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For Equality in the Muslim Family

Musawah Thematic Report on Article 16: Bahrain

**57th CEDAW Session
Geneva, Switzerland
February 2014**

Musawah

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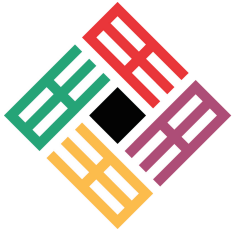
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Musawah Thematic Report on Article 16: Bahrain

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I. INTRODUCTION

A. Objective

Musawah, the global movement for equality and justice in the Muslim family, submits its fifth Thematic Report on Article 16 for consideration by the CEDAW Committee in its review of Bahrain, reporting before the 57th Session of the CEDAW Committee.¹ This report follows the July 2013 submission of the *Musawah List of Issues and Questions on Article 16: Bahrain* to the CEDAW Committee, during its Pre-Sessional Working Group.²

Musawah's issues of concern and supplementary research take a critical look at the status of marriage and family relations, as encapsulated in Article 16 of the CEDAW Convention. Since the concerns of equality and justice in the family are crosscutting, issues in Article 2 (*implementation of non-discrimination*), Article 9 (*equal rights with regards to nationality*), and Article 15 (*equality before the law; freedom of movement and residence*) are also covered.

In particular, this report examines Bahraini laws and practices that enforce direct and de jure discrimination against women in the following areas: **guardianship; early and forced marriage; equal rights and responsibilities; polygamy; domestic violence; divorce; custody and guardianship of children; right to confer nationality to children; inheritance; and personal status law for Shiite majority.**

It is hoped 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 Islamic legal theory that challenge the ways the State party uses religion to justify discrimination, including reservations and non-implementation of its international human rights treaty obligations; and (3) suggesting recommendations for reform based on good practices in Muslim contexts.

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.

¹ Musawah: <http://www.musawah.org/>.

² *Musawah List of Issues and Questions on Article 16: Bahrain* (July 2013), available at: <http://www.musawah.org/sites/default/files/MusawahListofQuestionsBahrain57CEDAW2014.pdf>.

B. 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 lived realities of women and men.³

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 women and families, and (2) Islamic 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) Documenting evidence of discrimination and harm in lived realities

Discriminatory laws and practices cause harm to women and families, and thus must be changed 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.⁴ 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 in this report was conducted based on close review of Bahrain's combined initial and second (2007)⁵ and third periodic State party reports (2011),⁶ the CEDAW Committee's list of issues and questions (2013),⁷ the State party's reply to list of issues (2013),⁸ the CEDAW

³ *Musawah Framework for Action*, available at: http://www.musawah.org/framework_action.asp.

⁴ 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, as and when relevant.

⁵ CEDAW 42nd Session, Bahrain State party report (November 2007), U.N. Doc. CEDAW/C/BHR/2, [hereinafter Bahrain SPR 2007], available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/373/56/PDF/N0837356.pdf?OpenElement>.

⁶ CEDAW 57th Session, Bahrain State party report (December 2011), U.N. Doc. CEDAW/C/BHR/3, [hereinafter Bahrain SPR 2011], available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fBHR%2f3&Lang=en.

⁷ CEDAW 57th Session, List of issues and questions in relation to the third period report of Bahrain, CEDAW/C/BHR/Q/3 (August 2013) [hereinafter CEDAW Committee list of issues], available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fBHR%2fQ%2f3&Lang=en.

⁸ CEDAW 57th Session, List of issues and questions in relation to the third period report of Bahrain—Addendum: Replies of Bahrain, CEDAW/C/BHR/Q/3/Add.1 (November 2013) [hereinafter State party response], available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fBHR%2fQ%2f3%2fAdd.1&Lang=en.

Committee's Concluding observations (2008),⁹ and 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 by local women's rights organisations to the CEDAW Committee for the 57th CEDAW Session. Every effort was made to find credible, varied and balanced information, and to use full citations throughout.

(2) Challenging State religious authority with Islamic legal sources

Discriminatory laws and practices—even those justified in the name of religion and culture—cause harm to women and families, and thus must be changed to ensure equality and justice for women. Reform of family laws from within Islamic traditions is both necessary and possible.

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.¹⁰

This report further advocates for reform by drawing on a variety of theories and methods within Islamic jurisprudence that can be used to reform Muslim laws:¹¹

- ❖ 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.¹²
- ❖ 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.

⁹ CEDAW 42nd Session, Concluding observations of the Committee on the Elimination of Discrimination against Women (November 2008), U.N. Doc. CEDAW/C/BHR/CO/2, [hereinafter Concluding observations 2008], available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/602/30/PDF/N0860230.pdf?OpenElement>.

¹⁰ 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.

¹¹ For more information, see *Musawah Framework for Action*, *supra* note 3.

¹² 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 3.

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.¹³

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 evolutions in practices provide support for this possibility of change.

(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*).¹⁴

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.

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.

¹³ For overview of State party commitment to spirit of equality within Islam, see Section II.4 of this report.

¹⁴ Musawah is currently undertaking a major research building initiative 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>. Also 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>

II. LEGAL BACKGROUND

This is the CEDAW Committee's second engagement with the Kingdom of Bahrain, which ratified the CEDAW Convention on June 18, 2002, and entered Reservations to Article 2 (*in order to ensure its implementation within the bounds of the provisions of the Islamic Shari'ah*), Article 9.2, Article 15.4, and Article 16 (*in so far as it is incompatible with the provisions of the Islamic Shari'ah*).¹⁵

(1) Legal history

Bahrain has a mixed legal system drawing from both English common law and codified systems, and from Islamic law. Upon independence in 1971 from its status as a British protectorate, a Legislative Committee was appointed to establish an independent legal system. Since that time, Bahraini law has followed a similar pattern to other Arab states' legislation. The Ja'fari school of *fiqh* is the predominant *madhhab* followed by the Shiite majority, while the Sunni minorities follow either the Shafi'i or Maliki school of law.¹⁶

(2) Codification of Sunni personal status law: *Law no. 19 (2009)*

In May 2009, a codified family law (*Bahraini Law no. 19 on the Promulgation of the Law of Family Rulings, First Part*) was passed for Bahrain's Sunni minority community, after years of advocacy efforts by local women's groups.¹⁷ Before this, personal status law was uncoded, and family matters were regulated within *Shari'ah* courts by government-appointed judges, who based judgments on their own interpretation of the *Shari'ah*, often in discriminatory ways.¹⁸ Furthermore, local CSOs note that codification has enabled litigants, judges, and lawyers to understand and implement legal provisions consistently.¹⁹

The codification of the personal status law occurred between the State party's last and current review by the CEDAW Committee (42nd CEDAW Session: October 2008, and 57th CEDAW Session: February 2014, respectively).

