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**Musawah Statement on the
Proposed CEDAW General Recommendation on the
Economic Consequences of Marriage and its Dissolution**

4 August 2009

Introduction

1. Musawah is a global movement for equality and justice in the Muslim family. Musawah, which means ‘Equality’ in Arabic, builds on decades of effort to reform Muslim family laws that discriminate against women and to resist regressive amendments. Its launch in Malaysia in February 2009 brought together over 250 participants – women and men, activists, scholars, and policy makers – from 48 countries, including 32 countries that are members of the Organisation of the Islamic Conference. For more information, visit the Musawah website at: <http://www.musawah.org>.
2. Like many other religious, customary and civil family laws, many Muslim family laws are deeply discriminatory with regard to women’s rights in marriage and on its dissolution. This discrimination has profound economic consequences that directly contribute to violence against women, poverty among women and children, and women’s and girls’ under-representation in education, employment, the political arena and national and community decision-making. The following are examples of discrimination in Muslim family laws that have immediate economic consequences for women: the sale-purchase nature of the classical Muslim marriage contract (on which modern contracts are based); decision-making within the family; marital property regimes; polygamy; forms and grounds for divorce; financial provisions and the division of marital assets; maintenance of children after divorce; and inheritance.
3. Of additional concern is that in recent years, both state and non-state actors have used Muslim family laws as a focal point for opportunistically mobilising political support. Appealing to those who feel threatened by women’s greater social and economic autonomy, those who use Islam for political purposes have attempted to introduce regressive reforms to family laws or have obstructed reform of discriminatory laws. In post-conflict contexts in Muslim countries, women’s rights within the family have been used as bargaining tools in ‘peace settlements’. Although women in most cultures and other religions also suffer discrimination, it is troubling the extent to which women’s roles within the Muslim family have become politicised, with women and family law becoming symbols of cultural authenticity and carriers of religious tradition.
4. One element of the politicisation of Muslim family laws is the fact that many governments and those who use Islam for political purposes vehemently declare that the laws cannot be changed because they are divine or based on the Qur’an. However, the reform of laws and practices for the benefit of society and the public interest (*maslahah*) has always been part of the Muslim legal tradition and is therefore possible. Musawah submits that the teachings of the Qur’an, the objectives of the *Shari’ah*, universal human rights standards, national fundamental rights and constitutional guarantees, and the realities of

Muslim women's and men's lives in the twenty-first century, all demand that relations between Muslim women and men in both the private and public spheres be governed by principles and practices that uphold equality, fairness and justice.

5. Musawah requests that, while considering a general recommendation on the economic consequences of marriage and its dissolution, the CEDAW Committee bear in mind the experiences specific to Muslim marriage, divorce and inheritance laws and practices. This statement provides information and recommendations from Musawah on why and how equality and justice are both necessary and possible in today's Muslim family laws.

Equality in Muslim Family Laws is Necessary¹

6. Most family laws and practices in today's Muslim countries and communities are based on theories and concepts that were developed by 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.
7. By the early twentieth century, the idea that equality is intrinsic to conceptions of justice began to take root. The world inhabited by the authors of classical jurisprudential texts (*fiqh*) had begun to disappear. But the unequal construction of gender rights formulated in their texts lingered—reproduced, in a modified way, in colonial and post-colonial family laws that merged classical juristic concepts with colonial influences and negative aspects of local customs.
8. Most of the current Muslim family laws and personal status codes were created through this process, and are therefore based on assumptions and concepts that have become irrelevant to the needs, experiences and values of Muslims today. The administration of these hybrid statutes shifted from classical scholars, who became increasingly out of touch with changing political and social realities, to executive and legislative bodies that had neither the legitimacy nor the inclination to challenge premodern interpretations of the *Shari'ah*. Even in Muslim communities where classical juristic concepts have not been codified into law, the centuries-old *fiqh* rules and colonial and local norms have, in many cases, been invoked to sustain inequality between women and men within the family and wider society.
9. Injustices resulting from this disconnect between outdated laws and customs and present-day realities are numerous and can be found in many Muslim countries and

