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For Equality in the Muslim Family

Musawah Thematic Report on Article 16: Iraq

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

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Musawah Thematic Report on Article 16: Iraq

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I. INTRODUCTION

A. Objective

Musawah, the global movement for equality and justice in the Muslim family, submits its seventh Thematic Report on Article 16 for consideration by the CEDAW Committee in its review of Iraq, reporting before the 57th Session of the CEDAW Committee.¹

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

In particular, this report examines Iraqi laws and practices that enforce direct and de jure discrimination against women in the following areas: **early, forced, and temporary marriage; polygamy; divorce; violence against women; and Article 41 of the Iraqi Constitution of 2005.**

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-compliance with its international human rights treaty obligations; and (3) suggesting recommendations for reform based on good practices in Muslim contexts.

Musawah hopes that the CEDAW Committee will utilise the content of this report as a key resource during its Constructive engagement with the State party, and in follow-up activities on the Concluding observations.

¹ Musawah: <http://www.musawah.org/>.

B. Methodology

This report draws on three methods of analysis that outline and challenge the structure of discrimination in Muslim family laws (MFL) and practices. These methods are derived from the *Musawah Framework for Action*, which advocates for reform from multiple approaches: Islamic sources, including Muslim jurisprudence; international human rights standards; national laws and constitutional guarantees of equality; and lived realities of women and men.²

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

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

(1) Documenting evidence of discrimination and harm in lived realities

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

This report advocates for reform by first providing sociological research and analysis on the extent of discriminatory law and practice, and its effect on the lived realities of women and families.³ In doing so, it measures the reality of key issues related to marriage and family relations against what the State party has stated, and against the standards of equality and non-discrimination required by the CEDAW Convention.

Research compiled in this report was conducted based on a close review of Iraq's fourth, fifth, and sixth periodic State party report (2013),⁴ the CEDAW Committee's list of issues and questions (2013),⁵ the State party's reply to list of issues (2013),⁶ and an extensive review of the reality of critical issues on the ground based on available and credible primary and secondary sources, including shadow reports submitted by local women's rights organisations to the CEDAW

² *Musawah Framework for Action*, available at: http://www.musawah.org/framework_action.asp.

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

⁴ CEDAW 57th Session, Combined fourth, fifth and sixth periodic reports of Iraq State party (January 2013), U.N. Doc. CEDAW/C/IR/4-6, [hereinafter Iraq SPR 2013] available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRQ%2f4-6&Lang=en.

⁵ CEDAW 57th Session, List of issues and questions in relation to the combined fourth, fifth and sixth periodic report of Iraq, CEDAW/C/IRQ/Q/4-6 (August 2013) [hereinafter CEDAW Committee list of issues 2013], available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRQ%2fQ%2f4-6%2fAdd.1&Lang=en.

⁶ CEDAW 57th Session, List of issues and questions in relation to the initial report of Qatar—Addendum: Replies of Qatar, CEDAW/C/IRQ/Q/4-6/Add.1 (November 2013) [hereinafter State party response 2013], available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRQ%2fQ%2f4-6%2fAdd.1&Lang=en.

Committee for the 57th CEDAW Session. Every effort was made to find credible, varied and balanced information, and to use full citations throughout.

(2) Challenging State religious authority with Islamic legal sources

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

Governments of countries with Muslim family law systems often argue that laws cannot be amended to allow for equality between men and women, because the law is ‘divine Islamic law’ (or ‘*Shari’ah*’), and therefore unchangeable.⁷

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:⁸

- ❖ 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.⁹
- ❖ 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.

⁷ 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.

⁸ For more information, see *Musawah Framework for Action*, *supra* note 3.

⁹ In Islamic theology, *Shari’ah* (lit. the way, the path to a water source) is the sum total of religious values and principles as revealed to the Prophet Muhammad to direct human life. *Fiqh* (lit. understanding) is the process by which humans attempt to derive concrete legal rules from the two primary sources of Islamic thought and practice: the Qur’an and the *Sunnah* of the Prophet. As a concept, *Shari’ah* cannot be reduced to a set of laws—it is closer to ethics than law. It embodies ethical values and principles that guide humans in the direction of justice and correct conduct. *Musawah Framework for Action*, *supra* note 3.

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

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

Specific discriminatory laws and practices are rooted within a greater structure of discrimination, which 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*).¹⁰

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.