Shiite personal status law remains uncoded for the nation's 65-75% majority Shiite community.²⁰ Conservative Shiite Ja'fari clerics and Members of Parliament from the opposition Al Wefaq party

¹⁵ United Nations Treaty Collection: *CEDAW Declarations and Reservations*, available at:

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

¹⁶ Abdullahi A. An-Na'im (ed). *Islamic Family Law in a Changing World: A Global Resource Book* (2002). p. 106.

¹⁷ Lynn Welchman. 'Bahrain, Qatar, UAE: First time Family Law Codifications in Three Gulf States,' *International Survey of Family Law*, Bill Atkin, ed. (July 2010), p. 1, available at: http://eprints.soas.ac.uk/10899/1/Welchman_'Bahrain,_Qatar,_UAE'_ISFL_2010.pdf.

¹⁸ Musawah. *Home Truths: A Global Report on Equality in the Muslim Family* (2009), pp. 4-5, available at: http://www.musawah.org/sites/default/files/Home%20Truths-EN_0.pdf.

¹⁹ Bahrain Women's Union. *Bahraini NGOs Shadow Report to CEDAW (2014)*, para. 30, available at: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/BHR/INT_CEDAW_NGO_BHR_16120_E.pdf.

²⁰ Estimates for exact size of Shiite community vary. See Carnegie Endowment for International Peace, 'Bahrain: Between the United States and Saudi Arabia' (4 April 2011), available at:

<http://carnegieendowment.org/2011/04/04/bahrain-between-united-states-and-saudi-arabia/t8>; and

Bloomberg, 'Bahrain Shiites May Rally After Funeral for Protester' (16 February 2011), available at:

rejected the draft law submitted by the government in 2009, stating, 'Parliament is not qualified to debate or decide on family matters rooted in religious jurisprudence.'²¹ The Sunni law retains the title 'First Part' in anticipation of a second part to govern the Shiite community.²²

(3) Constitutional status of Islamic law

Article 1(a) of the Constitution of the State of Bahrain (adopted May 16, 1973) affirms that, 'Bahrain is an Arab Islamic State;' Article 2 affirms Islam as the religion of the state, and identifies *Shari'ah* as a main source of legislation.²³

(4) State commitment to gender equality, and spirit of equality within Islam

Musawah hopes that the CEDAW Committee will hold the State party accountable to its own rights discourse and purported commitment to gender equality, as contained in several key statements in Bahrain SPR 2011. These include: 'The Constitution affirms that no person or authority is permitted to interfere with the course of justice' (para. 30); 'The Kingdom of Bahrain [is] committed to CEDAW on the basis of a firm belief in the principle of equality between men and women' (para. 40); and '[T]he principle of equality between men and women, which is affirmed by the [S]hari'ah, Koranic verses and Prophetic traditions are decisive in this regard' (para. 79).²⁴

<http://www.bloomberg.com/news/2011-02-15/bahrain-shiites-may-rally-after-funeral-for-second-person-killed-in-unrest.html>.

²¹ Gulf News, 'Bahrain parliament passes family law for Sunni section' (14 May 2009), available at:

<http://gulfnews.com/news/gulf/bahrain/bahrain-parliament-passes-family-law-for-sunni-section-1.2005>.

²² Welchman, *supra* note 17, p. 2.

²³ An-Na'im, *supra* note 16, p. 106.

²⁴ Other key statements reflecting the State party's commitment to gender equality contained in Bahrain SPR 2011 include paras. 20-21, and 42.

III. KEY ISSUES RELATED TO MARRIAGE AND FAMILY RELATIONS

This section identifies critical issues of discrimination against women under Article 16 (and Articles 2, 9, and 15, as relevant) raised by key documents in the engagement between the Bahraini State party and the CEDAW Committee. The section also presents research from other primary and secondary sources (including Shadow reports submitted by local women's rights organisations to the CEDAW Committee for the current Session), 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. Guardianship

Reservation to Article 2 (*in order to ensure its implementation within the bounds of the provisions of the Islamic Shari'ah*), and **Article 16** (*in so far as it is incompatible with the provisions of the Islamic Shari'ah*).²⁵

(1) Critical information

- ❖ **Male guardian (*wali*) required for women to enter marriage.**^{26 27} Under the Sunni codified law, if a woman has not been previously married, the consent of her father, grandfather, or brother is required for her marriage.²⁸ This restricts the right of women to freely choose a spouse and to enter into marriage with their free and full consent. Although Shiite women can sign their own marriage contract, they are often heavily influenced by their family's choices.²⁹ The majority of marriages in Bahrain are arranged, and it is not socially acceptable to marry without prior family consent and approval.³⁰

(2) Musawah Justification for Reform

- ❖ **On capacity to enter into marriage:**³¹ There are neither verses in the Qur'an nor references in *Hadith* that stipulate guardianship as a condition for marriage. Historically, the requirement of *wali* applied to both boys and girls and in some practices, both the mother and the father held guardianship. Court records in Egypt show that in pre-modern times, mothers had the right to oversee marriage of their minor children, and that judges often determined that mothers be guardians over the life and property of orphaned children. However, codification processes in Egypt, based on the French Napoleonic Code in the late 19th century, denied mothers the right of guardianship over their children and their

²⁵ United Nations Treaty Collection, *supra* note 15.

²⁶ Bahrain Women's Union, *supra* note 19, para. 34.

²⁷ Welchman, *supra* note 17, p. 3.

²⁸ Ahmed, Dunya Ahmed Abdulla. 'Bahrain' in Sanja Kelly and Julia Breslin, eds., *Women's Rights in the Middle East and North Africa* (2010), p. 60.

²⁹ Freedom House, *Women's Rights in the Middle East and North Africa: Citizenship and Justice* (2005), p. 56.

³⁰ Ahmed, *supra* note 28, p. 67.

³¹ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, pp. 32-33.

children's property.³² Given the changing position of women in Bahraini society, both in education and in the workforce, and historical practice in Muslim contexts, a competent adult woman should be given unrestricted rights to choose if, when and whom to marry as is already the position in the Hanafi school of law.

