



musawah

For Equality in the Muslim Family

Musawah Thematic Report on Article 16: Kuwait and Oman

**50th CEDAW Session
Geneva, Switzerland
October 2011**

Musawah

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I. Introduction

This Musawah report takes a critical look at the status of marriage and family relations, as encapsulated in Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW' or 'CEDAW Convention'), in Kuwait and Oman, two of the Organisation of Islamic Cooperation (OIC) member states reporting before the 50th Session of the Committee on the Elimination of Discrimination against Women ('CEDAW Committee').

Musawah, the global movement for equality and justice in the Muslim family, seeks to advance human rights for women in Muslim contexts, in both their public and private lives. Musawah's objectives are:

1. To build and share knowledge that supports equality and justice in the Muslim family using a holistic approach that combines Islamic teachings, international human rights standards, national laws and constitutional guarantees of equality and non-discrimination, and the lived realities of women and men.
2. To build a critical mass of organisations, groups, and individuals that support, use, and promote the Musawah Framework for Action and are empowered to engage in the public discourse on Islam and women's rights.
3. To support the work of human rights mechanisms as well as groups and individuals working with these processes at the international, regional, and national levels to advance equality and justice in the Muslim family.

Musawah's first report on the CEDAW Convention, entitled *CEDAW and Muslim Family Laws: In Search of Common Ground*, was presented to the CEDAW Committee and the Office of the High Commissioner for Human Rights (OHCHR) in January 2011.¹

This is Musawah's first thematic report on Article 16. In the absence of shadow or alternative reports from civil society activists in Kuwait and Oman, it is hoped that this thematic report will provide critical information, analysis and recommendations that can be used as a resource during the constructive engagements with States parties and in follow-up activities on the Concluding Observations.

This report looks at the following issues related to marriage and family relations within Muslim contexts: dower² (sometimes used interchangeably, and mistakenly, with dowry³); child marriage, forced marriage, and choice in marriage; divorce; property rights within marriage and its dissolution; inheritance; domestic violence (e.g., marital rape);

¹ Musawah, *CEDAW and Muslim Family Laws: In Search of Common Ground* (2011), available at <http://musawah.org/docs/pubs/CEDAW%20&%20Muslim%20Family%20Laws.pdf>.

² Women Living Under Muslim Laws provides the following definition of dower (known in various contexts/languages as *Mahr/Mahari/Mehr*): 'The goods and/or cash to be given by the groom to the bride as a requisite of a valid Muslim marriage. It may be given at the time of the marriage ceremony (prompt), or promised at a later date or to be paid upon divorce or the death of the husband (deferred) or divided into prompt and deferred portions'. Women Living Under Muslim Laws, *Knowing our Rights: Women, family, laws and customs in the Muslim world* (2006), p. 10, available at http://www.wluml.org/sites/wluml.org/files/import/english/pubs/pdf/knowning%20our%20rights/kor_2006_en.pdf.

³ Women Living Under Muslim Laws provides the following definition of dowry: 'Trousseau, or the goods (and cash) brought into the marriage by the bride'. Ibid., p. 8.

obedience; guardianship (*wali*⁴); custody; and the ability to pass nationality to foreign spouses and/or children.

The report aims briefly to document the reality of these issues on the ground based on limited available resources. It also attempts to measure the realities against what each Government has stated and against the standards of equality and non-discrimination required by the CEDAW Convention.

The report closes with recommendations for measures the States parties can take in order to meet their obligations of promoting, protecting and fulfilling equality and non-discrimination in the area of marriage and family relations. These recommendations are based on application of the Musawah Framework for Action, which itself is based on the following three principles: (1) equality, non-discrimination, justice and dignity as the basis of all human relations; (2) full and equal citizenship for every individual; and (3) marriage and family relations based on equality and justice, with men and women sharing equal rights and responsibilities.⁵

A major challenge in producing this thematic report was locating data and primary sources, including individuals and/or women's rights organisations from the reporting countries who were willing or able to provide information on equality in the family. Given these difficulties, Sections III and IV on Kuwait and Oman only list the discriminatory provisions in the two countries' family laws based on readily available sources in English and do not provide detailed analysis of the actual situation on the ground. Every effort was made to find credible, varied and balanced information and to use full citations throughout.

⁴ Women Living Under Muslim Laws defines a *wali* in the context of marriage as 'a marriage guardian. Usually recognized by some Schools as the father or paternal grandfather who has authority to contract the marriage on behalf of the bride'. Ibid., p. 12.

⁵ See the full Musawah Framework for Action at http://www.musawah.org/framework_action.asp.

