



musawah

For Equality in the Muslim Family

Musawah Thematic Report on Muslim Family Law: The Gambia

**61st CEDAW Session
Geneva, Switzerland
July 2015**

Musawah

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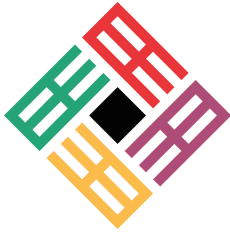
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Musawah Thematic Report on Muslim Family Laws: The Gambia 61st CEDAW Session July 2015

I. INTRODUCTION

A. Objective

Musawah, the global movement for equality and justice in the Muslim family, submits its twelfth Thematic Report on Muslim Family Law (and related concerns) for consideration by the CEDAW Committee in its review of the Republic of the Gambia, reporting before the 61st Session of the CEDAW Committee.¹

This is the CEDAW Committee's second engagement with the Republic of the Gambia, which acceded to the CEDAW Convention on 16 April 1993, without any reservations.²

Musawah's issues of concern and supplementary research take a critical look at the status of marriage and family relations, as largely 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 5 (*gender stereotypes; harmful practices*), 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 Gambian laws and practices that enforce *de jure* (direct) and *de facto* (indirect) discrimination against women in the following areas, discussed in order to relevant CEDAW Articles: **Early and forced marriage; equal rights and responsibilities in marriage; polygamy; access to divorce; and custody and guardianship of children.**

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.³

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 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.

³ 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.

Musawah would like to thank the women of the Gambia who have contributed their expertise, knowledge and stories. It is through the struggles and courage of these women that equality and justice in Muslim families will be achieved.

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 the lived realities of communities.⁴

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) 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) 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.⁵ 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.

Finally, research compiled is based on a close review of the Gambia's combined fourth and fifth periodic State party report (2013), the CEDAW Committee's list of issues and questions (2014), and the State party's reply to list of issues (2014).

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 Islamic jurisprudence—must be challenged to ensure equality and justice for women.

⁴ *Musawah Framework for Action*, available at: http://www.musawah.org/framework_action.asp.

⁵ 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.

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.⁶

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:⁷

- ❖ 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.⁸
- ❖ 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

⁶ 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.

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

⁸ 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.

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*).⁹

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.

III. KEY ISSUES: LIVED REALITIES, ISLAMIC JURISPRUDENCE, & REFORM

This section identifies critical issues of discrimination against women within the Muslim family law and *Syariah Penal Code Order (2013)*, under Articles 2, 5, 9, 15, and 16. The section also presents research from primary and 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. Early & Forced Marriage

(1) Critical information

- ❖ **No minimum legal age for marriage. Age of sexual consent for women is 18 years.**
The Children's Act, 2005 defines a "child" as a person under the age of eighteen years and

⁹ 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>. 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>.

PART IV section 24 states:¹⁰ “Subject to the provisions of any applicable personal law, no child is capable of contracting a valid marriage, and a marriage so contracted is voidable.”¹¹

- ❖ **Child marriage is prevalent.** Section 25 prohibits parents and guardians from betrothing, giving out children in marriage, and withdrawing children from school for the purpose of marriage. Any person who has sex with a girl under the age of 16 is guilty of a felony (except in the case of marriage); incest is also illegal.¹² However, in practice, girls are often married young due to the exception of personal laws.¹³
- ❖ **State has no provision through registration of marriage to provide evidence of the age of the couple to prevent early/forced marriages**¹⁴
- ❖ **There is pressure from some religious scholars emphasizing there is no age limit for marriage in Islam and justifying early marriage to prevent promiscuity and pregnancy outside marriage.**¹⁵
- ❖ **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.¹⁶ ¹⁷ 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.¹⁸
- ❖ **Early and forced marriage limits women and girls’ right to education, employment, and financial independence.**¹⁹ 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,²⁰ ²¹ ²² 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.²³ ²⁴

¹⁰ "CRC: Gambia. *United Nations Convention on the Rights of the Child*. United Nations Office of the High Commissioner for Human Rights, 28 May 2014. Web. 24 June 2015. Accessed at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGMB%2f2-3&Lang=en

¹¹ "Note on the Situation of Women in Gambia - 33rd Session of CEDAW." *FIDH*. International Federation of Human Rights, 12 July 2005. Accessed at: <https://www.fidh.org/International-Federation-for-Human-Rights/Africa/Gambia/Note-on-the-situation-of-women-in>.

¹² *Ibid.*

¹³ "Early Marriage Child Spouses." *Unicef-irc.org*. United Nations Children's Fund, Mar. 2001. Accessed at: <http://www.unicef-irc.org/publications/pdf/digest7e.pdf>

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 6, p. 31.

¹⁷ 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>.

¹⁸ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 6, p. 31.

¹⁹ The Beijing Platform for Action (BPFA), *supra* note 17; and CEDAW Committee General Recommendation No. 21, *supra* note 42.

²⁰ 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>.

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

²² Musawah, *CEDAW and Muslim Family Laws*, *supra* note 6, p. 31.

²³ *Ibid.*

²⁴ CEDAW Committee General Recommendation No. 21, *supra* note 17.

- ❖ **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.²⁵

(2) Musawah Justification for Reform

- ❖ **On minimum age of marriage:**²⁶ 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.²⁷ 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.

- ❖ **On forced marriage:**²⁸ 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.

²⁵ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 6, pp. 32-33.

²⁶ *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>.

²⁷ 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>.

²⁸ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 6, p. 32.

(4) Good practices

- ❖ **Minimum age of marriage:**²⁹
 - **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**³⁰
 - **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 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.