¹ Paragraphs 6-8 are derived from the Musawah Framework for Action and the following chapters in *Wanted: Equality and Justice in the Muslim Family*, edited by Zainah Anwar, Musawah (2008): Ziba Mir-Hosseini, 'Towards Gender Equality: Muslim Family Laws and the *Shari'ah*'; and Amira El-Azhary Sonbol, 'The Genesis of Family Law: How *Shari'ah*, Custom and Colonial Laws Influenced the Development of Personal Status Codes'.

communities. A number of these injustices involve economic and financial power imbalances between men and women. For instance²:

- a. Classical Muslim jurists in the medieval period defined marriage as a contract of exchange, likened to a contract of sale. Today's modern laws are based, in part, on the work of these classical jurists. *Mahr*, or dower given by the groom to the bride, is considered an essential part of Muslim marriage, often listed in the marriage contract itself. By giving his wife *mahr*, the husband is considered to have symbolically purchased the wife's virginity or sexual services. Coupled with interpretations of the Qur'an and *Sunnah* that emphasised male superiority, this laid the foundations for a highly inequitable relationship between the spouses. Once the marriage is consummated, the wife comes under her husband's *isma*, which can be translated as authority, protection and control, thus giving him superior rights in decision-making within the family. The husband has an obligation to maintain his wife by providing for all the household needs (food, clothing, shelter, child care, etc.), while the wife's sole obligation is to be obedient – including sexually submissive – to her husband. This means the husband can control his wife's freedom of movement, education, and employment, which can have direct economic consequences on her current and future financial autonomy. In practice, the model of the providing husband and submissive wife envisaged by the classical Muslim jurists was a legal fiction that had no basis in reality. Its main function was to bolster men's authority in marriage.
- b. Although Muslim laws recognise a wife's right to own and control her own property, the construction of marriage as a relationship of superior husband-inferior wife means that household income to which wives have directly and indirectly contributed is often controlled entirely by their husbands. In practice, the vast majority of women in Muslim societies have always contributed to the financial well-being of the family through unpaid domestic labour and agricultural work, and women in Muslim societies today are increasingly better educated and formally employed. For instance, in Indonesia, which has the world's largest Muslim population, women constituted almost 80 per cent of all migrant workers between 2000 and 2003;³ between 1990 and 2003, women's share of economic activity in the Arab region increased by 19 per cent, more than six times the global rate.⁴ Moreover, men have historically failed in their obligation of maintenance and, due to conflict, displacement, labour migration, poverty, drug and alcohol addiction, are increasingly less likely to be sole or even primary wage earners in the family. An example of this is that 29 per cent of households in Mauritania were female-headed as of 2005.⁵ Despite this reality, many Muslim societies and laws continue to uphold male superiority in the family, which results in a discriminatory economic impact on women. Meanwhile, fresh interpretations of the Qur'an and *Sunnah* by Muslim scholars offer various ways of re-

² More details on each of these aspects of Muslim family laws can be found in *Knowing Our Rights: Women, family, laws and customs in the Muslim world*, Women Living Under Muslim Laws (2006). Note that Muslim family laws differ greatly between different countries and contexts, so these examples are generalised and in fact take various forms in the different family law regimes.

³ United Nations Population Fund (2006), *State of World Population 2006: A Passage to Hope: Women and International Migration*.

⁴ United Nations Development Programme (2006), *Arab Human Development Report 2005: Towards the Rise of Women in the Arab World*, Amman: UNDP, p. 8.

⁵ United Nations Department of Economic and Social Affairs Statistics Division (2006), *The World's Women 2005: Progress in Statistics*, New York: United Nations. pp. 130-5.

constructing the spousal relationship in the light of today's realities and as a relationship of equals.