II. The CEDAW Committee and Article 16 on Marriage and Family Relations

In the Musawah report entitled *CEDAW and Muslim Family Laws: In Search of Common Ground*, it was noted that the CEDAW Committee generally addresses three categories or topics related to Muslim family laws and practices.⁶ First, the Committee has written and commented extensively on reservations to the Convention. Second, it notes with concern discrepancies between *Shari'ah* law and the CEDAW Convention and how States parties' legal systems deal with such discrepancies. Third, it regularly makes inquiries and recommendations on issues related to marriage and family relations in Muslim contexts, urging States parties to end discrimination against women in law and practice.

The Committee has elaborated on Article 16 of the CEDAW Convention in 1994 and 1998. In its 1994 General Recommendation number 21 on equality in marriage and family relations,⁷ the Committee made a number of assertions that can be applied to Muslim contexts, including in relation to polygamy, division of matrimonial assets; inheritance, right to choose a spouse, and right to pass nationality to one's spouse. On polygamy, for example, the CEDAW Committee stated, '[p]olygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited'.⁸ On a woman's right to marry, it stated, '[a] woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being'.⁹

In its 1998 statement on reservations,¹⁰ the CEDAW Committee noted 'with alarm' the number of States parties that have entered reservations to Article 16. Many of these 'claim[] that compliance may conflict with a commonly held vision of the family, based, inter alia, on cultural or religious beliefs'.¹¹ In response, the Committee unequivocally asserted that States should discourage any notion of inequality in the home, and that 'neither traditional, religious or cultural practice ... can justify violations of the Convention'.¹² It went on to find that reservations to Article 16 'are incompatible with the Convention and therefore impermissible and should be reviewed and withdrawn'.¹³

The Committee has also increasingly noted in Concluding Observations that reservations to Article 16 go 'against the object and purpose' of the Convention, and therefore must be withdrawn.¹⁴ It has also done so in instances where the reservations were based on arguments related to Islam or because of sensitivities of minority Muslim communities.¹⁵

⁶ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 1, pp. 6-10

⁷ CEDAW General Recommendation number 21: Equality in marriage and family relations (1994), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>.

⁸ *Ibid.*, para. 44.

⁹ *Ibid.*, para. 16.

¹⁰ See 'Report of the Committee on the Elimination of Discrimination Against Women (Eighteenth and nineteenth sessions)', A/53/38/Rev.1 (1998), pp. 47-50, available at <http://www.un.org/womenwatch/daw/cedaw/reports/18report.pdf>

¹¹ *Ibid.*, para. 12.

¹² *Ibid.*, paras. 12 and 17.

¹³ *Ibid.*, para. 17.

¹⁴ See e.g., Algeria Concluding Observations, U.N. Doc. CEDAW/C/BHR/CO/2 (2005), para. 23; Bahrain Concluding Observations, U.N. Doc. CEDAW/C/BHR/CO/2 (2008), para. 16; and United Arab Emirates Concluding Observations, U.N. Doc. CEDAW/C/SR.914 (2010), para. 21.

¹⁵ See e.g., India Concluding Observations, U.N. Doc. CEDAW/C/INC/CO/3 (2007), para. 11; Singapore Concluding Observations, U.N. Doc. CEDAW/C/SGP/CO/3 (2007), paras. 10 and 11.

III. Kuwait

❖ Reservations

Kuwait has entered the following reservations to the CEDAW Convention relating to marriage and family life:¹⁶

- 'The Government of Kuwait reserves its right not to implement the provision contained in article 9, paragraph 2, of the Convention, inasmuch as it runs counter to the Kuwaiti Nationality Act, which stipulates that a child's nationality shall be determined by that of his father'; and
- 'The Government of the State of Kuwait declares that it does not consider itself bound by the provision contained in article 16 (f) inasmuch as it conflicts with the provisions of the *Islamic Shariah*, Islam being the official religion of the State'.

❖ Governing legal structure

- *Shari'ah* courts have jurisdiction over personal status laws for Muslims in Kuwait.
- Personal status laws cover family-related issues such as marriage, divorce, maintenance, custody, and inheritance in Kuwait.¹⁷
- The courts apply different interpretations of Muslim laws depending on whether they are being applied to Sunni (Maliki or Hanbali) or Shiite (Jafari) Muslims.¹⁸ This can result in different interpretations and outcomes for the same issues, such as custody, inheritance, and marriage.¹⁹
- Where there is no specific reference and for purposes of interpretation, the Kuwaiti law requires reference to the prevalent Maliki opinion or by default to the 'general principles of the school'.²⁰

❖ Marriage

- The minimum age for marriage in Kuwait is 15 for women and 17 for men.²¹
- Law prohibits Muslim women from marrying men of other faiths, but Muslim men may marry women of other faiths (though there may be strong economic and societal pressures for the women to convert).²²
- Under the personal status laws, Sunni women are not able to conclude their marriage contracts without the consent of their *walis* (guardians).²³ Guardians are not required for Shiite women.²⁴

¹⁶ See 'Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women', U.N. Doc. CEDAW/SP/2010/2 (2010), p. 14, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/319/29/PDF/N1031929.pdf>.