(3) Recommendations

- ❖ Ensure men and women the same right to enter marriage, including repealing discriminatory laws, regulations, and practices requiring for a guardian's consent or approval.

(4) Good practices³³

- ❖ **Bangladesh, Pakistan, Sri Lanka:** A *wali* (guardian) is not required for Hanafi women who have reached puberty.
- ❖ **Kyrgyz Republic, Turkey, Uzbekistan:** A *wali* is not required.
- ❖ **Morocco:** A woman gains the capacity to contract her own marriage at the age of majority.
- ❖ **Tunisia:** Both husband and wife have the right to contract their marriage themselves, or to appoint proxies. The consent of a *wali* is not required, provided that both husband and wife are of the legal age of consent.

B. Early and Forced Marriage

Reservation to Article 2 (in order to ensure its implementation within the bounds of the provisions of the Islamic Shari'ah), and **Article 16** (in so far as it is incompatible with the provisions of the Islamic Shari'ah).³⁴

(1) Critical information

- ❖ **Different minimum age of marriage (16 for females; 18 for males); legal exceptions allow for child marriage.**^{35 36} Although recent figures are unavailable, UN data indicates that 4.2% of girls between 15 and 19 were married, divorced, or widowed in 2001,³⁷ while statistics from 2003 indicate that 1,077 females and 85 males between the ages of 15 and 19 received marriage licenses, and 18 females and no males below the age of 15 received marriage licenses.³⁸
- ❖ **Prevalence of forced marriage.** Marriages are arranged by parents or close relatives, and it is not socially acceptable to marry without prior family consent and approval.³⁹ Legal protective measures against forced marriages are routinely ignored by the judiciary.⁴⁰

³² Musawah, *WANTED: Equality and Justice in the Muslim Family* (2009), pp. 200-201, available at: http://www.musawah.org/sites/default/files/WANTED-EN-2edition_0.pdf.

³³ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, p. 46.

³⁴ United Nations Treaty Collection, *supra* note 15.

³⁵ Bahrain SPR 2011 para. 150; and State party response 2013 to Question 21.

³⁶ Bahrain Women's Union, *supra* note 19, para. 32.

³⁷ United Nations Population Division/DESA: World Marriage Data, available at: <http://data.un.org/DocumentData.aspx?id=322>.

³⁸ Scoop Wikileaks Independent News: *Bahrain Child Marriage* (16 March 2005), available at: <http://www.scoop.co.nz/stories/WL0503/S00577/cablegate-bahrain-child-marriage.htm>.

³⁹ Ahmed, *supra* note 28, p. 67.

⁴⁰ Bahrain Women's Union, *supra* note 19, para. 33.

- ❖ **Early and forced 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 risk of maternal and other pregnancy-related complications.^{41 42} 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.⁴³
- ❖ **Early and forced marriage limits women and girls' right to education, employment, and financial independence.**⁴⁴ This contradicts the State party's own emphasis on women's fundamental rights to education and employment.⁴⁵ A woman's financial independence affects both her decision-making powers within the family,^{46 47 48} 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.^{49 50}
- ❖ **Early and forced 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.⁵¹

(2) Musawah Justification for Reform

- ❖ **On minimum age of marriage:**⁵² Attempts to set 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 asserting that Aishah was likely to have been 19 at the time of her marriage.⁵³ 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.

⁴¹ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, p. 31.

⁴² 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>.

⁴³ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, p. 31.

⁴⁴ The Beijing Platform for Action (BPFA), *supra* note 42; and CEDAW Committee General Recommendation No. 21, *supra* note 42.

⁴⁵ Bahrain SPR 2011 paras. 20-21, 123 and 125.

⁴⁶ 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>.

⁴⁷ CEDAW Committee General Recommendation No. 21, *supra* note 42.

⁴⁸ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, p. 31.

⁴⁹ *Ibid.*

⁵⁰ CEDAW Committee General Recommendation No. 21, *supra* note 42.

⁵¹ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, pp. 32-33.

⁵² *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>.

⁵³ 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>.

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.

- ❖ **On forced marriage:**⁵⁴ The power of constraint in marriage, known as *wilayat al-ijbar*, under which the guardian has the right to determine a spouse and compel a ward to marry, is most likely rooted in pre-Islamic Arab social customs, which were incorporated into *fiqh* by [classical] jurists. Most OIC member states have banned *ijbar* marriages, either by law or regulation.

(3) Recommendations

- ❖ Increase the minimum legal age of marriage to 18 for both men and women, with no legal exceptions.
- ❖ Take all appropriate measures to eliminate the practice of early and forced marriage, and to ensure that women have the right to freely choose a spouse and to enter into marriage only with their free and full consent.
- ❖ Exercise due diligence to prevent, investigate, and punish acts that are aimed at coercing a child into forced and early marriage. Amend the Penal Code to include penalisation of forced marriage of girls under 18.
- ❖ Provide reparation to victims and survivors of forced and early marriage, including allowing 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.

(4) Good practices

- ❖ **Minimum age of marriage:**⁵⁵
 - **Algeria:** The minimum age of marriage is 19 for both males and females. The judge can grant an exception on the grounds of benefit or necessity.
 - **Bangladesh:** The minimum age of marriage is 18 for females and 21 for males; exceptions are not permitted.
 - **Morocco:** The minimum age is 18 for both males and females. The judge may grant an exception with the assistance of medical expertise, or after having conducted a social enquiry.
 - **Sierra Leone:** The minimum age is 18 for both males and females.
 - **Turkey:** The minimum age is 18 for females. The courts can permit the minimum age to be lowered to 16, under exceptional circumstances.
- ❖ **Forced Marriage**⁵⁶
 - **Algeria:** It is forbidden for the *wali* to compel a woman to marry; he may not give her in marriage without her consent.
 - **Malaysia:** Between 2003 and 2005, the Islamic Family Laws of different states were amended, banning *ijbar* marriages.
 - **Morocco:** Couples may not be coerced into marriage under any circumstances.
 - **Nigeria:** For Maliki communities (the majority of Nigerian Muslims), a biological father has the power of *ijbar*. However, the *wali* cannot compel his daughter to marry a man

⁵⁴ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, p. 32.

⁵⁵ *Ibid*, p. 45.

