

JOINT REPORT ON MUSLIM FAMILY LAW AND MUSLIM WOMEN'S RIGHTS IN MALAYSIA

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A. INTRODUCTION

Sisters in Islam (SIS), a national NGO working towards equality and justice for women within the Malaysian Islamic legal framework, together with Musawah, the global movement for equality and justice in the Muslim family, jointly submit this shadow report for consideration by the CEDAW Committee in its review of the Government of Malaysia, reporting before the 69th Session of the CEDAW Committee in February 2018.

This is the CEDAW Committee's second engagement with the Government of Malaysia, which ratified the Convention in July 1995, with reservations to articles 5 (a), 7 (b), 9 and 16. On 6th February 1998, the Government of Malaysia notified the Secretary-General of a partial withdrawal of reservations to articles 2(f), 9(1), 16(b), 16(d), 16(e) and 16(h). In July 2010, the government removed its reservations to CEDAW Articles 5(a), 7(b) and 16(2). However reservations still remain on five CEDAW Articles: 9(2), 16(1)(a), 16(1)(c), 16(1)(f) and 16(1)(g) as barriers that preclude full equality for women in family life.

In 2009, Concluding Observations of the CEDAW Committee on Article 16 included for the State party to undertake a process of law reform to ensure equality in the family. Recommendations were also made to the State party that a strong federal mechanism be put in place to harmonize and ensure consistency of application of *Shari'ah* laws across all states. However, it is noted that there has been no progress towards implementation of these recommendations. As this report shows, inequalities in law and practice remain entrenched in Malaysia, and no effort at law reform has taken place.

This report examines Malaysian laws and practices that enforce *de jure* and *de facto* discrimination against Muslim women in the following areas: trends in reform of Islamic Family Laws; discriminatory legal frameworks; early and child marriage; polygamy; divorce; inheritance; child custody and guardianship. Also included in this report are relevant statistics from 'Telenisa' - Sisters in Islam's free legal advisory services on legal rights of Muslim women and men under Islamic Family Laws and the Syariah Criminal Offences Law.

We hope 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 response to the list of issues;
- (2) Providing alternative arguments within Muslim legal theory that challenge the ways the State party uses religion to justify discrimination, including reservations and non-implementation of its international human rights treaty obligations; and
- (3) Suggesting recommendations for reform based on good practices in Muslim contexts.

We hope that the CEDAW Committee will utilise this report as a key resource during its Constructive engagement with the State party, and in identifying follow-up issues in the Concluding Observations.

B. LEGAL FRAMEWORK

Muslims in Malaysia constitute 61.3% of the population (Census 2010¹). They primarily belong to the Sunni sect and follow the Shafi'i *madhab* (school of Islamic jurisprudence).

Malaysia operates a plural legal system, based on English common law, Islamic law and customary laws. The Federal legislature (Parliament)² enacts the majority of laws, including laws on contracts, torts, property, crime and constitutional and administrative matters. These laws are enforced through a Federal judiciary.

Islamic laws (except for Islamic finance) are enacted by the state legislative bodies³ and only apply to Muslims. Islamic laws are enforced by Syariah Courts that are established at State level. The Constitution⁴ limits the matters that can be legislated at State level under the Ninth Schedule of the Second List (State List). In relation to Islamic laws they are:

1. ***“Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, organization and procedure of Syariah⁵ courts, which shall have jurisdiction only over persons professing the religion of Islam ...”.***

Article 121(1A) of the Federal Constitution (introduced in 1988) states that the civil courts have no jurisdiction in matters that fall within the Syariah court jurisdiction. It was introduced to remove jurisdictional overlaps between the two legal systems.

However, over the years, the interpretation of this article was corrupted to mean that, essentially, the civil courts had no power to judge on any matter that in any way involves Islamic laws or actions of Islamic authorities. This gave rise to significant injustices, particularly where the constitutional rights of individuals were being undermined. The uncertainty was created by conflicting judgements over whether Islamic laws override constitutional rights and Federal laws, and whether civil courts have the authority to judicially review the powers exercised by Islamic authorities.

The issue of jurisdiction of courts was recently resolved in the case of unilateral conversion of children into Islam by one party in the marriage. The Federal Court, in its landmark judgment in January 2018, decided that the civil courts have jurisdiction over judicial review, interpretation of laws and administrative justice even where the matter refers to Islamic laws or Islamic authorities⁶. The Federal Court also decided that in the best interest of the child, both parents must consent to the conversion of a child to Islam.