¹⁰ Musawah is currently undertaking a major research building initiative on the concepts of *qiwamah* and *wilayah*, which are commonly understood as male authority and guardianship over women and children. These concepts play a central role in institutionalising, justifying, and sustaining a patriarchal model of families in Muslim contexts, including the relationship of ‘complementary’ rights and responsibilities between men and women. For more information, see *Musawah’s Knowledge Building Initiative on Qiwamah and Wilayah*, at: <http://www.musawah.org/what-we-do/qiwamah-and-wilayah>. Also see Musawah’s Oral Statement presented at the 9th Session of the UN Working Group on Discrimination against Women in Law and Practice, available at: <http://www.musawah.org/musawah-oral-statement-discrimination-against-women-law-and-practice>

II. LEGAL BACKGROUND

This is the CEDAW Committee's third engagement with the Republic of Iraq, which ratified the CEDAW Convention on August 13 1986, and entered **Reservations to Article 2(f), Article 2(g), Article 9.1, Article 9.2, Article 16 (without prejudice to the provisions of the Islamic Shari'ah according women rights equivalent to the rights of their spouses so as to ensure a just balance between them), and Article 29.1.**¹¹

*Reservations to Article 9.2 have been effectively canceled by the Iraq Constitution of 2005 (Article 18), which stipulates that: 'Everyone who is born to an Iraqi father or an Iraqi mother is considered an Iraqi, and this is regulated by law.'¹²

(1) Legal history

Iraq has a mixed legal system that draws on both Sunni and Shi'ite *fiqh* for the law applied in *Shari'ah* courts. The legal system as a whole also includes constitutional law, legislation and statutory provisions, usage and custom, judicial precedent and authoritative juridical opinion.

Iraq came under Ottoman rule in the seventeenth century. From 1850, a number of new civil, penal and commercial codes were adopted by the Ottomans, based on French models, but the Ottoman Law of Family Rights (OLFR) of 1917 was never implemented, as a British Mandate was established in the region by the end of World War I. In 1921, a monarchy was established under King Faisal; in 1932, Iraq gained full independence from its Mandate status. In 1958, Iraq became a republic when a military coup brought an end to the monarchy.¹³

The Iraqi legal system has been in transition since the current conflict began in 2003.¹⁴

(2) Constitutional status of Islamic law

Article 2 of the Iraqi Constitution of 2005 stipulates that Islam is the state religion and a basic source of legislation, and that no law may contradict the established provisions of Islam.¹⁵

Article 1 of the Civil Code also identifies Islamic law as a formal source of law.¹⁶

(3) Schools of *fiqh*

The Ja'fari and Hanafi are the predominant schools of *fiqh* in Iraq. There are also Christian and small Jewish and Yezidi minorities. Iraq is also the birthplace of the Hanafi school of *fiqh*.¹⁷

¹¹ United Nations Treaty Collection: *CEDAW Declarations and Reservations*, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-8&chapter=4&lang=en.

¹² Global Policy Forum. *Iraqi Draft Constitution* (translated from Arabic by Associated Press) (25 August 2005), available at: <http://www.globalpolicy.org/component/content/article/168/36099.html>.

¹³ Abdullahi A. An-Na'im (ed). *Islamic Family Law in a Changing World: A Global Resource Book* (2002), pp. 111-112.

¹⁴ Musawah. *Home Truths: A Global Report on Equality in the Muslim Family* (2009), pp. 20-21, available at: http://www.musawah.org/sites/default/files/Home%20Truths-EN_0.pdf.

¹⁵ Global Policy Forum. *Iraqi Draft Constitution* (2005), *supra* note 12.

¹⁶ An-Na'im. *Islamic Family Law in a Changing World* (2002), *supra* note. 12, p. 112.

¹⁷ *Ibid*.

(4) Codification of personal status law: *The Personal Status Law No. 188 (1959)*

The Iraqi Personal Status Law No. 188 of 1959 (IPSL) regulates family affairs and all matters relating to marriage, divorce, inheritance, and guardianship and custody of children, for all Iraqis, regardless of sect¹⁸ (except those specifically exempted by law, mainly relating to Christian and Jewish minorities).¹⁹ The IPSL provides that, in the absence of any textual provision, judgments should be passed on the basis of the principles of the Islamic *Shari'ah* in closest keeping with the text of the IPSL.²⁰

The IPSL is based on the report of a commission appointed in 1958 to draft a code of personal status,²¹ has been subjected to amendments over the years, mostly for the benefit of women.²² Before 1959, personal status issues were not codified.²³

(5) Article 41 of the Iraqi Constitution of 2005

Article 41 of the Iraqi Constitution of 2005 provides that each religion or sect has freedom to manage its affairs and religious institutions, including personal status laws. This effectively repeals the IPSL, and allows each sect to create its own family laws, most likely to the detriment of women's rights.²⁴ ²⁵ The Constitutional Revision Committee has listed Article 41 of the new Constitution under the controversial articles for amendment. (*For more information, see Section III(e) of this report.*)

¹⁸ Musawah. *Home Truths* (2009), *supra* note 13, pp. 20-21.