- c. Most Muslim family laws do not allow a couple to choose the marital property regime most suited to their particular circumstances, and instead presume a complete separation of property regime. In theory, this means Muslim family laws recognise a wife's right to own and manage her property independently, including the dower and whatever property she brings to the marriage. However, because the husband has the right to demand 'obedience' and control his wife's freedom of movement and employment, in practice this property regime obstructs women's economic autonomy within marriage. Moreover, because husbands retain ownership over the income and property they contribute to the household wealth, this regime works to the disadvantage of those women who have no independent income or property but who contribute through unpaid labour.
- d. In most Muslim family laws, a man can take up to four wives, but he is required to prove he can maintain more than one wife if he wishes to engage in polygamy. However, this overlooks the fact that the existing wife/wives experience a lower standard of living when household income is divided among a greater number of wives and children, and when any future inheritance from the husband is divided between them. Moreover, the standards of proof required to prove the ability to maintain are often lax in practice. In addition, polygamy often in practice equates to desertion for months on end, leading to profound economic insecurity for wives.
- e. Most family laws in Muslim contexts – whether codified or not – do not provide women and men equal grounds for dissolution of marriage in law and in practice. The forms of divorce available to women that would offer greater post-divorce economic security are usually difficult to access both in law and in legal and social practice. Therefore, many women are forced to opt for the form or grounds for divorce that provide them the least economic security. In some Muslim contexts, this is the type of divorce called *khul'*, in which the wife provides the husband some form of financial compensation in return for the divorce. In other Muslim contexts where a 'fault-based divorce' is open to both spouses, husbands often force the wife to initiate the divorce and ensure that, as the initiator of the divorce, she is seen as being at greater fault and thereby denied financial rights upon divorce. It is also common for wives who initiate divorce to give up all financial claims in order to expedite the process. Whereas in many Muslim laws men may divorce relatively quickly and cheaply through a unilateral *talaq*, the fact that women must usually establish grounds before a court means they lack easy or quick access to divorce, may incur high legal costs and may be impoverished while awaiting a court decision.
- f. There is a wide variety of laws and practices in Muslim contexts regarding financial provisions and the division of matrimonial assets on divorce. Almost without exception, these provisions and practices leave women are financially vulnerable after divorce, which frequently means that women decide to remain in unhappy and violent marriages. In many systems, the division of matrimonial assets tends to favour men, both because the process commonly punishes women if they are 'at fault' in the divorce and because it often only values direct financial contributions made by women to the marital home, rather than indirect contributions such as labour and care for the home, children and other family members. In some countries, division of matrimonial assets is not practised at all. Women sometimes lose matrimonial property simply because they return to their natal homes and thus do not have physical access to the property. Division of matrimonial assets upon polygamy or

upon divorce from a polygamous marriage can be complicated and often does not take into account the existing wife's physical and emotional contributions to the original marriage. In the case of polygamous marriages, the principle of equality in division of assets between wives may not necessarily be just, as the first wife would have stayed in the marriage longer and contributed more to the marriage than the subsequent wife.

- g. Although fathers are often required to provide maintenance for their children after divorce, such orders are often not enforced so custodial mothers bear the financial burden of ensuring their children have proper food, clothing, shelter, educational opportunities, etc. The assets of underage children usually may not be managed by the custodial mother because laws give the male guardian on the father's side authority over the children. The underlying rationale for such discriminatory provisions and practices is that men have the duty and responsibility to provide for the family, though the reality is that men are often not the sole or even primary providers for the family, especially where women are educated and working on an equal basis with men.
 - h. Muslim inheritance provisions in many countries are discriminatory on the basis of gender. Under traditional inheritance rules, a wife inherits one-quarter of her deceased husband's estate if the deceased had no children and one-eighth if he had children, whereas a husband inherits one-half or one-quarter of his wife's estate in the same situations; polygamous wives have to divide the share demarcated for 'the wife' amongst themselves. Some family laws, and practice in most Muslim societies, discourage or restrict the use of wills or bequests to increase women's shares.
10. Many of these economic issues are interconnected, and they are often dependant on the form of the marriage (oral or written), the type of divorce, the relevant laws and the customs practiced by the woman or her husband's family or community. A common thread is that women seldom have power to negotiate or determine their own experiences or outcomes with regard to economic matters at any stage in their marriages.

Equality in Muslim Family Laws is Possible

11. Governments of countries that have 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. Musawah declares that equality in Muslim family laws is possible, and that such laws can be changed to ensure equality, fairness, justice and dignity for men, women and children within family relationships.
12. Several basic concepts in Islamic legal theory lay the foundation for the claim that family laws and practices can be changed to reflect equality and justice and the lived realities of Muslims today⁶:

⁶ 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'.