⁵⁶ *Ibid*.

suffering from contagious diseases, insanity, or reproductive problems. Case law is clear that *ijbar* cannot be enforced for adult women, and the courts generally accept a variety of circumstances that overrule of the possibility of *ijbar*, including where the woman has her own financial income.

- **Pakistan:** Case law provides that marriage without the consent of both spouses is void.
- **Saudi Arabia:** In April 2005, the top religious authorities banned the practice of forcing women to marry against their will, stating that it contravenes provisions of the *Shari'ah*. The clerics said that whoever forces a woman to marry against her will is disobeying God and His Prophet, and that coercing women into marriage is 'a major injustice' and 'un-Islamic.'
- **Tunisia:** There is no marriage without the consent of both spouses. A marriage contracted without such consent is declared null and void.

C. Equal Rights & Responsibilities

Reservation to Article 2 (in order to ensure its implementation within the bounds of the provisions of the Islamic *Shari'ah*), **Article 15.4**, and **Article 16** (in so far as it is incompatible with the provisions of the Islamic *Shari'ah*).⁵⁷

(1) Critical information

- ❖ **Husband is legal head of household;**⁵⁸ **Wife's right to maintenance lost if she is 'recalcitrant' (*nushuz*).**⁵⁹ ⁶⁰ 'Complementary' rights and responsibilities include the wife's duty to 'care for and obey' her husband as head of the family. If the wife is *nushuz* (recalcitrant), she risks losing her right to alimony, and the dowry paid to her by her husband in the case of divorce. Husbands often leverage women's legally-mandated obedience (referred to as 'House of Obedience') to humiliate their wives, and cause moral and material harm.⁶¹
- ❖ **Women as breadwinners.** Underlying the 'complementary' nature of men's and women's duties within the family is the assumption that men are the primary breadwinners, and women the primary caregivers.⁶² However, it is impossible to sustain and continue to justify roles within the family as 'complementary' given today's global economy and social realities. Bahrain SPR 2011 paras. 20 and 21 indicate the State party's efforts to increase human resource development of all citizens, while paras. 123 and 125 indicate that women comprise more than 50% of all levels of education, and that a national project provides additional technical and vocational education for young women. Women often serve as the protectors of their families, provide essential income for their families, and contribute through unpaid labour.
- ❖ **Unequal right to choose residence:** Men are given the exclusive right to determine the place of their wives' residence.⁶³ Exceptions include if the woman has indicated otherwise in the marriage contract, move from one residence to another is meant to harm her, or if the court determines move from one residence to another is not in the woman's best interest. However, it is often difficult to prove 'harm.' Furthermore, if the married woman does not

⁵⁷ United Nations Treaty Collection, *supra* note 15.

⁵⁸ Bahrain SPR 2011 paras. 143, 409, and 426-427.

⁵⁹ *Ibid*, paras. 81, 93; State party response 2013 to Question 10.

⁶⁰ Bahrain Women's Union, *supra* note 19, para. 36.

⁶¹ *Ibid*, paras. 39-40.

⁶² Bahrain SPR 2011 para. 93, justified in Bahrain SPR 2007 para. 329.

⁶³ Bahrain SPR 2011 para. 148; State party response 2013 to Question 4.

move to or leaves the matrimonial house against her husband's will and without legal grounds, her right to alimony is forfeited.⁶⁴

(2) Musawah Justification for Reform

- ❖ **On husband's right to authority.**⁶⁵ The concept of male authority 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*).

- ❖ **On husband's duty to financially provide for the family.**⁶⁶ In Muslim legal tradition, the husband's duty to maintain his wife and children comes with a corollary condition—that the wife is required to be obedient to him. Her failure to obey (*nushuz*) could lead to her losing her right to maintenance. In reality today, many men fail to fulfill their duty to provide, and yet do not lose their right to demand obedience from their wives. This idea of 'complementarity' does not in practice lead to equity in rights and responsibilities between the husband and wife. Men who fail to provide do not lose their authority over women. While women who financially provide for the family do not enjoy corollary rights and privileges.

Musawah argues that the logic of such a law, maintenance in return for obedience, is discriminatory in practice. The Qur'an introduced numerous reforms to existing cultural practices relating to the financial rights of women, including allowing women to own and inherit property. This was the beginning of a trajectory of reform which, if carried forward 1400 years later to match changing times and contexts, should lead to the elimination of the legal logic of maintenance in exchange for obedience, and to the introduction of equality between men and women in all areas, including financial matters. The idea that 'complementarity' or 'reciprocity' of rights and obligations do not constitute discrimination in the Muslim Personal Status laws must be challenged.⁶⁷

(3) Recommendations

- ❖ Accord husband and wife equal rights and responsibilities in marriage, within a legal framework that recognises marriage as a partnership of equals.
- ❖ Take all appropriate measures to give married women equal right to determine their place of residence, in both law and practice.

⁶⁴ Bahrain Women's Union, *supra* note 19, paras. 36-38.

⁶⁵ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, pp. 26-28.

⁶⁶ *Ibid.*

⁶⁷ For more information, read on *Musawah's Knowledge Building Initiative on Qiwwamah and Wilayah*, *supra* note 14; also see *Musawah's Oral Statement* presented at the 9th Session of the UN Working Group on Discrimination against Women in Law and Practice, *supra* note 14.

(4) Good practices⁶⁸

- ❖ **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.

D. Polygamy

Reservation to Article 2 (in order to ensure its implementation within the bounds of the provisions of the Islamic Shari’ah), and **Article 16** (in so far as it is incompatible with the provisions of the Islamic Shari’ah).⁶⁹

(1) Critical information

- ❖ **Permissibility of polygamy.** Although women can prohibit polygamy in their marriage contract,⁷⁰ the law neither includes other conditions limiting polygamy, nor allows the first wife to end her marriage once her husband marries again. In reality, women rarely have the knowledge or means to prohibit polygamy in their marriage contract.⁷¹
- ❖ **Polygamy poses significant emotional, financial, and physical harm to women and families.** Polygamy often results in inequality between wives; negative emotional consequences for both first and successive wives, as well as their respective children; economic difficulties; and greater levels of conflict and violence within families.^{72 73} Furthermore, the threat of polygamy can be used as a powerful means of control of the wife by the husband.⁷⁴

(2) Musawah Justification for Reform

- ❖ **On discouraging or prohibiting polygamy.**⁷⁵ 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 this could pose grounds for divorce. It is also possible for this clause to become a

⁶⁸ Musawah, *CEDAW and Muslim Family Laws*, supra note 10, p. 45.