¹⁹ An-Na'im. *Islamic Family Law in a Changing World* (2002), *supra* note. 12, p. 112.

²⁰ An-Na'im. *Islamic Family Law in a Changing World* (2002), *supra* note. 12, p. 112.

²¹ *Ibid.*

²² American Bar Association. 'Iraq Personal Status Law of 1959 (ABA Translation),' available at: http://apps.americanbar.org/rol/publications/iraq_personal_status_law_1959_english_translation.pdf.

²³ Musawah. *Home Truths* (2009), *supra* note 13, pp. 20-21.

²⁴ *Ibid.*

²⁵ NGOs Coalition of CEDAW Shadow Report. *Iraqi Women in Armed Conflict and Post-Conflict Situation: Shadow Report Submitted to the CEDAW Committee at the 57th Session* (February 2014), p. 12, available at: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/IRQ/INT_CEDAW_NGO_IRQ_16192_E.pdf.

III. KEY ISSUES RELATED TO MARRIAGE AND FAMILY RELATIONS

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

In addition, each section provides justification for reform based on arguments that affirm the possibility and necessity of change within Muslim contexts.

The section further provides recommendations and a listing of good practices in member countries of the OIC to illustrate that reform is possible in Muslim contexts.

A. Early, Forced, & Temporary Marriage

Reservation to Article 16: *The State party claims that Reservation shall be without prejudice to the provisions of the Islamic Shari'ah according women rights equivalent to the rights of their spouses, so as to ensure a just balance between them.*²⁶

(1) Critical information

- ❖ **Same minimum age of marriage (18 for females and males), but legal exceptions enable child marriage.** As with many countries that have set the minimum age of marriage at 18, Iraq also provides for an exception to that minimum age upon parental consent or court's authorisation. This has led to the continuing practice of child marriage. In fact, rates of marriages involving minor girls has increased dramatically since 2003, due to the deteriorating economic and security conditions, and the increase of poverty and illiteracy: 19% of women and girls between the ages of 15 and 19 are married in the south; 10% of women and girls in the same age group are married in the Kurdistan region. Cases of marriage involving girls under the age of 15 have also increased, including cases with girls as young as 10 years old.²⁷ Further information is unavailable on how many marriages have been approved for girls below 15, the ages of husbands in said marriages, and the specific criteria used by judges to validate these marriages.
- ❖ **Early marriage infringes on women and girls' physical and mental integrity.** Research indicates that early and forced marriage often leads to physical, sexual, and mental violence; and increased risk of maternal and other pregnancy-related complications.^{28 29} 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.³⁰

²⁶ United Nations Treaty Collection: *CEDAW Declarations and Reservations*, *supra* note 11.

²⁷ NGOs Coalition of CEDAW Shadow Report. *Shadow Report Submitted to the CEDAW Committee* (February 2014), *supra* note 23, p. 51.

²⁸ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, p. 31.

²⁹ 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>.

³⁰ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, p. 31.

- ❖ **Early marriage limits women and girls' right to education, employment, and financial independence.**³¹ This contradicts the State party's own emphasis on women's fundamental rights to education and employment.³² A woman's financial independence affects both her decision-making powers within the family,³³ ³⁴ ³⁵ 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.³⁶ ³⁷
- ❖ **Early marriage challenges family peace and well-being.** Research indicates that early and forced marriage often leads to difficulties in marriage—including divorce and health risks, such as HIV/AIDS—and has greater impact on the general level of violence in families.³⁸
- ❖ **Increase in marriages outside of court, including temporary marriage.** Although not legally recognised, and rather, considered by many a liberty afforded by religion, women—including many widows and divorced women—resort to temporary marriage due to economic destitution, rather than free choice and sexual desire. Some clerics who perform these temporary marriages outside of court, justify the trend by arguing that such a marriage protects single women from sex outside of marriage, including resorting to forced prostitution. The duration of the temporary marriage varies from minutes to several years, and does not require a written contract; men can maintain unlimited number of temporary marriages, in addition to their permanent wife. In most cases, women do not have the right to terminate the temporary marriage before its expiry, except in the case of the husband's consent.³⁹

Many young men—particularly those unemployed—prefer temporary marriages to permanent marriages, which require long-term financial commitment. The increase in temporary marriage reflects the increase of poverty, unemployment, and the growing number of widows and divorced women. There is a particular increase in temporary marriages among university students.⁴⁰ Due to the secrecy of its occurrence, no accurate statistics exist. However, recent data from the Najaf Federal Courts estimate that there were 2773 marriages in 2013 conducted outside of the courts in the region (including temporary marriages), which is more than the number of marriages registered in the Najaf Federal Courts.⁴¹

³¹ The Beijing Platform for Action (BPFA), *supra* note 42; and CEDAW Committee General Recommendation No. 21, *supra* note 42.