¹⁷ Foreign Law Guide, 'Current Sources of Codes and Basic Legislation in Jurisdictions of the World: Kuwait', 2010.

¹⁸ Embassy of the United States, Kuwait, 'Family Law' circular, available at http://kuwait.usembassy.gov/region_specific_information/family-law-in-kuwait.html.

¹⁹ U.S. Department of State, '2010 Human Rights Report: Kuwait' (April 8, 2011), available at <http://www.state.gov/g/drl/rls/hrrpt/2010/nea/154465.htm>.

²⁰ Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Developments and Advocacy*, Amsterdam University Press (2007), p. 45.

²¹ Kuwaiti State party report, U.N. Doc. CEDAW/C/KWT/3-4, para. 11, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/442/88/PDF/G1044288.pdf?OpenElement>.

²² U.S. Department of State, '2010 Human Rights Report: Kuwait', *supra* note 19.

²³ Freedom House, *Women's Rights in the Middle East and North Africa, Gulf Edition*, 'Special Report Section: Kuwait' (2009), available at <http://www.freedomhouse.org/template.cfm?page=384&key=171&parent=16&report=76>.

- A woman's compliance with her 'matrimonial duties' may be tied to her right to receive maintenance (financial support in the form of money, food, housing, clothing, etc.) from her husband. For example, her 'unjustified' refusal to cohabit with her husband and/or her working outside the home (if perceived to go against the interest of the family) may be cause for her to forfeit her right to maintenance.²⁵
- Polygamy is permitted with minimal restrictions that are broadly defined, such as that the husband is able to be just and provide for each wife equally.²⁶ A Kuwaiti man is permitted to marry up to four wives.

❖ Dissolution of Marriage

- A woman's ability to petition for divorce is limited, and may vary depending on whether she is Sunni or Shiite.²⁷
- Generally, a Kuwaiti woman is able to petition for divorce if she is able to prove, for example: injury, her husband's absence for more than a year without legitimate excuse, and/or non-payment of maintenance.²⁸
- However, women face severe difficulties in proving the above due to, *inter alia*, high standards of proof (e.g., two male witnesses required to prove abuse²⁹); reluctance to pursue the claim; and/or bias and unsympathetic police and judicial attitudes.³⁰
- Neither courts following Sunni schools of law nor courts following Shiite schools of law permit polygamy as a ground for divorce by the first wife,³¹ unless this is specifically provided for in the marriage contract.³²

❖ Violence against women

- In Kuwait, rape is criminalised, though marital rape is not.³³
- There is no specific provision in Kuwaiti law for 'domestic violence' or 'sexual harassment'.

❖ Inheritance Rights

- Inheritance laws differ according to whether the Kuwaiti courts are applying their interpretation of Sunni or Shiite laws.
- Under Kuwaiti law, a daughter in a Shiite family may inherit an entire property in the absence of a male heir, whereas in the same circumstance a daughter in a Sunni family may only inherit a portion of the property, with the balance of the property going to the remaining male heirs of the deceased.³⁴

²⁴ Ibid.

²⁵ Welchman, *Women and Muslim Family Laws in Arab States*, *supra* note 20, p. 173, quoting the Kuwaiti Personal Status Laws, articles 87-90.

²⁶ Ibid.

²⁷ Embassy of the United States, Kuwait, 'Family Law' circular, *supra* note 18.

²⁸ Kuwaiti State party report, *supra* note 21, paras. 112 and 113.

²⁹ U.S. Department of State, 'Forced Marriage Flyer – Kuwait', available at http://www.travel.state.gov/travel/tips/safety/safety_5477.html.

³⁰ Freedom House, 'Special Report Section: Kuwait', *supra* note 23, footnote 18.

³¹ Ibid.

³² Embassy of the United States, Kuwait, 'Family Law' circular, *supra* note 18.

³³ U.S. Department of State, '2010 Human Rights Report: Kuwait', *supra* note 19.

³⁴ Ibid.

❖ **Nationality**

- Kuwaiti women are unable to pass their nationality to their children or to their foreign-born spouses, whereas Kuwaiti men are able to pass on their nationality.³⁵

❖ **2004 CEDAW Committee Concluding Observations**

- On reservations: 'The Committee requests the State party to provide, in its next report, comprehensive information on the effect of its reservations on the implementation of the provisions of the Convention and the situation of women in Kuwait, and in this regard, draws attention to its statement on reservations and its guidelines for the preparation of reports'.³⁶
- On marriage and family relations: 'The Committee is also concerned that provisions in the Personal Status Act and the Civil Code establish different rights and responsibilities for women and men in issues related to marriage and family relations, including in regard to the minimum age of marriage for women and men; divorce; and guardianship of children'.³⁷
- On minimum age of marriage: 'The Committee urges the State party to raise the minimum age of marriage for women and men to 18 years, in line with the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child'.³⁸

³⁵ Human Rights Watch, Kuwait Country Summary (2010), available at http://www.hrw.org/sites/default/files/related_material/kuwait.pdf.