⁶⁹ United Nations Treaty Collection, supra note 15.

⁷⁰ Bahrain SPR 2011 para. 150.

⁷¹ Bahrain Women’s Union, supra note 19, para. 35.

⁷² CEDAW Committee General Recommendation No. 21, supra note 42.

⁷³ The serious emotional and financial consequences of polygamy have been documented in research undertaken by the NGO Sisters in Islam (Malaysia) and partner universities, between 2008 and 2010 (Musawah, *CEDAW and Muslim Family Laws*, supra note 10, p. 35).

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, pp. 33-36.

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 existed and continues to exist in various civilizations, religions, and cultures in communities throughout the world, including among Jews, Chinese, Indians, and Mormon Christians.

(3) Recommendations

- ❖ Abolish polygamy in law and in practice.

(4) Good practices⁷⁶

- ❖ **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.

E. Domestic Violence

(1) Critical information

- ❖ **Marital rape not criminalised (unclear whether draft law on violence will address the issue).**⁷⁷
- ❖ **Rape perpetrators exempt through marriage:** Marriage to the victim exempts perpetrators of rape from prosecution; this is justified to protect the victim's free choice.⁷⁸

(2) Musawah Justification for Reform

- ❖ **On domestic violence, including marital rape:** The Prophet is reported to have said, 'The most perfect of the believers is the best of you in character, and the best of you are those among you who are best to their wives'.⁷⁹ In this regard, marital rape constitutes serious abuse of a wife. Musawah maintains that outlawing marital rape, like domestic violence, is not against Islam, and is in fact consistent with Qur'anic principles of justice ('*adl*), equality (*musawah*), dignity (*karamah*) and love and compassion (*mawaddah wa rahmah*). Further, international bodies and experts, including the CEDAW Committee itself,

⁷⁶ *Ibid*, p. 47.

⁷⁷ Bahrain SPR 2011 para. 138; CEDAW Committee List of issues 2013 para. 11; State party response 2013 to Question 11.

⁷⁸ *Ibid*.

⁷⁹ Hadith from Imam Ghazzali, *Ihya Ulum-Id-Din, Volume II*, p.32.

have repeatedly underscored their conviction that marital rape is an unlawful form of violence against women and should thus be criminalised.⁸⁰

(3) Recommendations

- ❖ Issue the Family Protection from Domestic Violence law, and include criminalisation of marital rape.
- ❖ Withdraw exemptions from prosecution from Article 353 of the Penal Code.

(4) Good practices

- ❖ **Tunisia,**⁸¹ **Turkey**⁸²: Marital rape is criminalised under the Penal Code.
- ❖ **Morocco**⁸³: Article 475 of the Penal Code, which allowed rapists to escape prosecution through marriage with underage victims, was amended in January 2014 to prohibit this practice.

F. Divorce

Reservation to Article 2 (*in order to ensure its implementation within the bounds of the provisions of the Islamic Shari'ah*), and **Article 16** (*in so far as it is incompatible with the provisions of the Islamic Shari'ah*).⁸⁴

(1) Critical information

- ❖ **Unilateral (*talaq*) divorce:** Men have right to unilateral divorce (*talaq*), including pronouncement outside of court,⁸⁵ and without their wife's knowledge or physical presence.⁸⁶
- ❖ **Limited alimony in the case of unilateral (*talaq*) divorce:** Maximum one-year compensation for women divorced unilaterally.⁸⁷ The restriction on alimony often does not reflect the harm caused to the divorced woman and her children, particularly after many years of marriage, and/or if the woman is elderly, unable to work, or without employment qualifications. Furthermore, this stipulation stands in contradiction to Article 94(b) of the New Family Law (*Law No. 19, 2009*), which states that alimony should be estimated according to the husband's wealth, period of marriage, and circumstances of divorce.⁸⁸
- ❖ **Hurdles to compensated (*khul'*) divorce:** Although women can dissolve marriage through compensated divorce (*khul'*), judges often require women to provide large sums of

⁸⁰ See e.g., Singapore Concluding Observations (2007), *supra* note 15, para. 28.

⁸¹ Immigration and Refugee Board of Canada, *Tunisia: Domestic violence, legislation and protection available to victims (2007-2009)*, 24 November 2009, available at: <http://www.unhcr.org/refworld/docid/4b20f04a3c.html>.

⁸² United Nations Press Release, 'Anti-Discrimination Committee Takes Up Situation of Women in Turkey' (21 January 2005), available at: <http://www.unis.unvienna.org/unis/pressrels/2005/wom1480.html>.

⁸³ Aljazeera, 'Morocco repeals "rape marriage law": Controversial article previously allowed rapists to avoid charges if they married their victims' (23 January 2014), available at: <http://www.aljazeera.com/news/africa/2014/01/morocco-repeals-rape-marriage-law-2014123254643455.html>.

⁸⁴ United Nations Treaty Collection, *supra* note 15.

⁸⁵ Welchman, *supra* note 17, p. 7.

⁸⁶ Bahrain Women's Union, *supra* note 19, para. 41.

⁸⁷ Welchman, *supra* note 17, p. 9.

⁸⁸ Bahrain Women's Union, *supra* note 19, paras. 42-43.

money and to waive their legal rights, including custody of their children.^{89 90 91}

(2) Musawah Justification for Reform

- ❖ **On equal right to divorce.** The Qur'an calls on parties to the marriage '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 places 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.'

Various *fiqh* schools have provided for more egalitarian access to divorce, such as delegated divorce (*talaq-i-tafwid* as commonly practiced in South Asia, in which the marriage contract may stipulate that the husband has delegated to his wife the right for her to unilaterally repudiate the marriage without cause), divorce for cause with no return of dower (*fasakh*), and divorce for breach of stipulations as contracted by the spouses (*ta'liq*). It is thus possible for states to formulate divorce laws that provide equal rights at the dissolution of marriage. Many OIC member countries have also provided that divorce can only take place in the courts.

(3) Recommendations

- ❖ Abolish the husband's right to unilateral divorce, to ensure that both parties in a marriage are fully aware of its dissolution and its consequences.
- ❖ All divorces must take place in court, with both parties present.
- ❖ 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.