³² Qatar SPR 2012 paras. 106 and 143, respectively.

³³ 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>.

³⁴ CEDAW Committee General Recommendation No. 21, *supra* note 42.

³⁵ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, p. 31.

³⁶ *Ibid.*

³⁷ CEDAW Committee General Recommendation No. 21, *supra* note 42.

³⁸ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, pp. 32-33.

³⁹ NGOs Coalition of CEDAW Shadow Report. *Shadow Report Submitted to the CEDAW Committee* (February 2014), *supra* note 23, p. 52.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, Annex (to be inserted February 2014).

(2) Musawah Justification for Reform

- ❖ **On minimum age of marriage:**⁴² State parties face difficulties in enforcing laws that provide for a minimum age of marriage at 18 for several reasons. In Muslim contexts, like Iraq, resistance often comes from conservative religious authorities and the community, claiming that such a law 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.⁴³ 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:**⁴⁴ 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

- ❖ Take steps to amend the law to allow for no legal exceptions to the minimum age of marriage, and to provide sanctions for violating the law.
- ❖ Exercise due diligence to prevent, investigate, and punish acts that are aimed at coercing a child into forced and early marriage.
- ❖ Enforce mandatory registration of marriage, and improve existing registration mechanisms.
- ❖ Obtain accurate statistics on cases and contexts of marriages that take place outside the court, including temporary marriage, in order to better address and legally restrict this practice. Further provide an analysis of the judges' rationale for allowing marriage of girls under 18, and statistics on the number of such documented cases in Iraq.
- ❖ Take steps, including through public education, to end the practice of child and temporary marriage.

⁴² Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, 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>.

⁴³ 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>.

⁴⁴ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, p. 32.

(4) Good practices

- ❖ **Minimum age of marriage, with restrictions to exceptions and punishment for violations:**⁴⁵
 - **Bangladesh:** The minimum age of marriage is 18 for females and 21 for males; anyone solemnising and contracting a child marriage, as well as any adult spouse, is liable to punishment.
 - **Gambia:** The minimum age of marriage is 21 for females and males, but marriage is possible at 18 with parental permission. A marriage is void where the parties are not of marriageable age.
 - **Kyrgyz Republic and Uzbekistan:** The minimum age of marriage is 18 for females, and an absolute minimum age is set at 17, and this may be allowed for exceptional reasons with court authorisation and parental permission.
 - **Indonesia:** All spouses under 21 require parental permission to marry.
 - **Turkey:** The minimum age is 18 for females. An absolute minimum age is set at 16, under exceptional circumstances and with court authorisation.

- ❖ **Forced Marriage**⁴⁶
 - **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 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. Polygamy

Reservation to Article 16: *The State party claims that Reservation shall be without prejudice to the provisions of the Islamic Shari'ah according women rights equivalent to the rights of their spouses, so as to ensure a just balance between them.*⁴⁷

(1) Critical information

- ❖ **Permissibility of polygamy.** Polygamy is permitted only by judicial authorisation, obtainable on the condition that the husband must show some lawful benefit and financial ability to support more than one wife. Permission is not to be granted if the judge fears

⁴⁵ Women Living Under Muslim Laws. *Knowing Our Rights, Women, family, laws and customs in the Muslim World* (2003), pp. 125-126.

⁴⁶ *Ibid.*

⁴⁷ United Nations Treaty Collection: *CEDAW Declarations and Reservations*, *supra* note 11.

unequal treatment of co-wives. The law further provides penalties of imprisonment and/or fines for non-compliance with provisions relating to polygamy.^{48 49} The Kurdistan regional Parliament enacted Law No. 15 (2008) of the Kurdistan Region to amend the application of the Iraqi Personal Status Law, which eases the legal restrictions to polygamy.⁵⁰

- ❖ **High rates of polygamy in practice.** Recent statistics from 2013 from the Najaf Federal Courts indicate 96 approvals for second marriages. In the same year, 450 polygamous marriages were registered in the Kirkuk Court, and 150 polygamous marriages were registered in the Makhmur Court.⁵¹ It is noteworthy that many marriages, including to successive wives, take place outside the courts, and are therefore unregistered.⁵²
- ❖ **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.^{53 54} Furthermore, the threat of polygamy can be used as a powerful means of control of the wife by the husband.⁵⁵