³⁶ Kuwait Concluding Observations, U.N. Doc. CEDAW/C/KWT/CO/2 (2004), para. 61, available at <http://www2.ohchr.org/english/bodies/cedaw/docs/co/KUWAITCO30.pdf>.

³⁷ *Ibid.*, para. 66.

³⁸ *Ibid.*, para. 67.

IV. Oman

❖ Reservations

Oman has entered the following reservations to the CEDAW Convention relating to marriage and family life:

- 'All provisions of the Convention not in accordance with the provisions of the Islamic sharia and legislation in force in the Sultanate of Oman'; and
- 'Article 16, regarding the equality of men and women, and in particular subparagraphs (a), (c), and (f) (regarding adoption)'.³⁹

❖ Governing legal structure

- All laws are issued by decree of the Sultan and the Cabinet.⁴⁰
- Muslim family law issues are governed by Personal Status Law, adopted by decree in 1997.⁴¹ The Personal Status Law covers issues related to inheritance, marriage, divorce, and child custody.⁴²
- *Shari'ah* courts adjudicate personal status cases and follow the Ibadi school of law, generally considered to be one of the more conservative schools.⁴³
- Where there is no specific reference and for purposes of interpretation, the Omani law has a general residual reference to 'the principles of the Islamic shari'a most appropriate to the provisions of this law'.⁴⁴
- In less populated areas, tribal laws and customs are frequently used to adjudicate disputes, including those related to marriage and family relations.⁴⁵

❖ Marriage

- Although Omani law prohibits marriage under the age of 18 for both men and women, marriage of girls under this age is still widely practised and accepted by Omani custom.⁴⁶
- According to a 2005 study, about 17 per cent of Omani girls and women aged 15 to 19 are married, as are about 60 per cent of those aged 20 to 24.⁴⁷
- Although by law an Omani woman has the freedom to choose her spouse and her consent is necessary for a valid marriage contract,⁴⁸ in reality she often faces societal pressure to accept her family's choice.⁴⁹

³⁹ See Oman reservations, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-8&chapter=4&lang=en.

⁴⁰ Foreign Law Guide, 'Current Sources of Codes and Basic Legislation in Jurisdictions of the World: Oman' (2010).

⁴¹ Welchman, *Women and Muslim Family Laws in Arab States*, *supra* note 20, p. 40.

⁴² Freedom House, *Women's Rights in the Middle East and North Africa, Gulf Edition*, 'Special Report Section: Oman' (2009), available at <http://www.freedomhouse.org/template.cfm?page=384&key=172&parent=16&report=76>.

⁴³ Foreign Law Guide, 'Current Sources of Codes and Basic Legislation in Jurisdictions of the World: Oman', *supra* note 40.

⁴⁴ Welchman, *Women and Muslim Family Laws in Arab States*, *supra* note 20, p. 45.

⁴⁵ See UNHCR, 'Freedom in the World – Oman', available at <http://www.unhcr.org/refworld/country,,,OMN,4562d8cf2,4a6452939,0.html>.

⁴⁶ Oman State party report, U.N. Doc. CEDAW/C/OMN/1, para. 239, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/437/56/PDF/G1043756.pdf?OpenElement>.

⁴⁷ Hoda Rashad, Magued Osman, and Farzaneh Roudi-Fahimi, 'Marriage in the Arab World', Population Reference Bureau(2005), p. 3.

⁴⁸ Oman State party report, *supra* note 46, para. 238.

- Omani women are not free to marry men of other faiths whereas Omani men are free to marry women of other faiths.⁵⁰
- Dower (*mahr*) is paid to the woman in exchange for her consent to be married.⁵¹ This has been known, particularly in villages and rural areas, to result in women being forced into unwanted marriages by parents who are tempted by the high dower payments.⁵²
- Polygamy is permitted in Oman with minimal restrictions that are broadly defined, such as that the husband must be able to be equal and just with each wife. By law, Omani men are permitted to marry up to four women.⁵³

❖ Dissolution of Marriage

- A woman is permitted to petition for a divorce under one of the following eight grounds: illness, non-payment of dower, ill-treatment or discord, failure to provide, imprisonment of spouse, absence/disappearance, prolonged sexual abstinence and repudiation, and at the instance of the wife/no-fault.⁵⁴
- Where the divorce is instigated by the wife, she is obligated to return the dower.⁵⁵

❖ Violence against women

- Whereas Omani law criminalises some forms of rape, it does not criminalise marital rape, nor does it specifically address domestic violence or sexual harassment.⁵⁶ Neither does Omani law criminalise female genital mutilation, which is reportedly still a broadly accepted practice, especially in rural areas.⁵⁷

❖ Inheritance Rights

- Women enjoy equal rights as men to own land,⁵⁸ although wives, daughters and sisters inherit half that of husbands, sons and brothers.