B. Equal Rights & Responsibilities

(1) Critical information

- ❖ **Husband is traditionally considered the head of the family** and takes responsibility for most of the decisions that affect the family, such as how money is spent and where to live.³¹
- ❖ **Women are subjected to the *pardah* (female seclusion).** This means that a married woman is confined to the home with very limited freedom of movement.

²⁹ *Ibid*, p. 45.

³⁰ *Ibid*.

³¹ Canada: Immigration and Refugee Board of Canada. "Gambia: Information on Muslim Women, Marriage and Divorce, and the Shari'a Law on Spousal Abuse." *Refworld*. The UN Refugee Agency, United Nations High Commissioner for Refugees, 1 May 1994. Accessed at: <http://www.refworld.org/docid/3ae6ad146c.html>

Visits to friends and even close relatives are prohibited. Many visitors are screened before entry into the home and the woman may not be allowed to entertain male visitors.³²

(2) Musawah Justification for Reform

- ❖ **On husband's right to authority.**³³ 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.**³⁴ 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.³⁵

(3) Recommendations

- ❖ Accord husband and wife equal rights and responsibilities in marriage, within a legal framework that recognises marriage as a partnership of equals.

³² Canada: Immigration and Refugee Board of Canada. "Gambia: Information on Muslim Women, Marriage and Divorce, and the Shari'a Law on Spousal Abuse." *Refworld*. The UN Refugee Agency, United Nations High Commissioner for Refugees, 1 May 1994. Accessed at: <http://www.refworld.org/docid/3ae6ad146c.html>

³³ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 6, pp. 26-28.

³⁴ *Ibid.*

³⁵ For more information, read on *Musawah's Knowledge Building Initiative on Qiwwamah and Wilayah*, *supra* note 9; 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.

- ❖ Take all appropriate measures to give married women equal right to determine their place of residence, in both law and practice.

(4) Good practices³⁶

- ❖ **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.

C. Polygamy

(1) Critical information

- ❖ **Prevalence of polygamy.** Polygamy is seen mark of prestige and status in the community³⁷ Islamic tradition allows for a man to marry up to four wives³⁸ Wives whose husbands enter a second or subsequent marriage do have the option to divorce.³⁹
- ❖ **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.^{40 41} Furthermore, the threat of polygamy can be used as a powerful means of control of the wife by the husband.⁴²

(2) Musawah Justification for Reform

- ❖ **On discouraging or prohibiting polygamy.**⁴³ 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,

³⁶ Musawah, *CEDAW and Muslim Family Laws*, supra note 6, p. 45.

³⁷ "Gambian Muslims and Islamic Practices." *Gambia*. 2009. Accessed at: <http://accessgambia.com/information/muslims-islam.html>

³⁸ *Ibid.*

³⁹ "Gambian Government Policy on Gender Issues." *Republic of The Gambia State House Online*. Government of the Gambia. Accessed at: <http://www.statehouse.gm/women1.htm>

⁴⁰ CEDAW Committee General Recommendation No. 21, supra note 17.

⁴¹ 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 6, p. 35).

⁴² Musawah, *CEDAW and Muslim Family Laws*, supra note 6, p. 35.

⁴³ *Ibid.*, pp. 33-36.

and that this could pose grounds for divorce. It is also possible for this clause to become 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 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 practices⁴⁴

- ❖ **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

(1) Critical information

- ❖ **Personal law governs divorce:** Constitution of The Gambia 1997 in its Sections 7c and f recognize both the Customary and Sharia as matters of personal law applicable to members of the communities to which they apply respectively. The Sharia Courts of jurisdiction over divorce.⁴⁵
- ❖ **Divorce (and marriage) must be registered within one month by either the husband, wife or wife's representatives. Wives have no legal right to advance notice regarding husband's intentions to divorce or give their approval.**⁴⁶

(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.'

⁴⁴ *Ibid*, p. 47.

⁴⁵ *Ibid*.

⁴⁶ *Ibid*.

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 practices⁴⁷

- ❖ **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.

E. Custody & Guardianship of Children

(1) Critical information

- ❖ **Custody:** Under personal law, Cadi Courts and District Tribunals have jurisdiction over matters regarding Muslim children. These courts will normally apply *Maliki* jurisprudence, which gives the mother custody of male children until puberty, the maximum age recognized for puberty in males being 15, and female children until marriage.⁴⁸
- ❖ Sharia considers husbands to be the natural head of the family, have sole responsibility for matters concerning the raising of children. If one parent is not Muslim then the children must live with the Muslim parent. If the mother moves more than seventy-two miles from the place of residence of the father she will lose custody.⁴⁹

(2) Musawah Justification for Reform

⁴⁷ *Ibid.*

⁴⁸ "The Gambia." *Reunite.org*. Reunite International Child Abduction Centre, 2005. Accessed at: <http://www.reunite.org/edit/files/Islamic%20Resource/gambia%20TEXT.pdf>

⁴⁹ "Gambian Government Policy on Gender Issues." *Republic of The Gambia State House Online*. Government of the Gambia. Accessed at: <http://www.statehouse.gm/women1.htm>

- ❖ **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.'

(4) Good practices⁵⁰

- ❖ **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.

III. 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

⁵⁰ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 6, p. 48.

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.⁵¹

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.⁵²

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.

⁵¹ *Musawah Framework for Action, supra note 4.*

⁵² *Musawah Framework for Action, supra note 4.*

IV. Annex: Glossary of Key Terms⁵³

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.

⁵³ Musawah, *CEDAW and Muslim Family Laws*, Annex 1: Glossary of Key Terms, *supra* note 6, 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>.

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.