(4) Good practices⁹²

- ❖ **Indonesia:** All divorces must go through the court. The six grounds for divorce are available to both husbands and wives.
- ❖ **Morocco:** Dissolution of marriage is a prerogative that may be exercised equally by both husband and wife.
- ❖ **Tunisia:** Divorce shall only take place in court. There are equal grounds for divorce for husband and wife.
- ❖ **Bangladesh, Pakistan, Iraq, Jordan, Morocco, Syria:** A husband may delegate his unilateral right to divorce his wife, permitting her to pronounce *talaq* upon herself (*talaq-i-tafwid* or '*esma*'). The wife's right to financial entitlements remains preserved.

⁸⁹ CEDAW Committee List of issues 2013 para. 21.

⁹⁰ Bahraini NGOs, 'The Shadow Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (September 2008), p. 21, available at:

<http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/Bahrainwomenunion42.pdf>.

⁹¹ Musawah, *Home Truths: A Global Report on Equality in the Muslim Family* (2009), p. 4, available at:

http://www.musawah.org/sites/default/files/Home%20Truths-EN_0.pdf.

⁹² Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, p. 47.

G. Custody & Guardianship of Children

Reservation to Article 2 (in order to ensure its implementation within the bounds of the provisions of the Islamic Shari'ah), and **Article 16** (in so far as it is incompatible with the provisions of the Islamic Shari'ah).⁹³

(1) Critical information

- ❖ **Men's right to legal guardianship:** Women are denied right to legal guardianship of children.^{94 95}
- ❖ **Women's custody lost upon remarriage:** Women forfeit right to children's custody upon remarriage to men who are not close relatives of the ward, based on the provisions outlining the 'best interest' of the child.⁹⁶ No data is available on how many women with young children remarry after divorce; how often mothers lose custody of their children upon remarriage; how often judges are called to consider the 'best interest' of the child; and whether specific, consistent, and fair criteria is used by judges to determine the 'best interest.' Furthermore, there is no evidence of sound sociological research that justifies the assumption that a mother's remarriage sufficiently challenges the 'best interest' of the child.

(2) Musawah Justification for Reform

- ❖ **On equal right to custody and guardianship of children:** The Qur'an does not distinguish between fathers and mothers where the upbringing of children is concerned. Even parents who are divorced should still exercise 'mutual consent and due consultation' (*Surah al-Baqarah* 2:233) with each other regarding the upbringing of their children: '[...] No mother shall be treated unfairly on account of her child. No father on account of his child.'

The classical jurists generally divided the rights and responsibilities of adults over their children into *hadanah* (physical care and custody) and guardianship. It was regarded more suitable to confer *hadanah* to women over men. In practice, many *Shari'ah* courts in pre-modern times granted mothers the guardianship of their orphaned children.

Loss of custody on the ground of the mother's remarriage is based on a Tradition of the Prophet, where he said to a divorced wife, 'You have the first right to look after [your child] unless you marry.' It is unfortunate that this Tradition has often been interpreted to mean that the mother loses the right to custody upon her remarriage, and that custody reverts to the father, regardless of whether this is in the child's best interest. However, it is possible to interpret this *hadith* as conferring upon the mother a prior right of custody over her young children before her remarriage, and if she remarries, then the mother and the father could have equal right to custody, and the case may be considered on its individual merits.

(3) Recommendations

- ❖ Ensure that women and men have the same rights and responsibilities as parents in matters relating to their children, and that determinations in custody and guardianship proceedings are decided based on the 'best interests of the child.'

⁹³ United Nations Treaty Collection, *supra* note 15.

⁹⁴ Welchman, *supra* note 17, p. 10.

⁹⁵ Embassy of the United States, 'Human Rights Report: Bahrain' (2012), available at: <http://bahrain.usembassy.gov/policy/human-rights-report.html>.

⁹⁶ Welchman, *supra* note 17, pp. 11-12.

(4) Good practices⁹⁷

- ❖ **Bangladesh, Central Asian Republics, Gambia, India, Malaysia, Pakistan, Senegal, Sri Lanka, Turkey:** Determine custody through the courts on the basis of the best interests of the child. This has led to an expansion of mothers' rights, as compared to more conservative interpretations of Muslim laws.
- ❖ **Central Asian Republics:** Custody and guardianship of children can be given to either parent, with the best interests of the child as the paramount consideration.
- ❖ **Malaysia:** In the best interest of the child, a mother can retain custody of her children upon remarriage.
- ❖ **Tunisia:** Both parents have equal rights in custody and guardianship during marriage. Upon divorce, the court decides custody on the basis of the best interests of the child. If custody is awarded to the mother, she also has guardianship rights as regards travel, schooling, and management of finances. The court may award full guardianship to the mother if the father is deceased or unable to exercise his duties. Regardless, the mother has an equal right to supervise the child's affairs.
- ❖ **Turkey:** In the event of separation or divorce, the rules regarding custody and guardianship do not discriminate between the father and the mother.

H. Right to Confer Nationality to Children

Reservation to Article 9.2 (withdrawal under consideration).⁹⁸

(1) Critical information

- ❖ **Women with foreign spouses cannot transmit nationality to spouses or children** (withdrawal under consideration).⁹⁹ However, Article 4 (b) of the Nationality Act (1963) stipulates that a person shall be considered Bahraini if the father is unknown, or if the relationship to the father has not been legally established.¹⁰⁰
- ❖ **Discriminatory nationality laws expose children to statelessness; State is unable to ensure protection of physical, moral, and intellectual development of stateless children.** Children of national women and non-national men can be rendered stateless in a variety of circumstances, including when: the father dies before the child's birth; the father is stateless and has no nationality to confer; the father holds a nationality but is unable to confer it; the father is unable or unwilling to take the necessary steps to secure a nationality for the child. The impact of statelessness on individuals is severe: Stateless persons face restrictions on their access to fundamental rights, including formal employment, public healthcare, state education, social welfare, official documents, judicial process, and the right to own and inherit property.¹⁰¹ Bahrain's large stateless population, comprising mainly the Bidun, put children at significant risk of becoming stateless.¹⁰²
- ❖ **Discriminatory nationality laws put strain on family unit.** Furthermore, research indicates that statelessness due to gender discrimination in nationality law has a dire effect

⁹⁷ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, p. 48.

⁹⁸ United Nations Treaty Collection, *supra* note 15.

⁹⁹ Bahrain SPR 2011, paras. 82, and 118-122; State party response 2013 to Questions 4 and 15.