(2) Musawah Justification for Reform

- ❖ **On discouraging or prohibiting polygamy.**⁵⁶ Musawah maintains that Islam promotes monogamy, as can be seen in *Surah an-Nisa'* 4:3: 'If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two, three or four; but if you fear that you shall not be able to deal justly [with your wives], then marry only one [...] That will be more suitable, to prevent you from doing injustice.' Some Muslim countries have also prohibited polygamy. In other countries, women are entitled to add a stipulation in their marriage contracts that their husbands cannot take other wives without their permission, and that this could pose grounds for divorce. It is also possible for this clause to become a 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.

⁴⁸ An-Na'im. *Islamic Family Law in a Changing World* (2002), *supra* note. 12, p. 112.

⁴⁹ NGOs Coalition of CEDAW Shadow Report. *Shadow Report Submitted to the CEDAW Committee* (February 2014), *supra* note 23, p. 72.

⁵⁰ *Ibid.*

⁵¹ *Ibid*, Annex (to be inserted February 2014).

⁵² *Ibid*, p. 72.

⁵³ CEDAW Committee General Recommendation No. 21, *supra* note 42.

⁵⁴ The serious emotional and financial consequences of polygamy have been documented in research undertaken by the NGO Sisters in Islam (Malaysia) and partner universities, between 2008 and 2010 (Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, p. 35).

⁵⁵ *Ibid.*

⁵⁶ *Ibid*, pp. 33-36.

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.
- ❖ Enforce the law on illegal polygamous marriages.

(4) Good practices⁵⁷

- ❖ **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.

C. Divorce

Reservation to Article 16: *The State party claims that Reservation shall be without prejudice to the provisions of the Islamic Shari'ah according women rights equivalent to the rights of their spouses, so as to ensure a just balance between them.*⁵⁸

(1) Critical information

- ❖ **Husband's right to unilateral (*talaq*) divorce must be confirmed by the Shari'ah Court's judgement, or registered with the court during the 'idda period.** *Talaq* by a man who is intoxicated, insane, feeble-minded, under coercion, enraged, or seriously ill or near death, is ineffective, as is *talaq* that is not immediate or is conditional or in the form of an oath. All *talaqs* are deemed single and revocable, except the third of the three *talaqs* pronounced.⁵⁹
- ❖ **Wife's right to judicial divorce, upon meeting certain criteria.** The wife is entitled to request a dissolution if the husband does not fulfil any lawful condition stipulated in the marriage contract. If she requests dissolution on the grounds of discord, the court must initiate reconciliation procedures. If reconciliation efforts fail and the husband refuses to pronounce *talaq*, the court may grant judicial divorce; if the wife is found to be at fault, her financial rights are then forfeited. The wife may also obtain a compensated (*khul'*) divorce from her husband, in return for a consideration that may be more or less than her dower.⁶⁰
- ❖ **Research indicates high rate of divorce, including outside of court.** Recent statistics from 2013 from the Najaf Federal Courts indicate a total of 2951 cases of registered divorce (compared to 2206 in 2012). According to the court social office, 70% of these cases involved marriages of persons (in most cases girls) under 18. There is an average of 8.2 divorces recorded daily in the Najaf Federal Courts. There are no statistics available on the number of divorce cases outside of court.
- ❖ **Divorced women face economic and social vulnerability.** Divorced women face difficult social challenges and harsh discriminatory norms—they often risk sexual exploitation, prostitution, and offers of temporary marriages. Most families headed by women are low-

⁵⁷ *Ibid*, p. 47.

⁵⁸ United Nations Treaty Collection: *CEDAW Declarations and Reservations*, *supra* note 11.

⁵⁹ An-Na'im. *Islamic Family Law in a Changing World* (2002), *supra* note. 12, p. 113-114.