- a. There is a distinction between *Shari'ah*, the revealed way, and *fiqh*, the science of Islamic jurisprudence. 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. What many commonly assert to be *Shari'ah* laws are, in fact, often the result of *fiqh*, juristic activity, hence human, fallible and changeable.
 - b. There are two main categories of legal rulings: *'ibadat* (devotional/spiritual acts) and *mu'amalat* (transactional/contractual acts). Rulings in the *'ibadat* category regulate relations between God and the believer, and therefore offer limited scope for change. Rulings in the *mu'amalat* category, however, regulate relations between humans, and therefore remain open to change. Since human affairs constantly evolve, there is always a need for new rulings that use new interpretations of the religious texts to bring outdated laws in line with the changing realities of time and place (*zaman wa makan*). This is the rationale for *ijtihad* (lit. endeavour, self-exertion), which is the jurist's method for finding solutions to new issues in light of the guidance of revelation. Rulings concerning the family and gender relations belong to the realm of *mu'amalat*, which means that Muslim jurists have always considered them as social and contractual matters that are open to rational consideration and change.
 - c. Diversity of opinion (*ikhtilaf*) is a basic concept that has always been a part of *fiqh*, even after the formal establishment of schools of law. There is not now, nor has there ever been, a single, unitary 'Islamic law'. It is commonly recognised that there are multiple schools of Islamic law, and family laws in different countries vary widely, with individual provisions on every aspect of family life that differ considerably from country to country. The very existence of multiple schools of law, along with the huge variety in Muslim family law provisions, attests to the fact that no one person, group or country can claim there is a unified, monolithic, divine Islamic law over which they have ownership. 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.
 - d. 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. These are values and principles on which Muslims agree and which Muslim jurists hold to be among the indisputable objectives of the *Shari'ah*, and are also consistent with universal human rights principles and values.
13. In addition, historical events support the idea of equality between men and women in terms of economic circumstances in marriage and family relations. The Qur'an introduced numerous reforms to existing cultural practices relating to financial provisions for women, including retaining women's rights to own property and giving them the right to inherit. The Prophet Muhammad supported the activities of his first wife, Khadija, as an independent businesswoman, showing respect for women who serve as equals in the financial aspects of a marriage. This was the beginning of a trajectory of reform that, carried forward 1400 years later to match the time and context, should lead to equality between men and women in financial matters.

14. Thus, contemporary 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. Since these interpretations and laws are human-made and concern relations between humans, they can change within the framework of Islamic principles and in accordance with the changing realities of time and place. Recent positive reforms in Muslim family laws and evolutions in practices provide support for this possibility of change.

Musawah Recommendations

15. Bearing in mind the ideas and information outlined above, Musawah recommends that the CEDAW Committee include the following in the proposed General Recommendation on the economic consequences of marriage and divorce:

- a. All States parties, regardless of national, religious or cultural composition, should enable the development of laws and practices that recognise in theory and in practice equality between women and men in family laws, including equality in marriage and dissolution of marriage, inheritance, custody and guardianship. The fact that laws are based on religion cannot justify inequality in the family, since they are based on human interpretations of religious texts and must comply with religious and universal human rights standards of equality and justice.
- b. States parties should take all possible measures to uphold existing provisions in international law that set out standards of equality in marriage and its dissolution, including by withdrawing reservations to articles 2, 5 and 16 of CEDAW.
- c. States parties should support open and inclusive public debate regarding diversity of opinion and interpretations of religious laws and principles relating to family laws.
- d. States parties should ensure improved access to justice for women, especially with regard to the issues of dissolution of marriage, spousal maintenance and child maintenance.
- e. States parties should gather and maintain statistical data regarding the paid and unpaid economic contribution of women's labour to the household, such as domestic work, child care, breastfeeding, etc., and the prevalence of female-headed households or households in which women are the primary wage earners.
- f. The United Nations, the international community and States parties should recognise and support the women and men who are engaging in processes of reform of family laws and protection of existing rights in ways that take into account religious values and universal human rights and that move the family towards relationships of equality, justice, dignity and mutual respect.

16. Musawah is willing to provide more input and detailed information about Muslim marriage laws and practices at the Committee's request. Thank you for your time and consideration.