We hope that this once and for all resolves the issue and will set a healthy precedent for the future. It should be noted however, that there were certain developments after the Federal Court decision that were of concern. In particular, was the outcry from certain Islamist groups stating that the decision relegated the Syariah Courts to a secondary court, and it did not respect Muslim rights.

¹ 2010 Census on Population and Housing
https://www.dosm.gov.my/v1/index.php?r=column/cthem&menu_id=L0pheU43NWJwRWVVSZkIWdzQ4TlhUUT09&bul_id=MDMxdHZjWtk1SjFzTzNkRXYzcVZjd09

² Article 73 of the Federal Constitution of Malaysia

³ Other areas where States legislate laws are such as land and other natural resources of the State.

⁴ Article 74(2) of the Federal Constitution of Malaysia states that: “Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a state may make laws with respect to any of the matters enumerated in the State List (i.e. the Second List set out in the Ninth Schedule) or the Concurrent List.”

⁵ Malay spelling for ‘Shari’ah’

⁶ Press Release | Only Civil Courts, and Not Syariah Courts, Have Jurisdiction to Review Constitutional Issues Relating to Conversion of Religion
http://www.malaysianbar.org.my/press_statements/press_release_%7C_only_civil_courts_and_not_syariah_courts_have_jurisdiction_to_review_constitutional_issues_relating_to_conversion_of_religion.html

LEGISLATION ON MARRIAGE AND DIVORCE

While the Law Reform Marriage and Divorce Act (1976) regulates marriage relations for persons who do not profess the Islamic faith, Muslims are governed under Islamic Family Laws (IFL), which are legislated at the state level, without option.

In Malaysia there are 14 states (one of which is the Federal Territories encompassing three areas i.e. Kuala Lumpur, Labuan and Putrajaya). This means that each of the 14 jurisdictions is able to enact its own set of laws through its state legislature, governing Muslims in that state. The head of state (in many states being the Sultan) is also the head of religion and thus laws require assent of the head of state and public gazette prior to enforcement.

In 1984, the Federal Parliament enacted the Islamic Family Law (Federal Territories) Act 1984 (IFLA) for the Federal Territories (Kuala Lumpur, Labuan and Putrajaya). Many of the states adopted slightly altered versions of the IFLA, but several states, including Kelantan, Melaka and Kedah, have adopted their own family law enactments that restrict women's rights in marriage and divorce much more than the IFLA.

What is of urgent concern to women's rights groups in Malaysia is the way the plural legal system operates. Since 1976, the government has undertaken a series of law reform to end discrimination against women in marriage and in the family. But this only applies to women of other faith. In the name of Islam, Muslim women not only remains discriminated against, but law reform rolled back rights they had gained and added further grounds for discrimination.

In 1976, the Law Reform (Marriage and Divorce) Act was amended to abolish all forms of discrimination against non-Muslim women. Polygamy was banned. The same rights to enter into marriage and grounds for divorce applied to both men and women.

In 1999, the Guardianship of Infants Act was amended to provide for the father and mother to have equal rights to guardianship of their children and the Distribution Act was amended in 1999 to provide for equal inheritance rights for widows and widowers. However, none of these law reform efforts were extended to Muslim women.

Furthermore, the law reform process adopted for the Law Reform (Marriage and Divorce) Act observed a robust legislative process and was conducted in a democratic and consultative manner. A Parliamentary Select Committee was established and it travelled all over the country to listen to diverse views from the ground before this law was drafted. However, when it came to family law reform for Muslims, no consultation with women's rights groups were held. It was primarily driven by a small Syariah Technical committee in consultation only with like-minded people at the state level – male religious leaders, the state executive committee members for religion and the legal advisers – mostly all men.

This resulted in two rounds of law reform to the IFLA (1994 and 2003) that further discriminate against Muslim women. In effect, Muslim women in Malaysia face double discrimination – firstly, discriminated vis-à-vis Muslim men within the IFLA and secondly, discriminated vis-à-vis women of other faith, with Muslim women enjoying far less rights in marriage, divorce, guardianship of their children and inheritance.

In the context of political Islam, rising conservatism and identity politics in Malaysia, the State party remains willfully oblivious to the gross injustice it perpetuates against more than half of its female population.