⁶⁰ *Ibid*, p. 114.

income, and face severe economic conditions. According to interviews conducted by the International Committee of Red Cross, the average income of households headed by women, including divorced women, is 150,000 Iraqi dinars (~USD125) per month, which is less than half the minimum of average household expenditure. Divorced women further face difficulties entering the labour market, due to social stigma, and lack of relevant education, training, and skills.⁶¹

- ❖ **Lack of effective implementation of government support services for divorced women.** Although in 2008 the State party established the Social Welfare Department for Women (including widows, divorced women, wives of missing persons, wives of imprisoned and disabled persons, and orphans),⁶² there is a critical lack of effective implementation mechanisms, including limited funds available (currently, the Department only supplies USD90 per month to beneficiaries, which is less than half the minimum of average household expenditure). Furthermore, the Department has not implemented many of its planned objectives, including empowerment, capacity building, and creating work opportunities. Finally, reports indicate lengthy bureaucratic processes to obtain support, and levels of administrative corruption.⁶³

(2) Musawah Justification for Reform

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

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

(3) Recommendations

- ❖ Abolish the husband's right to unilateral divorce, to ensure that both parties in a marriage are fully aware of its dissolution and its consequences.
- ❖ All divorces must take place in court, with both parties present.
- ❖ Equal rights and access for both men and women to matters related to the dissolution of marriage, including the grounds for divorce and standards of proof.
- ❖ Obtain accurate statistics on cases and contexts of divorces that take place outside the court, in order to better address and legally restrict this practice.
- ❖ Establish accurate and comprehensive database of divorced women, in order to support effective implementation of welfare services.

⁶¹ NGOs Coalition of CEDAW Shadow Report. *Shadow Report Submitted to the CEDAW Committee* (February 2014), *supra* note 23, pp. 75-76.

⁶² Iraq SPR 2013, para. 235.

⁶³ NGOs Coalition of CEDAW Shadow Report. *Shadow Report Submitted to the CEDAW Committee* (February 2014), *supra* note 23, pp. 75-76.

(4) Good practices⁶⁴

- ❖ **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.

D. Violence Against Women

(1) Critical information

- ❖ **Domestic violence and marital rape not criminalized.** Police are reluctant to treat violence against women, particularly violence within the family, as a criminal matter. Reports suggest that police reluctance to address the issue using the criminal law deters women from coming forward to report violence within the home. There have been significant delays in issuing the Law on Protection from Domestic Violence.⁶⁵
- ❖ **Husband has legal right to 'discipline' wife.** Article 41 of the Penal Code permits men to discipline their wives, even if such acts cause women emotional and physical harm, and lead to spousal abuse. It is noteworthy that this legal text is categorized along with the right of parents and teachers to discipline minor children,⁶⁶ thus further humiliating adult women and encouraging their infantilisation and unequal treatment. There are strong links between corporal punishment—violence that may lawfully be inflicted on women and children in the guise of 'discipline'—and all other forms of violence, including gender-based violence.⁶⁷ Other research points to domestic violence as a systemic practice embedded in beliefs of male authority in the family and the right to govern (and thus discipline) women and children.⁶⁸ As the Committee on the Rights of the Child (CRC) emphasized in its General Comment No. 8 (2006), addressing corporal punishment is 'a key strategy for reducing and preventing all forms of violence in societies.'⁶⁹
- ❖ **Perpetrators of violence exempt with claim of 'honour'.** Article 128 of the Penal Code mitigates punishment for perpetrators of extreme gendered violence, including murder, if the crime is committed out of 'honour' or 'on the basis of serious provocation from the victim unjustly.' In many of these cases, penalty imposed for domestic murder is reduced

⁶⁴ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 10, p. 47.

⁶⁵ NGOs Coalition of CEDAW Shadow Report. *Shadow Report Submitted to the CEDAW Committee* (February 2014), *supra* note 23, p. 6.

⁶⁶ *Ibid*, p. 4.

⁶⁷ Global Initiative to End All Corporal Punishment of Children, 'Briefing on Qatar for the Committee on the Elimination of Discrimination against Women, Pre-sessional Working Group' (July 2013). Available at: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/QAT/INT_CEDAW_NGO_QAT_13525_E.pdf.

⁶⁸ Zarizana Abdul Aziz, 'Culture, Power and Narratives in Domestic Violence Discourse' in Maznah Mohamad and Saskia E. Wieringa (eds.): *Family Ambiguity and Domestic Violence in Asia* (2013): Ch. 3, pp. 53-77.