❖ Nationality

- Omani women are not permitted to pass their nationality to their foreign-born husbands; but Omani men are permitted to do so to their foreign-born wives.⁵⁹
- Women who marry foreigners cannot pass their nationality to their children, but men with foreign spouses are able to do so.⁶⁰

⁴⁹ Freedom House, 'Special Report Section: Oman', *supra* note 42, p. 5.

⁵⁰ *Ibid.*

⁵¹ Oman State party report, *supra* note 46, para. 241.

⁵² Saleh Al Shaibany, 'High dowries putting strain on marriages', *Times of Oman* (October 6, 2010), available

at <http://www.timesofoman.com/searchdetail.asp?cat=&detail=39528&rand=66YQNYTeUwWajxnv3NkoCXoXfh>.

⁵³ Welchman, *Women and Muslim Family Laws in Arab States*, *supra* note 20, p. 81.

⁵⁴ Oman State party report, *supra* note 46, para. 243.

⁵⁵ Freedom House, 'Special Report Section: Oman', *supra* note 42, p. 5.

⁵⁶ U.S. Department of State, '2010 Human Rights Report: Oman' (April 8, 2011), available at <http://www.state.gov/g/drl/rls/hrrpt/2010/nea/154470.htm>.

⁵⁷ *Ibid.*

⁵⁸ Women Living Under Muslim Laws, 'Oman: Oman women get equal rights to own land', available at <http://www.wluml.org/node/4923>.

⁵⁹ Asma Barlas, 'Fighting for Muslim women's rights', *BBC News* (October 27, 2008), available at <http://news.bbc.co.uk/2/hi/7689897.stm>.

⁶⁰ *Ibid.*

V. The Musawah Framework for Action

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.⁶¹

Most family laws and practices in today's Muslim countries and communities, including in Kuwait and Oman, are based on theories and concepts that were developed by medieval/classical jurists (*fuqaha*) in vastly different historical, social and economic contexts. In interpreting the Qur'an and the *Sunnah*, classical jurists were guided by the social and political realities of their age and a set of assumptions about law, society and gender that reflected the state of knowledge, normative values and patriarchal institutions of their time. The idea of gender equality had no place in, and little relevance to, their conceptions of justice. It was not part of their social experience. The concept of marriage itself was one of domination by the husband and submission by the wife. Men were deemed to be protectors of women and the sole providers for the household, such that their wives were not obliged to do housework or even suckle their babies. Women, in turn, were required to obey their husbands completely.

This is the source of the dominant idea that persists today that men and women cannot be equal in marriage because 'Islam' has assigned them complementary and reciprocal roles and responsibilities.

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

The Musawah Framework for Action refutes this argument, declaring that equality in Muslim family laws is possible, and that such laws must change to ensure equality, fairness, justice and dignity for men, women and children within family relationships. Several basic concepts in Islamic legal theory lay the foundation for this claim:⁶²

- The distinction between *Shari'ah*, the revealed way, and *fiqh*, the science of Islamic jurisprudence. Much of what is deemed to be 'Islamic law' today is *fiqh* and not divine law, and therefore is human, fallible and changeable.⁶³
- The categorisation of legal rulings into '*ibadat* (devotional/spiritual acts) and *mu'amalat* (transactional/contractual acts). The laws regulating marriage and family come under the *mu'amalat* category, which regulate relations between humans, and therefore remain open to rational consideration and change.⁶⁴

⁶¹ See Musawah Framework for Action, *supra* note 5.

⁶² For more detailed discussions and references, see the following chapters in *Wanted: Equality and Justice in the Muslim Family*, edited by Zainah Anwar, Musawah (2009): Ziba Mir-Hosseini, 'Towards Gender Equality: Muslim Family Laws and the *Shari'ah*'; Muhammad Khalid Masud, '*Ikhtilaf al-Fuqaha: Diversity in Fiqh as a Social Construction*'; and Khaled Abou El Fadl, 'The Human Rights Commitment in Modern Islam'.

⁶³ 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 5.

⁶⁴ See Musawah, *CEDAW and Muslim Family Laws*, *supra* note 1, p. 23.

