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For Equality in the Muslim Family

Musawah Thematic Report on Muslim Family Law: Lebanon

**62nd CEDAW Session
Geneva, Switzerland
November 2015**

Musawah

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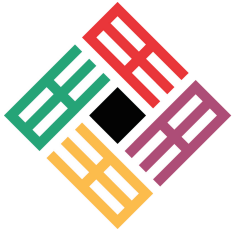
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**Musawah Thematic Report on Muslim Family Law:
United Arab Emirates (UAE)
62nd CEDAW Session
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62nd CEDAW Session

I. INTRODUCTION

Musawah, the global movement for equality and justice in the Muslim family, submits its 14th Thematic Report on Muslim Family Law (and related concerns) for consideration by the CEDAW Committee in its review of the Government of Lebanon, reporting before the 62nd Session of the CEDAW Committee.¹

This is the CEDAW Committee's third engagement with the Government of Lebanon, which acceded to the CEDAW Convention on 16 April 1997, and entered **reservations to Articles 9.2, and 16.1(c)(d)(f)(g)**.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; penal provisions that constitute discrimination against women*), 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 Lebanese 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: **Equal rights & responsibilities in marriage (gender stereotypes); male guardianship; access to divorce; custody & 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 The Government of Lebanon also entered a reservation to Article 29.2, declaring that it does not consider itself bound by the provisions of paragraph 1 of that article. See: 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 Rights 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.

II. LEGAL BACKGROUND

- ❖ **Lebanon has 15 distinct personal status laws for its recognized religions.** Article 9 of the Lebanese Constitution (1926) guarantees ‘respect for the system of personal status and religious interests of inhabitants from the various religious communities.’ As such, the State party leaves issues of personal status exclusively to the care of sectarian legislation.
- ❖ **Lebanon’s multiple personal status laws are principally administered by religious courts that enjoy a great deal of autonomy from the Government, and are subject to little or no oversight by state judicial bodies.**⁴
- ❖ **The structure of religious courts for Muslims is as follows:** First-instance courts are comprised of individual judges, with 19 Sunni and 20 Ja`fari courts across the country. There is also a Supreme Sunni Court and a Supreme Ja`fari Court, which act as appellate courts; these courts are comprised of a chief judge and two member judges, and are located in Beirut. Judges in the Ja`fari and Sunni courts are appointed based on the recommendation of the Supreme Islamic Authority, affiliated with the cabinet, pursuant to the approval of the Islamic Judiciary Council. The Islamic Judiciary Council is composed of the Mufti of Lebanon, the heads of the Supreme Courts, judges seconded to the general prosecution, and judicial inspectors. The courts are funded by the state.⁵
- ❖ **Lebanon has no civil code covering personal status issues such as marriage, divorce, and property rights.** This is despite a 1936 decree that, while it established Lebanon’s personal status order recognizing the ability of religions groups to apply their own laws to their communities, also gave every citizen the right to choose his or her religious affiliation, or to choose not to affiliate with any religion and theoretically be subject to a civil code on personal status matters.⁶
- ❖ **Although men and women are equal in Article 7 of the Lebanese Constitution (1926), both the Nationality Law and personal status laws explicitly discriminate against women.**^{7 8} In a review of 447 court cases and 72 interviews, Human Rights Watch found that Lebanon’s multiple religion-based personal status laws and the religious courts that apply them discriminate against women across the religions spectrum.⁹ In its last Concluding Observations, the CEDAW Committee called on Lebanon to ‘urgently adopt a

⁴ Human Rights Watch. HRW Submission to the CEDAW Committee of Lebanon’s Periodic Report 62nd Session, February 2015. See: <http://www.hrw.org/news/2015/02/01/human-rights-watch-submission-cedaw-committee-lebanons-periodic-report-62nd-session>.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Issam Fares Institute for Public Policy and International Affairs, American University of Beirut; Research, Advocacy & Public Policy-Making: Working Paper Series 8, “Women’s Citizenship Rights in Lebanon” edited by Maya W. Mansour and Sarah G. Abou Aad, May 2012. Available at: https://www.aub.edu.lb/ifi/public_policy/rapp/Documents/working_paper_series/20120504ifi_rapp_hrp_wps08_womens_citizenship_rights_in_lebanon_english.pdf