⁶⁹ General Comment No. 8 on 'The right to the child to protection from corporal punishment and other cruel or degrading forms of punishment,' available at: www2.ohchr.org/English/bodies/crc/comments.htm.

from death penalty or life imprisonment to six months in prison.⁷⁰ It is further noteworthy that the law does not similarly exonerate women who commit acts of domestic violence, including murder, in defense of 'honour.'⁷¹

- ❖ **Perpetrators of rape, forced detention, and kidnapping exempt from punishment through marriage.** Articles 130 and 131 of the Penal Code reduce the punishment for rape if a valid marriage is conducted between the perpetrator and victim/survivor of rape. These legal stipulations encourage and lead to further coercion through forced marriage, and mental and physical harm for rape victims/survivors.⁷² Similarly, Article 427 of the Penal Code stipulates that all investigation and legal procedures shall be suspended if a valid marriage is conducted between the perpetrator of the crime and the victim.
- ❖ **High rates of violence against women.** As a result of the accumulation of the U.S. occupation, sectarian violence, policies by the former regime, increasing levels of poverty, and high rates of unemployment, there are high levels of gendered violence, including within families. Violence against women often takes the form of domestic violence, female genital mutilation, and so-called 'honour' killings.⁷³
- ❖ **Poor infrastructure to support female victims/survivors.** The lack of political will to protect women from violence is further reflected in poor existing infrastructure to support female victims/survivors of violence. There are small numbers of shelters for battered women in the Kurdistan region. Social workers and staff working in family protection establishments are often poorly prepared, and there is a lack of an integrated system of referral and rehabilitation programs for victims/survivors.⁷⁴

(2) Musawah Justification for Reform

- ❖ **On domestic violence, including marital rape:** The Prophet is reported to have said, 'The most perfect of the believers is the best of you in character, and the best of you are those among you who are best to their wives'.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

(3) Recommendations

- ❖ Issue the Family Protection from Domestic Violence law, and include criminalisation of all forms of domestic violence, including marital rape.
- ❖ Repeal Article 41 of the Penal Code; withdraw exemptions from prosecution from Articles 128, 130 and 131 of the Penal Code.
- ❖ Challenge and change discriminatory social and cultural patterns and pervasive patriarchal attitudes regarding rights and bodily integrity of women and men in the family and in society.

⁷⁰ NGOs Coalition of CEDAW Shadow Report. *Shadow Report Submitted to the CEDAW Committee* (February 2014), *supra* note 23, p. 4.

⁷¹ *Ibid*, p. 5.

⁷² *Ibid*.

⁷³ *Ibid*, p.6.

⁷⁴ *Ibid*, pp. 2 and 7.

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.

(4) Good practices

- ❖ **Tunisia,⁷⁷ Turkey⁷⁸**: Marital rape is criminalised under the Penal Code.
- ❖ **Morocco⁷⁹**: Article 475 of the Penal Code, which allowed rapists to escape prosecution through marriage with underage victims, was amended in January 2014 to prohibit this practice.
- ❖ **Bangladesh, Chad, Egypt, Indonesia, Jordan, Kyrgyz Republic, Malaysia, Saudi Arabia, Tunisia, Turkey**: All these OIC member countries have enacted laws criminalising domestic violence.

E. Article 41 of the Iraqi Constitution of 2005

(1) Critical information

- ❖ **Article 41 of the Constitution of 2005 repeals the IPSL.** Article 41 of the Iraqi Constitution of 2005 provides that each religion or sect has freedom to manage its affairs and religious institutions, including personal status laws. This effectively repeals the IPSL, and allows each sect to create its own family laws, most likely to the detriment of women's rights.^{80 81} For instance, in October 2013, the Ministry of Justice submitted drafts of both the Ja'fari personal status law, and the Ja'fari judiciary law, based on Ja'fari doctrine. The draft Ja'fari personal status law sets the minimum age of marriage for girls at 9, and further enables temporary marriages and polygamy. The government has decided to postpone consideration of both draft laws until after the elections of April 2014, and after consultations with religious authorities. There is high likelihood that both drafts will be considered if religious political parties win in the elections.⁸²
- ❖ **NGO advocacy to invalidate Article 41.** Iraqi women's organisations have been actively campaigning to retain the IPSL and invalidate Article 41 of the new Constitution.⁸³ These demands have been supported by many international and non-governmental women's associations. In 2006, as a result of pressure and advocacy campaigns organised by non-governmental women's associations, the Constitutional Revision Committee listed Article 41 of the new Constitution under the controversial articles for amendment. However, due to political instability in the State party, the report of the Constitutional Revision Committee was never submitted to the Council of Representatives for approval. The Committee ceased and has not resumed activities since 2009.⁸⁴

⁷⁷ Immigration and Refugee Board of Canada, *Tunisia: Domestic violence, legislation and protection available to victims (2007-2009)*, 24 November 2009, available at:

<http://www.unhcr.org/refworld/docid/4b20f04a3c.html>.

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>.

⁷⁹ Aljazeera, 'Morocco repeals "rape marriage law": Controversial article previously allowed rapists to avoid charges if they married their victims' (23 January 2014), available at:

<http://www.aljazeera.com/news/africa/2014/01/morocco-repeals-rape-marriage-law-2014123254643455.html>.