- Diversity of opinion (*ikhtilaf*) in the *fiqh* tradition has led to multiple schools of law, resulting in the huge variety and diversity of provisions in Muslim family laws today. There is no one unified, monolithic, divine Islamic law governing human relations. Within the context of the modern state, we must recognise and engage with this diversity of opinions to determine how best to serve the public interest (*maslahah*) and meet the demands of equality and justice.
- Justice is inherent to the philosophy of law in Islam; thus laws or legal 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.

Contemporary Muslim family laws, whether codified or uncodified, are not divine, but are based on centuries-old, human-made *fiqh* interpretations that were enacted into law by colonial powers and national governments. Almost every Muslim country has a different family or personal law, enacted by a legislative body, and these laws can and have been amended multiple times in different countries.

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. For instance, as the injustices of slavery became increasingly recognised and the conditions emerged for its abolishment, laws and practices related to slavery were reconsidered and the classical *fiqh* rulings that recognised slavery became obsolete. Likewise, Muslim family laws and practices can and must evolve to reflect the justice of our times.

VI. Recommendations and Rights-Based Examples

Below are a set of recommendations for reform in areas where discrimination in marriage and family relations was identified for both Kuwait and Oman. The recommendations are then explained from the perspective of the Musawah Framework, which promotes equality and justice within Muslim families and family laws. Where available, examples of rights-based laws from other OIC countries are provided for the specific issues.

❖ Marriage

Recommendations

- Equal marriage age for both men and women, set at 18, the age of majority.
- No requirement for a guardian's consent/approval.
- Abolition of polygamy in law and in practice, as polygamy constitutes harm for women and children.

Musawah Framework

- **Child marriage.**⁶⁵ The Qur'an does not provide any specification for age of marriage. *Surah an-Nisa'* 4:6 requires only that orphans be found to be of sound judgment before they marry, which would indicate that he/she must reach the age of majority before being allowed to marry. Furthermore universal human rights standards prohibit child marriage, defined as marriage under the age of eighteen.⁶⁶ All members of the OIC have ratified the Convention on the Rights of Children, including Kuwait and Oman. There is also overwhelming evidence demonstrating the negative physical, sexual, psychological, economic and other effects of child marriage on girls.
- **Capacity to enter into marriage.**⁶⁷ There are no verses in the Qur'an and no references in *hadith*⁶⁸ that stipulate guardianship as a condition for marriage. In the absence of such injunctions, 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.
- **Polygamy.**⁶⁹ 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 others, 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 be a ground for divorce. It is thus also possible

⁶⁵ For fuller arguments, see *Ibid.*, pp. 30-32.

⁶⁶ See e.g., Convention on the Rights of the Child, Article 1.

⁶⁷ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 1, pp. 32-33. Musawah is currently undertaking a major research project on the Qur'anic 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 institutionalizing, justifying and sustaining a patriarchal model of families in Muslim contexts.

⁶⁸ *Hadith* are the sayings and/or deeds of Prophet Muhammad as recounted by his followers. A *hadith* has two parts: the first part cites the narrator(s), and the second part their recounting of the Prophet Mohammad's deeds/saying. The veracity of the *hadith* is dependent on the credibility of the narrator(s). See Musawah, *CEDAW and Muslim Family Laws*, *supra* note 1, p. 43.

⁶⁹ *Ibid.*, pp. 33-36.

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.

Rights-Based Examples from Other OIC Countries

<p>Minimum age of marriage⁷⁰</p>	<p>Algeria: The minimum age of marriage is 19 for both males and females.</p> <p>Bangladesh: The minimum age is 18 for females and 21 for males; exceptions are not permitted.</p> <p>Morocco and Sierra Leone: The minimum age is 18 for both males and females.</p> <p>Turkey: The minimum age is 18 for females.</p>
<p>Women's capacity for marriage⁷¹</p>	<p>Bangladesh, Pakistan, Sri Lanka: A <i>wali</i> (guardian) is not required for Hanafi women who have reached puberty.</p> <p>Kyrgyz Republic, Turkey, Uzbekistan: A <i>wali</i> is not required.</p> <p>Morocco: A woman gains the capacity to contract her own marriage at the age of majority.</p> <p>Tunisia: Both husband and wife have the right to contract their marriage themselves or appoint proxies. The consent of a <i>wali</i> is not required, provided that both are of the legal age of consent.</p>
<p>Monogamy / Polygamy⁷²</p>	<p>Tunisia, Turkey, Kyrgyz Republic, Tajikistan, Uzbekistan: Polygamy is prohibited.</p> <p>Saudi Arabia, Syria, Jordan, Egypt, Lebanon, Bahrain (for Sunnis only): 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.</p>

❖ **Dissolution of marriage**

Recommendation

- Equal rights and access for both men and women to matters related to the dissolution of marriage. This includes with regards to issues such as grounds for divorce, standards of proof, custody and maintenance issues.