¹⁰⁰ Women's Refugee Commission & Tilburg University. 'Briefing on Qatar, Iraq and Bahrain for the CEDAW Committee Pre-Session Working Group,' (July 2013), pp.1-2, available at:

http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/BHR/INT_CEDAW_NGO_BHR_14648_E.pdf.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*, p. 6.

on family unity in the MENA region. Sources of strain on the family structure include: repeated rejections by potential suitors in marrying or starting a family; threats to physical unification due to increased risk of detention and deportation; threats to financial stability due to lack of property and inheritance rights; and psychological strain due to social and institutional isolation, and at times, pressure to divorce to resolve the situation.¹⁰³ These findings undermine the very justification for the discrimination: Rather than protecting the family unit, discriminatory nationality laws can further restrict a family's healthy development and place great strain on its structure.

- ❖ **Available alternative mechanisms.** The State party justifies this discrimination by claiming that it prevents people from holding dual citizenship.¹⁰⁴ However, other states that do not recognise dual nationality address this question through a variety of mechanisms, including by requiring children to choose one of the nationalities at the age of 18.¹⁰⁵

(2) Recommendations

- ❖ Allow Bahraini women to transfer their nationality to their children, without discrimination, and ensure that children born to Bahraini women are given access to adequate shelter, food, health care, and education, irrespective of their father's nationality or official marital status.
- ❖ Enforce measures to ensure that children of Bahraini women who would otherwise be stateless, have access to citizenship.

(3) Musawah Justification for Reform

- ❖ The idea of nationality is a modern conceptualisation of statehood. There are no injunctions in the Qur'an or *Hadith* on this and Musawah maintains there are no religious impediments to granting women equal political and legal rights to pass on nationality to their children and foreign spouses, as equal citizens of the nation. Moreover, Constitutions of many Muslim-majority countries recognise the principles of equality before the law, and prohibit discrimination on the basis of gender. Several OIC member countries have already reformed their laws in recent years to extend this equal right to women.

(4) Good practices¹⁰⁶

- ❖ **Algeria:** Women married to foreigners can extend citizenship rights to their husbands and children.
- ❖ **Egypt, Morocco:** Women married to foreigners have the right to confer their citizenship to their children.
- ❖ **Lebanon:** By decree, foreign husbands and children of Lebanese women can apply for 'courtesy residency' permits to remain in Lebanon.

¹⁰³ Women's Refugee Commission, *Our Motherland, Our Country: Gender Discrimination and Statelessness in the Middle East and North Africa* (June 2013), available at:

<http://www.womensrefugeecommission.org/component/content/article/143-misc/1656-the-women-s-refugee-commission-launches-new-report-on-statelessness?highlight=YToxOntpOjA7czozMzoic3RhdGVsZXNzbnVzcyI7fQ==>.

¹⁰⁴ Bahrain SPR 2012, para. 118.

¹⁰⁵ Women's Refugee Commission & Tilburg University, *supra* note 98, p. 6.

¹⁰⁶ Available at <http://www.learningpartnership.org/citizenship>.

I. Inheritance

(1) Critical information

- ❖ **Female siblings receive one-half inheritance of male siblings.**¹⁰⁷ Women who act—sometimes as co- and other times as sole—providers and protectors of their families do not receive greater shares of inheritance to reflect their greater responsibilities. When arguments raise the link between a man's duty to provide maintenance and his privileged share of inheritance, it is never mentioned that a man's failure to provide maintenance does not disqualify him from double the share of a woman's inheritance.

(2) Musawah Justification for Reform¹⁰⁸

- ❖ Men's superior right to inheritance is frequently justified by scholars on the grounds that men have a 'degree of advantage' over women (*Surah al-Baqarah* 2:228) and that they are the protectors and providers (*qawwamun*) of the family (*Surah an-Nisa'* 4:34). Yet, in reality women, too, are providers and protectors. Traditionally, women's roles as homemaker, primary caregiver of children and elderly parents, and other forms of unpaid work in the home and on the land are crucial to family well-being and survival. But this unpaid contribution is not given recognition. The rise of women-headed households, dual-income families and women migrant workers who are compelled to leave their families to earn better wages mean that today women are also providing financially for their families. Musawah maintains that laws must take into account the socio-economic realities of women's lives and family life today. Under these circumstances, a right that is given on the assumption that only men provide for the family must be re-evaluated especially when socio-economic realities render the presupposition false.
- ❖ While many States parties argue that the inheritance laws are stipulated in the Qur'an, and thus cannot be changed or reformed, in reality, the traditional Muslim rules of inheritance were elaborated and systematised by the various schools of law through jurisprudential methods and interpretations. Many modern Muslim nation-states have adapted these rules from one of the major Sunni or Shiite schools of law, have combined rules from two or more different schools, or have created modern inheritance laws based loosely on traditional jurisprudence but suited for modern realities.
- ❖ An example of how the major schools of Islamic law differ can be seen in the case of the maximum amount of an estate female heirs can inherit. In the Shafi'i and Maliki schools, daughters and sisters can inherit a maximum of 2/3 of the estate; the residue would go to agnatic males, and, if there are none, to the public treasury. For the Hanbali and Hanafi schools, if there are no agnatic males, the female heirs can inherit the residue – it would not go to the public treasury. In the Jafari school, one or more daughters can inherit the entire estate outright if there is no son. Agnatic males are excluded. In some countries, bequests can be made to heirs, thus enabling parents to expand the right of daughters to inherit more, a step forward in redressing the discriminatory inheritance rules. Similarly, some countries allow for the estate to be shared in whatever proportion, if all beneficiaries agree.

(3) Recommendations

- ❖ Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which bar women from receiving an equal share of inheritance.

¹⁰⁷ SPR 2011 para. 80.

¹⁰⁸ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, p. 38-39.

(4) Good practices

- ❖ **Tunisia¹⁰⁹ and Iraq¹¹⁰**: Sunni schools of law adopt the Shiite practice where daughters can inherit an entire property in the absence of sons, thus excluding male agnates.
- ❖ **Egypt, Morocco, Tunisia¹¹¹**: The children of a predeceased son or daughter can inherit through an obligatory bequest.
- ❖ **Malaysia¹¹²**: Division of the deceased's property can be changed in whatever manner if all heirs agree to such a division.
- ❖ **Tunisia¹¹³**: Bequests can be made in favour of an heir and beyond the one-third limit if other heirs agree to it.
- ❖ **Egypt, Sudan, Iraq¹¹⁴**: Bequests can be made in favour of heirs up to one-third of the estate without the consent of the other heirs.