C. KEY ISSUES, LIVED REALITIES, ISLAMIC JURISPRUDENCE AND REFORM

1. TRENDS IN LAW REFORM ARE REGRESSIVE AND PERPETUATE DISCRIMINATION AGAINST MUSLIM WOMEN

According to Malaysia State party report on CEDAW:

'Several provisions in the Islamic Family Law (Federal Territories) Act 1984 were amended to further safeguard the rights of women. For example, section 23 of the Act was amended to protect a woman whose husband contracts another marriage. The amended provision imposes a condition for the man who wishes to contract another marriage to obtain the court's written permission prior to the marriage.'

In addition, the new provision provides that the court shall have the power on the application by any party to the marriage to require a person to pay maintenance to his existing wife or wives, or to order the division between the parties of the marriage of any assets acquired by them during the marriage by their joint efforts, or the sale of any such assets and the division of the proceeds of the sale. In this regard, most of the states in Malaysia have taken action by amending the relevant provisions.'

CEDAW/C/MYS/3-5

1. Amendments to Islamic Family Laws leading to discrimination against Muslim women

The Islamic Family Law (Federal Territories) Act 1984 (IFLA) was once regarded as among the most progressive in the Muslim world. However, subsequent amendments to the law in 1994 and 2003 have diminished the rights of Muslim women in Malaysia instead of moving forward to recognize the changing circumstances of women today. The assertion by the State party that amendments were made "to further safeguard the rights of women" are not borne by facts.

In 1994, the first round of law reform chiseled away at rights granted under the original 1984 law. The amendments allowed for divorces pronounced outside the courts and polygamy committed without the court's permission to be registered as legal, upon payment of a small fine for breaking the law. These amendments created a legal loophole which led to a proliferation of men who divorce their wives at will and who take second, third and fourth wives without the permission of the court. The fifth condition for polygamy— 'no drop in standard of living of existing family' – was repealed, thus eliminating an important condition that a man has to fulfil before the court would consider giving him permission to marry again.

By making it easier for men to divorce and to commit polygamy, the law reform caused further harm to women and children and undermined the family institution that the government proclaimed to support. According to anecdotal evidence, many women found out they were divorced through a letter from the court or that their husbands had taken second wives through friends. Divorce via text messages was also considered valid by Syariah Court judges.

Ten years forward, another round of law reform was introduced in 2003 to further discriminate against Muslim women. More legal rights were given to men and the use of gender neutral language extended to men rights that historically were seen as the rights of women. Amendments were first introduced in the state of Selangor in 2003, and thereafter the Islamic Family Law (Federal Territories) (Amendment) Act 2006 was passed in Parliament applicable for Federal Territories, with a number of discriminatory provisions which further dismantled the progressive provisions in the 1984 IFLA.

These include:

- The first condition for polygamy was amended to reduce the husband's burden of proof to justify a polygamous marriage in court. In the original 1984 law, a proposed polygamous marriage had to be shown to be "just AND necessary". The 2006 amendments changed this to "just OR necessary". Only one justification needs to be proven.

- Granting the husband the right to claim a share of the matrimonial assets upon his polygamous marriage (section 23(9)); This provision created a gross injury upon the rights of an existing wife where a husband who is going to marry a new wife would be able to seek the sale of the matrimonial home and make claims on the matrimonial assets in order to support his new family;
- A wife is forced to choose either maintenance OR division of *harta sepencarian* (matrimonial assets) upon a husband's polygamous marriage (section 23(9)(a)). Under Islamic law, it is a husband's duty to maintain his wife. A division of the matrimonial assets is an additional right to protect the existing wife and children's financial interest due to the husband's decision to take a second wife;
- The wife's right to *fasakh* divorce is extended to the husband as well (section 52(1)), while the husband's right to unilaterally divorce at will remains;
- The wife's right to get a court order to stop the husband from disposing his assets (section 107A) to defeat claims to maintenance is now extended to the husband.

These grossly discriminatory amendments met with public outrage and a revolt by women members of the Senate. This led the then Prime Minister to instruct the Attorney General's Chambers to form a committee, that included women's rights groups, to review the discriminatory amendments. A series of new recommendations for amendments to the law to make it fairer for women was proposed and agreement on these amendments was reached in 2006. **However to date, 11 years later, these relatively more progressive amendments are yet to be submitted to Parliament.**

Further discrimination over insurance and distribution of assets

The discriminatory law reform process against Muslim women also extended to insurance and the Employees Provident Fund⁷ (EPF). The Insurance Act was amended in 1996 to provide that the Muslim beneficiary named in an insurance policy acts only as the administrator of the estate, as the deceased insurance monies is to be distributed according to *fara'id* (Islamic inheritance rules). This means if a husband buys a policy and names his wife as the beneficiary in order to protect her well being upon his death (knowing that she would only inherit 1/8th of his assets), his wish is actually denied by law, as the monies will be divided according to *fara'id*.