⁸ Tanseeq: For Ending Gender Based Violence in Lebanon, Issue 3, January-June 2011. Available at: <http://www.unfpa.org.lb/Documents/Tanseeq-issue-3-English.aspx>

⁹ *Supra* note 4.

unified personal status code which is in line with the Convention and would be applicable to all women in Lebanon, irrespective of their religion' but this has not been implemented.¹⁰

- ❖ **Although the Government of Lebanon and various NGOs have proposed revisions of discriminatory laws that exist (concerning marital rape and the penal code), and the Government claims that there are a number of bills and proposals being currently studied or monitored, there is a serious lag in full implementation.** The number of bills and proposals adopted by the legislative authority are considerably less than the number of bills and proposals submitted; the legal provisions amended most often concern issues and rights that fall outside of the 'private sphere;' the length of time it takes to study certain bills reveals that women's issues are not a top priority.^{11 12}

¹⁰ CEDAW 40th Session, CEDAW Committee Concluding Observations: Lebanon (8 April 2008), U.N. Doc. CEDAW/C/LBN/CO/3, [hereinafter Lebanon COBs 2008], para. 19. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fLBN%2fCO%2f3&Lang=en.

¹¹ CEDAW 62nd Session. Lebanon Fourth and fifth periodic reports (15 May 2014), U.N. Doc. CEDAW/C/LBN/4-5, [hereinafter Lebanon SPR 2014], para. 9. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fLBN%2f4-5&Lang=en.

¹² *Supra* note 4.

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

This section identifies critical issues of discrimination against women within the Muslim family law 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. *Equal Rights & Responsibilities (Gender Stereotypes)*

(1) Critical information:

- ❖ **Complementary rights and responsibilities between a husband and wife are codified in law.** Under both Sunni and Shia (as well as Druze and Christian) personal status laws, a husband is obligated to meet his wife's needs for food, clothing, shelter, and other living expenses during marriage. Spousal maintenance expires at the end of the marriage, although under Sunni and Shia personal status laws, the husband must continue to pay maintenance after divorce during the waiting period (defined as three menstrual periods or three months) during which the divorce is still revocable.¹³ In return, the wife is legally bound to obey her husband; she can be found legally recalcitrant under all personal status laws if she leaves the marital home and refuses to cohabit with her husband without reason that the religious courts consider legitimate. A recalcitrant wife is not entitled to spousal maintenance, and a finding of recalcitrance may hinder her custodial rights.¹⁴
- ❖ **Sectarian institutions perpetuate traditional and stereotypical gender roles.** Lebanon does not have a 'national' policy on family upbringing; while sectarian institutions also do not make explicit provisions for family upbringing, they disseminate the advice and suggestions through sermons delivered by clergy. These precepts and laws tend to become fixed, and do not match changing realities on the ground.¹⁵
- ❖ **Family responsibilities, including care-taking are generally seen as the mother and wife's responsibilities, even if she works outside the home.**¹⁶ Although spouses claim to generally share decision-making, women are consistently responsible for decision relating to household management and children's education, while men are responsible for financial decisions.¹⁷ Gender stereotyping in family roles has a significant effect on family dynamics, and a woman's life; the State party itself notes that tackling gender stereotypes and norms is as ending legal and judicial discrimination.¹⁸¹⁹ Crucially, marriage becomes a relationship of 'complementary' rights and responsibilities, in which the husband is

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Lebanon SPR 2014, *supra* note 11, para. 52.

¹⁶ *Ibid.*, para. 53.1.

¹⁷ *Ibid.*, para. 53.4.

¹⁸ *Ibid.*, para. 50.

¹⁹ *Ibid.*

functional provider and head of the household.

(2) Musawah Justification for Reform

- ❖ **On husband's right to authority.**²⁰ 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.**²¹ 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.²²

(3) Recommendations

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

²⁰ Musawah, *CEDAW and Muslim Family Laws*, pp. 26-28.