J. Uncodified Personal Status Law for Shiite Majority

Reservation to Article 2 (in order to ensure its implementation within the bounds of the provisions of the Islamic Shari'ah), and **Article 16** (in so far as it is incompatible with the provisions of the Islamic Shari'ah).¹¹⁵

(1) Critical information

- ❖ **New family law (2009) excludes majority Shiite community.**¹¹⁶ Abuses and discriminatory rulings for women from majority Shiite community in absence of codified law, concerning divorce, child custody, alimony, and inheritance.^{117 118 119 120}
- ❖ **Lack of political will to codify family law for Shiite community.** Members of the Council of Representatives have moved to withdraw 'Part 2' of the New Family Law concerning Shiites from Parliament; the State party is currently seeking to prepare society to accept codification by raising awareness of its importance.¹²¹ Local CSOs believe that the issue of 'sensitivity' around the promulgation of 'Part 2' of the New Family Law has been used by the Government as an excuse to avoid taking concrete steps to comply with the State's

¹⁰⁹ Collectif 95 Magheb-Egalité, *Guide to Equality in the Family* (2006), p. 140; John L. Esposito with Natana J. DeLong-Bas, *Women in Muslim Family Law* (2001), p. 109.

¹¹⁰ Esposito, *supra* note 107, p. 109.

¹¹¹ *Ibid*, p. 110.

¹¹² Section 15 (1), Small Estates (Distribution) Act, 1955 provides an option for all beneficiaries to agree as to the manner in which the estate should be distributed, ...unless it appears to be unjust or inequitable to do so.

¹¹³ Esposito, *supra* note 107, p. 109.

¹¹⁴ *Ibid*.

¹¹⁵ United Nations Treaty Collection, *supra* note 15.

¹¹⁶ Bahrain SPR 2011 para. 151.

¹¹⁷ Local CSOs confirmed the difficulty of securing relevant statistics from the Shiite *Shari'ah* courts, which only intensifies the challenges in assessing women's access to justice in the court system. Bahrain Women's Union, *supra* note 19, para. 28.

¹¹⁸ The Bahrain Pulse, 'Al Wefaq Islamic Society Rejects Family Law that Protects Women's Rights in Bahrain (22 May 2012), available at: <http://bahrainpulse.com/tag/womens-rights/>.

¹¹⁹ Human Rights Watch, 'World Report: Bahrain' (2012), available at: <http://www.hrw.org/world-report-2012/world-report-2012-bahrain>.

¹²⁰ Embassy of the US, 'Human Rights Report: Bahrain' (2012).

¹²¹ State party response 2013 to Question 21.

commitment to the CEDAW Convention.¹²²

(2) Musawah Justification for Reform

- ❖ The fact that some 20 NGOs, including women's rights and human rights activists, lawyers and businesswomen, have demanded for a codified family law to govern all Bahrainis, Sunnis and Shiites, does mean there is a significant segment of society that is ready for such an outcome.¹²³ The issue here, then, is more of political will and courage to do what is right and just in the face of opposition from a particular section of society that may not necessarily represent the majority voice. There is a need to recognise that resistance to reform towards equality and justice for women, and in this case for codification, stem from reasons beyond ostensible religious grounds, including political interests and power relations. Given the government's commitment to a codified family law for the Shiite community, and the strong advocacy by women's groups for such a law, the government should display leadership and the political will to do what is right and just for Bahraini society.

(3) Recommendations

- ❖ Clearly define executive steps to issue 'Part 2' of the New Family Law (*Law No. 19, 2009*) to include Shiite majority community, and to work towards an eventual unified law; and in the meantime, implement immediate and concrete measures to improve access to equality and justice for Shiite women.

¹²² Bahrain Women's Union, *supra* note 19, para. 27.

¹²³ Gulf News, *supra* note 21.

IV. CONCLUSION

The challenge here, really the biggest, biggest, biggest challenge facing women's rights scholars and activists, is to face the huge wave of discriminations against women just with the single words from conservatives that 'God says so.' This is the biggest challenge women have in Bahrain today.

—Ahmed, Researcher at religious and cultural affairs NGO that partners with women's rights activists and organisations. (27 September 2013)¹²⁴

The Bahraini State party should be commended for its implementation of the New Family Law (Part 1) (*Law No. 19, 2009*), in immediate accordance with Concluding observations 2008 paras. 38-39, and para. 47 on priority follow-up issues on the importance of issuing a codified family law.

However, the analysis of key issues related to marriage and family relations, as contained in Articles 2, 9, 15, and 16 of the CEDAW Convention, disclose a daily reality of widespread and systemic discrimination against Bahraini women and girls, impairing or nullifying their right to equality and justice, according to both universal human rights standards and Islamic teachings.

Furthermore, it is imperative to acknowledge the increased militarisation, crises in democracy, and continuing climate of impunity surrounding the grave human rights violations committed by the State party in 2011, as contexts in which women's rights activism becomes more critical, yet dangerous.

Although culture and religion are often used as an excuse for not fulfilling international obligations, there is always room for recognition of women's rights within cultural and religious frameworks. In many cases, what lies behind the State's refusal to act are political considerations, rather than regard for religious principles. The failure of past efforts at law reform—most notably, to promulgate 'Part 2' of the New Family Law for Bahrain's Shiite majority—must be critically examined.

Given the many voices in Bahrain—in both government and civil society—that recognise the possibility of reform of discriminatory laws made in the name of Islam, it is imperative that the Bahraini State party exercises the political will and leadership required to forge the necessary reform of discriminatory laws and practices, in order to fully comply with its obligations to the CEDAW Convention, and ensure equality and justice in the family.

¹²⁴ As quoted in: Sheherazade Jafari, *Traversing Religious-Secular Divides within Transnational Women's Movements: Women's Rights Advocacy in Muslim-Majority Countries*. Doctoral Dissertation, American University, Washington, DC (forthcoming, 2014).

V. 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.¹²⁵

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.¹²⁶

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.

¹²⁵ *Musawah Framework for Action, supra* note 3.

¹²⁶ *Musawah Framework for Action, supra* note 3.

VI. Annex: Glossary of Key Terms¹²⁷

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 about 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.

¹²⁷ Musawah, *CEDAW and Muslim Family Laws*, Annex 1: Glossary of Key Terms, *supra* note 10, p. 43-44.

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.

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>.

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