The same applies to EPF funds as well. In 2000, the National Fatwa Council issued a *fatwa* to extend the *fara'id* rule to EPF funds. So if a wife and daughters are named as beneficiaries, they will actually only act as administrators. Under *fara'id* rule, a daughter inherits half what a son gets, a wife with children will get only 1/8th; a wife with no children gets 1/4, and the rest goes to the husband's surviving heirs. If he has no surviving heirs, the rest goes to *Baitulmal*.⁸

Challenges in advocating for reform

Campaigns to reform discriminatory laws against Muslim women pose particular challenges for several reasons, including:

1. Islamic laws come under state jurisdiction. This means any campaign must be done at the federal level and also the 13 other states, and any law reform must be approved by 14 separate jurisdictions.
2. These laws bear the label "Islamic". Therefore there is wide belief among political and religious leaders that only the "ulama" (religious scholars) have the authority to deliberate and make decisions and broader consultations are not required. Thus the most discriminatory understanding of Islam was codified into law.
3. Women's groups campaigning for equality and justice for Muslim women are labelled as deviants, and their demands regarded as anti-Islam and anti-*Shari'ah*. For this reason, very few men in authority, not least political leaders, are willing to take the side of women's rights activists in their campaign to reform discriminatory laws.

⁷ A mandatory contribution by employers and employees for the purposes of retirement and savings.

⁸ Baitulmal in ancient Arabia is the treasury of the State. In Malaysia, the Baitulmal collects monies from sources including properties where there are no inheritors (and zakat) and determines the manner of its safekeeping or disposal. The Baitulmal is part of the Islamic State administration.

It is untenable and unjust that in this day and age, while laws that discriminate against women of other faiths were amended to recognize equality, law reform in the name of Islam made it worse for Muslim women in Malaysia. However, notwithstanding these challenges, women's groups in Malaysia remain persistent in claiming their right and asserting their authority to challenge the ways Islam is used to justify discrimination against women and to offer an alternative vision of Islam to uphold equality and justice and argue for the possibility of reform.

We recommend that the CEDAW Committee to urge the State party to take urgent and immediate steps to treat Muslim women as citizens of equal worth and dignity and ensure that law reform towards equality and justice extend to all citizens, including Muslim women.

TOOLS FOR REFORMING MUSLIM FAMILY LAW

In addition to human rights instruments, juristic tools and concepts exist within Islamic legal theory that can be used to reform discriminatory Muslim laws:

First, there is a distinction between what the State party calls *Shari'ah*, the revealed way, and *fiqh* - jurisprudence and human understanding of the *Shari'ah*. Much of what is deemed to be 'Islamic law' by the State party, and what is practiced in its family courts today are in fact, *fiqh* - jurisprudence. **It is not divine law. It is human-made, fallible and changeable.**

Second, Muslim jurists have always considered legal rulings related to marriage and family as social and contractual matters, not spiritual or devotional matters. As such these rulings have always been open to reform, **given changing times and circumstances.**

Third, diversity of opinion has always been accepted and celebrated in the Muslim legal tradition. This led to multiple schools of law, with Kuwait following a particularly school of jurisprudence. Principles such as ***maslahah* (public interest)**, and ***istihsan* (choosing the best opinion among many)** must be used to meet the demands of equality and justice today.

Fourth, laws or amendments introduced in the name of *Shari'ah* and Islam must reflect the values of **equality, justice, love, compassion and mutual respect** among all human beings. These values exist in the Qur'an and the Muslim legal tradition, and they correspond with contemporary human rights principles.

These rights-based principles and scholarship that exist within Islam, the State party constitutional provision that recognizes equality and non-discrimination, and most importantly, the changing realities of women's lives today in Malaysia, necessitate the urgent need for reform.

