'an.

talaq: Repudiation of marriage by the husband.

talaq-i-tafwid (or 'esma): A delegated right of divorce exercised by the wife.

ta'liq: Divorce for breach of condition in marriage contract or any subsequent written agreement between the husband and wife.

wali: Guardian (for marriage); regarded by some schools of law as the father or paternal grandfather who has authority to contract marriage on behalf of the bride.

¹⁰⁴ Musawah, CEDAW and Muslim Family Laws, Annex 1: Glossary of Key Terms, *supra* note 10, p. 43-44.

About Musawah

Musawah is a global movement of women and men who believe that equality and justice in the Muslim family are necessary and possible. Musawah, which means ‘Equality’ in Arabic, builds on centuries of effort to promote and protect equality and justice in the family and in society. For details, visit the Musawah website at <http://www.musawah.org>.

A Note on Terms

Many of the terms used in Muslim family laws and practices are transliterated and/or translated from Arabic words. Because transliteration styles differ, different spellings for the same term are used in different places. For ease of reading, we have opted to use a single transliteration for each term consistently throughout the report (e.g. Shari'ah, qadi), except in formal usual specific to a particular country or context (e.g. Syariah Court, Kadhis' Court). This in no way implies that there is a ‘correct’ way of spelling any given term.