Musawah Framework

- Various *fiqh* schools have provided for more egalitarian access to divorce, such as delegated divorce (*talaq tafwid* or *'esma*, in which the marriage contract may stipulate that the wife has a right to unilaterally repudiate the marriage without

⁷⁰ See *CEDAW and Muslim Family Laws*, *supra* note 1, Annex 2: Table of Rights-Based Laws in the Muslim World, p. 45.

⁷¹ *Ibid.*, p. 46.

⁷² *Ibid.*, p. 46.

cause), divorce for cause with no return of dower (*fasakh*) and divorce for breach of stipulations as contracted by the spouses (*taqliq*). It is thus possible for States to formulate divorce laws which provide equal rights at the dissolution of marriage as required under Article 16(c).

Rights-Based Examples from Other OIC Countries

<p>Equal right to divorce⁷³</p>	<p>Indonesia: All divorces must go through the court. The six grounds for divorce are available to both husbands and wives.</p> <p>Morocco: Dissolution of marriage is a prerogative that may be exercised equally by both husband and wife.</p> <p>Tunisia: Divorce shall only take place in court. There are equal grounds for divorce for husband and wife.</p>
<p>Delegated right to divorce (<i>talaq tafwid</i> or '<i>esma</i>)⁷⁴</p>	<p>Bangladesh, Pakistan, Iraq, Jordan, Morocco, Syria: A husband may delegate his unilateral right to divorce his wife, permitting her to pronounce <i>talaq</i> upon herself (<i>talaq tafwid</i> or '<i>esma</i>). The wife's right to financial entitlements remains preserved.</p>

❖ **Violence against women**

Recommendation

- Criminalisation of marital rape.

Musawah Framework

- 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'.⁷⁵ 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, have repeatedly underscored their conviction that marital rape is an unlawful form of violence against women and should thus be criminalised.⁷⁶

Rights-Based Examples from Other OIC Countries

<p>Marital rape</p>	<p>Tunisia,⁷⁷ Turkey⁷⁸: Marital rape is criminalised under the Penal Code.</p>
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⁷³ Ibid., p. 47.

⁷⁴ See WLUML, *Knowing Our Rights*, supra note 2, pp. 267-271

⁷⁵ Hadith from Imam Ghazzali, *Ihya Ulum-Id-Din, Volume II*, p.32.

⁷⁶ See e.g., Singapore Concluding Observations (2007), supra note 15, para. 28.

⁷⁷ Immigration and Refugee Board of Canada, *Tunisia: Domestic violence, legislation and protection available to victims (2007-2009)*, 24 November 2009, TUN103273.FE, available at <http://www.unhcr.org/refworld/docid/4b20f04a3c.html>.

⁷⁸ 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>.

❖ Inheritance Rights

Recommendation

- Women are able to inherit equally with men.

Musawah Framework

- Men's superior right to inheritance is frequently justified by scholars on the grounds that men have a 'degree of advantage' over women (Qur'an, *Surah al-Baqarah* 2:228) and that they are the protectors and providers (*qawwamun*) of the family (Qur'an, *Surah an-Nisa'* 4:34). Yet in reality, women are also 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. 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.⁷⁹ 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.

⁷⁹ See the section on Inheritance Reform on the Sisters in Islam website, http://www.sistersinislam.org.my/files/downloads/inheritance_reform_on_rights.pdf.

Rights-Based Examples from Other OIC Countries

Daughters exclude collateral male agnates	Tunisia⁸⁰ and Iraq⁸¹ : Sunni schools of law adopt the Shiite practice where daughters can inherit an entire property in the absence of sons, thus excluding male agnates. ⁸²
Right of orphaned grandchildren to inherit	Egypt, Morocco, Tunisia⁸³ : The children of a predeceased son or daughter can inherit through an obligatory bequest. ⁸⁴
Bequests can be made to heirs	Tunisia⁸⁵ : Bequests can be made in favour of an heir and beyond the one-third limit if other heirs agree to it. ⁸⁶ Egypt, Sudan, Iraq⁸⁷ : Bequests can be made in favour of heirs up to one-third of the estate without the consent of the other heirs.

❖ **Nationality**

Recommendation

- Women have equal rights to men in passing their nationality to their children and foreign-born spouses.

Musawah Framework

- The idea of nationality is a modern conceptualisation of statehood. There are no injunctions in the Qur'an or *hadith* on this issue. 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 a nation.

⁸⁰ See Collectif 95 Magheb-Egalité, *Guide to Equality in the Family*, Women's Learning Partnership Translation Series, Syracuse University Press (2006), p. 140; John L. Esposito with Natana J. DeLong-Bas, *Women in Muslim Family Law*, Syracuse, N.Y.: Syracuse University Press, 2d ed. (2001), p. 109.