2. FAMILY LAW BASED ON DISCRIMINATORY FRAMEWORK

CRITICAL INFORMATION

1. Reciprocity of rights

The Islamic Family Laws of Malaysia are grounded in a marital framework based on 'reciprocal' or 'complementary' rights (as opposed to 'equal' rights) between the two spouses, whereby in return for maintenance and protection from her husband, a wife is expected to 'obey' him. Her failure to obey can lead to a loss of maintenance.

This classical legal framework that regards all men as providers and protectors of the family leads to privileges and rights granted to men in terms of marriage, divorce, guardianship, inheritance, etc. In practice, when men fail to undertake their roles and their responsibilities, their privileges remain in place; while women today who provide and protect their families do not get any recognition in law that they are worthy of being treated as equal to men.

Under the IFLA, a woman who 'commits *nusyuz*' or disobeys any order lawfully given by her husband has committed an offense and can be fined. Section 59 of the IFLA states that:

- (2) *Subject to Hukum Syarak (Islamic law) and confirmation by the Court, a wife shall not be entitled to maintenance when she is nusyuz, or unreasonably refuses to obey the lawful wishes or commands of her husband, that is to say, inter alia—*
- (a) *when she withholds her association with her husband;*
 - (b) *when she leaves her husband's home against his will; or*
 - (c) *when she refuses to move with him to another home or place, without any valid reason according to Hukum Syarak.*
- (3) ***As soon as the wife repents and obeys the lawful wishes and commands of her husband, she ceases to be nusyuz.***"

2. Male guardianship (wali)

The IFLA does not grant women equal consent and capacity as men to enter into marriage. Regardless of her age, a prospective bride requires the consent of a male guardian (*wali*) to marry. The guardian must be a Muslim and a male relative of the prospective bride (father, followed by the paternal grandfather, full-brothers, half-brothers, sons of full brothers, sons of half-brothers, paternal uncles and male cousins).⁹

Women in Malaysia have achieved a literacy rate of 96.3% (2010) and the majority of students in higher secondary and tertiary enrollment are women.¹⁰ The female labour force participation rate was 54.3% in 2016¹¹ and continues to be on the rise since 2010 and it is noted that gender parity index for women's economic participation is also increasing.¹² At least 35.8% of the top management positions in government are held by women¹³, while 26.3% of upper management among the top 100 listed companies are held by women.¹⁴

Many Malaysian Muslim women are heads of households, primary caregivers, and key decision makers within their families and communities. However, the limitations on women's capacity to independently enter into a marriage do not reflect the progress Malaysian women have made. This continued disconnect between law and reality is harmful to family well being. This is reflected in the particularly disproportionate high divorce rate among Muslims compared to non-Muslims in Malaysia.

⁹ Sections 7, 13 of the IFLA (1984), <http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20303.pdf>; Information obtained from Malaysian Advocate, February 2017

¹⁰ Department of Statistics, Malaysia (2017). Statistics On Women Empowerment In Selected Domains, Malaysia, 2017 https://www.dosm.gov.my/v1/index.php?r=column/pdfPrev&id=SGZCnMrWW9ZTEdpYys4YW0yRlhoQT09Zz09&menu_id=L0pheU43NWJwRWVVSZklWdzQ4TlhUUT09

¹¹ Department of Statistics, Malaysia (2016), Labour Force Participation Survey <https://www.dosm.gov.my/v1/index.php?r=column/pdfPrev&id=SGZCnMrWW9ZTEdpYys4YW0yRlhoQT09>

¹² Statistics on Empowerment of Women in Selected Domains, Department of Statistics, 2017.

¹³ Department of Statistics, Malaysia (2017). Statistics On Women Empowerment In Selected Domains, Malaysia, 2017

¹⁴ Women In Leadership Positions: Where Is Malaysia At? <https://leaderonomics.com/leadership/facts-fiction-womens-agenda>

CHALLENGING THE MAINTENANCE-FOR-OBEDIENCE FRAMEWORK

This idea of 'complementarity of rights' is a manifestation of male authority (*qiwamah*) and guardianship (*wilayah*) over women. does not in practice lead to equality in rights and responsibilities between the husband and wife. Men who fail to provide do not lose their authority over women, and women who financially provide for the family do not enjoy corollary rights and privileges.