⁸⁰ Musawah. *Home Truths* (2009), *supra* note 13, pp. 20-21.

⁸¹ NGOs Coalition of CEDAW Shadow Report. *Shadow Report Submitted to the CEDAW Committee* (February 2014), *supra* note 23, p. 12.

⁸² *Ibid.*

⁸³ These include: the Women's Leadership Institute in Baghdad and Basra, Al-Yoser organisation in Hilla, the Center for the Development of the Capacities of Women in Erbil, the Iraqi Women's Movement, the Rafidain Women Coalition, Al-Amal Association, and Baghdad Women's Association. *Ibid.*

⁸⁴ *Ibid.*, pp. 12 and 38.

- ❖ **Arguments demanding the repeal of the IPSL include:** The law arose from the previous political regime and should be abolished as part of the regime change; the law violates the provisions of *Shari'ah*; and the law denies private sectarian rights of Iraqi citizens.⁸⁵
- ❖ **Arguments demanding the retention of the IPSL include:** The law is based on an advanced reading of Islamic law and was prepared by a committee of experts and scholars based on the doctrinal texts; the law unifies all Iraqis and encourages social cohesion away from the narrow sectarian tendencies that threaten the Iraqi state; the law is a product of the struggle of Iraqi women and the progressive forces that ruled before the Ba'ath party, thus it is not a symbol or a remnant of the previous regime; the abolition of the law would result in significant risks to mixed families (e.g. where one spouse is Shi'ite and other Sunni), which constitute a large portion of Iraqi society; the abolition of the law would contribute to the deepening of sectarian tendencies and division of communities, and thus encourage Iraqi society to return to a state of lawlessness.⁸⁶

(2) Musawah Justification for Reform

- ❖ The strong voice and mobilization of NGOs demanding amendment to Article 41 indicates the will of a significant segment of society. The issue here, then, is more of political will and courage to do what is right and just in the face of opposition from a particular section of society that may not necessarily represent the majority voice. There is a need to recognise that resistance to reform towards equality and justice for women, and in this case for Constitutional amendment, stem from reasons beyond ostensible religious grounds, including political interests and power relations. Given the State party's history of progressive interpretations of the *Shari'ah* through the IPSL and its subsequent amendments, and the strong advocacy by women's groups for reconsideration of Article 41, the government should display leadership and the political will to take concrete steps to comply with the State's commitment to the CEDAW Convention.

(3) Recommendations

- ❖ Repeal Article 41 of the Constitution of 2005 to ensure equality before the law regardless of religious sect, and full compliance with the CEDAW Convention.

⁸⁵ Musawah. *Home Truths* (2009), *supra* note 13, pp. 20-21.

⁸⁶ *Ibid.*

IV. CONCLUSION

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

Although culture and religion are often used as an excuse for not fulfilling international obligations, there is always room for recognition of women's rights within cultural and religious frameworks. In many cases, what lies behind the State's refusal to act are political considerations, rather than regard for religious principles.

It is imperative to acknowledge the multiple concerns, discriminations, and kinds of violence that women and families in Iraq face today. The ongoing conflict and breakdown of the rule of law (leading to impunity for crimes, limited access to justice, and weak institutions); peace and security challenges (including increasing rates of displacement, abductions/kidnappings, murders, and sexual violence); discriminatory laws and policies; and increase in the power of tribes, militia, and clerics are contexts in which women's rights activism becomes more critical, yet dangerous.

Given the many voices in Iraq that recognise the possibility of reform of discriminatory laws made in the name of Islam, and the need for effective implementation of just legal provisions that exist, it is imperative that the Iraqi State party exercises the political will and leadership required to forge the necessary reform of discriminatory laws and practices, in order to fully comply with its obligations to the CEDAW Convention, uphold its constitutional obligations, and ensure equality and justice in the family.

V. MUSAWAH VISION

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

Musawah believes that Qur'anic teachings which encompass the principles of justice, equality, dignity, and love and compassion lay out a path towards reform of Muslim family laws and practices, in line with contemporary notions of justice, which includes equality between the sexes and equality before the law.⁸⁷

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.⁸⁸

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.

⁸⁷ *Musawah Framework for Action*, *supra* note 3.

⁸⁸ *Musawah Framework for Action*, *supra* note 3.

VI. Annex: Glossary of Key Terms⁸⁹

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.

⁸⁹ Musawah, *CEDAW and Muslim Family Laws*, Annex 1: Glossary of Key Terms, *supra* note 10, p. 43-44.

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

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

About Musawah

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

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