²¹ *Ibid.*

²² For more information, read on *Musawah's Knowledge Building Initiative on Qiwanah and Wilayah*, available at: <http://www.musawah.org/what-we-do/qiwanah-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>

(4) Good practices²³

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

B. Access to Divorce

(1) Critical information

- ❖ **Unequal right to divorce.** A Muslim man has the right to divorce his wife at any time without needing to provide justification. A Sunni woman may divorce her husband only for a number of specified reasons.²⁴
- ❖ **Compensation for divorce.** Both Sunni and Shiite women can also seek divorce by returning their dowry, and forfeiting any financial maintenance in exchange for divorce. If a man asks for a divorce, no compensation is required to be paid to the woman.²⁵

(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.’ This call for kindness and equity contradicts the provision allowing a man to divorce his wife at will.
- ❖ 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.

²³ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 20, p. 45.

²⁴ UNICEF: Gender Equality, 2011 Lebanon Country Profile. Available at:

<http://www.unicef.org/gender/files/Lebanon-Gender-Equality-Profile-2011.pdf>.

²⁵ *Ibid.*

- ❖ 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 practices²⁶

- ❖ **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.

C. Custody & Guardianship of Children

(1) Critical information

- ❖ **Discriminatory maternal custody and guardianship laws.** Although the Sunni courts raised the age of custody to 12 in 2011, Sunni judges have the right to rule other than in the child's best interest. In both Sunni and Shiite courts, women are generally awarded custody, but not guardianship—this means that women only have the right to raise their children until the custody period expires, and cannot enjoy any of the powers of guardianship.²⁷
- ❖ **Women's custody lost upon remarriage:** In the Shiite sect, the mother loses the right to custody of her children if she marries a man forbidden or permitted in law to marry the minor.²⁸ 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.
- ❖ **Maternal custody laws and discriminatory stereotypes affect one another.** Religious judges assess a woman's ability as care-taker and provider based on discriminatory stereotypes of motherhood and women generally, rather than an evaluation of whether the mother is a fit parent, and the child's best interest.²⁹

(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'

²⁶ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 20, p. 47.

²⁷ Lebanon SPR 2014, *supra* note 11, para. 210.2.1.

²⁸ *Ibid*, para. 210.1.2.

²⁹ *Supra* note 4.

(*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 practices³⁰

- ❖ **Algeria:**³¹ Mothers and fathers both have legal right to custody and guardianship.
- ❖ **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.

³⁰ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 20, p. 48.

³¹ Welchman, Lynn. 'Qiwamah and Wilayah as Legal Postulates in Muslim Family Laws,' in *Men in Charge: Rethinking Authority in Muslim Legal Tradition* (2015).

IV. 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.³²

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.³³

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.

³² *Musawah Framework for Action*, *supra* note 3.

³³ *Ibid.*

ANNEX 1: Research Methodology

This report draws on three methods of analysis that outline and challenge the structure of discrimination in Muslim family laws (MFL) and practices, and in this report, Islamic Criminal Law. 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.³⁴

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.³⁵ 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.

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.

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.³⁶

³⁴ *Musawah Framework for Action*, available at: http://www.musawah.org/framework_action.asp.

³⁵ 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.

³⁶ 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.

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:³⁷

- ❖ 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.³⁸
- ❖ Second, Muslim jurists have always considered legal rulings related to marriage and family as social and contractual matters, rather than spiritual or devotional matters. As such these rulings have always been open to consideration and change.
- ❖ Third, diversity of opinion has always been accepted and celebrated in Islamic jurisprudence, which is why there are multiple schools of law. The fact that different countries have different laws demonstrates that there is no unified, monolithic 'divine' law. We must recognise that contemporary codified laws are not God-given, but were adopted by humans serving in legislatures or committees. Humans can thus change the laws to be more just and equal.
- ❖ Fourth, laws or amendments introduced in the name of *Shari'ah* and Islam should reflect the values of equality, justice, love, compassion and mutual respect among all human beings. These values correspond with contemporary human rights principles.

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

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

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

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

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

Musawah draws the CEDAW Committee's attention to the classical Muslim marriage contract, which was patterned by classical Muslim jurists on the contract of sale, and establishes the wife's

³⁷ For more information, see *Musawah Framework for Action*, *supra* note 7.

³⁸ 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.

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*).³⁹

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.

³⁹ 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>.

ANNEX 2: Glossary of Key Terms⁴⁰

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.

⁴⁰ 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>.

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.