⁸¹ See Esposito, *Women in Muslim Family Law*, *supra* note 80, p. 109.

⁸² According to traditional Sunni inheritance rules, in the absence of a son, one daughter can inherit up to one-half of the estate and two or more daughters can share in two-thirds of the estates, but the remainder must revert to a male agnate residuary, regardless of how close or distant a relative he is. Sisters in Islam, 'Inheritance Reform', *supra* note 79.

⁸³ See Esposito, *Women in Muslim Family Law*, *supra* note 80, p. 110.

⁸⁴ In the Sunni schools of law, orphaned grandchildren, or the children of the deceased's son or daughter who predeceased the deceased, are not allowed to inherit when there is a surviving son. This means that a son could inherit everything from his parents while his orphaned nieces and nephews (and their predeceased parent) inherit nothing. Sisters in Islam, 'Inheritance Reform', *supra* note 79.

⁸⁵ See Esposito, *Women in Muslim Family Law*, *supra* note 80, p. 109.

⁸⁶ Under the traditional Sunni rules of inheritance, bequests of up to one-third of the estate can be made, but not to an heir unless (for some schools) the other heirs agree. The Shiite (Jafari) rules of inheritance allow heirs to receive a bequest of up to one-third of the estate without the consent of the other heirs. Sisters in Islam, 'Inheritance Reform', *supra* note 79.

⁸⁷ See Esposito, *Women in Muslim Family Law*, *supra* note 81, p. 109.

Moreover, the Constitution 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 right to women.

Rights-Based Examples from Other OIC Countries

Right of women to confer nationality	<p>Algeria⁸⁸: Women married to foreigners can extend citizenship rights to their husbands and children.</p> <p>Egypt, Morocco⁸⁹: Women married to foreigners have the right to convey their citizenship to their children.</p> <p>Lebanon⁹⁰: By decree, foreign husbands and children of Lebanese women can apply for ‘courtesy residency’ permits to remain in Lebanon.</p>
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❖ Data Collection, Monitoring and Evaluation

Recommendations

- Governments must collect data and conduct in-depth studies related to equality in the family, especially documenting the impact of laws and practices that discriminate or disadvantage women. In particular, research and advocacy for reform is particularly needed in areas such as inheritance; child marriage; financial rights and the economic consequences of divorce.
- Governments must monitor and evaluate their reform initiatives and their impact in particular to advance the rights of women in the family.

Musawah Framework

- Our research revealed a dearth of information in English related to the issues addressed in this thematic report. Even where this information did exist, it was found to be incomplete and out of date. Furthermore, where programmes and policies did exist to promote equality in the family, there was no mechanism by which to gauge their effectiveness and progress to date. Both data and monitoring mechanisms are essential to assess, measure and advance real and lasting change.

⁸⁸ Kelly Haggart, ‘Research Leads to Rights Breakthrough for Arab Women’, *IDRC Bulletin* (September 2009), available at http://www.idrc.org/en/ev-145159-201-1-DO_TOPIC.html.

⁸⁹ *Ibid.*

⁹⁰ Women’s Learning Partnership, ‘Lebanon’s Decree 4186 on Courtesy Residency Goes Into Force’ (8 September 2010), available at <http://www.learningpartnership.org/blog/2010/09/lebanon-decree4186-residency/>.

VII. 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 fulfil 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 Islamic 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. This is in line with contemporary notions of justice, which includes equality between the sexes and equality before the law.⁹¹

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; and
- Support civil society groups and individuals engaged in family law reform campaigns, moving the family towards relationships of equality, justice, dignity and mutual respect.

⁹¹See the Musawah Framework for Action, *supra* note 5.

Annexe 1: Glossary of Terms

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.

Dower: (*Mahr/Mahari/Mehr*): The goods and/or cash to be given by the groom to the bride as a requisite of a valid Muslim marriage. It may be given at the time of the marriage ceremony (prompt), or promised at a later date or to be paid upon divorce or the death of the husband (deferred) or divided into prompt and deferred portions.

Hadith: A *hadith* is a report about what the Prophet Muhammad said about something, practiced, or approved, or when he 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: the first part is a list of narrators of the *hadith* and the second part is the text or content. The jurists and the collectors of *hadith* differed in their criteria about the normativity of a *hadith*.

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.

talaq: Oral repudiation of marriage by the husband.

wali: Guardian (for children and/or adult women); recognised by some schools of law as the father, paternal grandfather or other male figure 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. Musawah is led by Muslim women who seek to publicly reclaim Islam's spirit of justice for all. Musawah acts together with individuals and groups to grow the movement, build knowledge and advocate for change on multiple levels. Musawah uses a holistic framework that integrates Islamic teachings, universal human rights, national constitutional guarantees of equality, and lived realities of women and men. For details, visit the Musawah website at <http://www.musawah.org>.

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