QUR'ANIC PRINCIPLES PROMOTE EQUALITY BETWEEN SEXES

- The concept of male authority (*qiwamah*) and male guardianship (*wilayah*) over women play a central role in institutionalizing, justifying, and sustaining a patriarchal model of families in Muslim contexts, and must be challenged.
- The very notion of male authority and guardianship over women is not in line with Qur'anic principles. The hierarchical understandings of *qiwamah* and *wilayah* are juristic (fiqh) constructs that belong to the time and context where patriarchy was part of the social and economic fabric of life, and where men's superiority and authority over women was theoretically a given.
- We can and must reconsider these concepts in line with the Qur'anic principles of justice and fairness, to build egalitarian family laws and practices that are based on social justice and enable families and their individual members to reach their full potential.

CONTEMPORARY LIVED REALITIES

- Women's lives and stories reveal that laws based on male authority and guardianship over women are untenable, unjust and discriminatory. Far from creating harmony in marriage, these laws are the main causes of marital breakdown and violence against women and thus there is urgent need for reforms.

RECOMMENDATIONS

We recommend the CEDAW committee to urge the State party to:

- ❖ Ensure law reform to end discrimination against women benefit all citizens equally;
- ❖ Conduct a complete review of Islamic Family Laws to grant Muslim women equal rights to men and equal rights to women of other faith. The review must consider an enlightened and progressive interpretation of the *Shari'ah*, and be grounded in a legal framework that regards marriage as a partnership of equals;
 - Reference should be made to the extensive rights-based scholarship on Islam and women's rights produced by scholars and activists and on progressive models of family law;
 - In 2005, Sisters In Islam began its work on a model Muslim Family Law based on the principles of justice and equality. This model law can serve as the basis to promote law reform;
- ❖ Involve all stakeholders in the law reform process including women's rights organizations;
- ❖ Amend all provisions in the IFLA that respond to a maintenance-for-obedience legal framework;
- ❖ Specifically repeal Sections 59(2) and (3) of the IFLA concerning *nusyuz* (disobedience) of a wife;
- ❖ Ensure that Muslim women have equal right and capacity to enter into marriages on their own accord without permission of a male guardian or a judge;
- ❖ Specifically remove the consent requirement for a woman's marriage by repealing Section 13 of the IFLA.

EQUALITY OF SPOUSES IN MARRIAGE

POSITIVE DEVELOPMENTS IN MUSLIM FAMILY LAW GLOBALLY

ALGERIA

Under the Constitution and the Civil Code, the family is based on equality between spouses

TURKEY

The Family Code requires each spouse to cohabit in harmony, mutual respect and kindness, contribute jointly to the preservation of the family's interests, the protection of their children and the provision of a sound education for them and mutually agree in the management of the family's affairs, including the spacing of births.

MOROCCO

The Family Code (Moudawana) recognises marriage as a partnership of equals and specifies the 'mutual rights and duties' between spouses which includes: (i) cohabitation, mutual respect, affection and the preservation of the family interest; (ii) both spouses assuming the responsibility of managing and protecting household affairs and the children's education; and (iii) consultation on decisions concerning the management of family affairs.

MALE GUARDIAN (WALI)

POSITIVE DEVELOPMENTS IN MUSLIM FAMILY LAW GLOBALLY

CONSENT OF MALE GUARDIAN (WALI) NOT REQUIRED FOR ADULT BRIDE AND GROOMS

TURKEY, TUNISIA, MOROCCO, EGYPT, IRAQ, AFGHANISTAN

3. EARLY AND CHILD MARRIAGE

CRITICAL INFORMATION

1. Child marriage is still permitted in Malaysia despite removal of reservation to Article 16(2) of CEDAW

In July 2010, the Malaysian government removed its reservation to Article 16(2) of CEDAW. Article 16(2) states that the age of majority is to be specified by the state, however CEDAW General Recommendation No. 21 states that it "*considers that the minimum age for marriage should be 18 years for both man and woman.*"¹⁵ It also states that legal provisions, which allow for different ages at which men and women can marry, should be abolished.¹⁶ Most importantly, the Malaysia Child Act 2001 provides that "*child*" - (a) means a person under the age of eighteen years.¹⁷

However, the legislative provisions on the age of marriage has remained unchanged since the last NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia published in 2005.¹⁸

Under the IFLA (note that the laws across the 14 states are uniform in this regard) the minimum age for marriage is 18 for men and 16 for women, with exception that they may marry at younger ages with the permission of the Syariah judge in certain circumstances. In effect, **there is no minimum age as long as it is with the approval of the Syariah judge.**

There is no specific penalty provided if such an approval is not obtained. Strictly speaking the marriage would be in contravention of the law, however, a legal loophole is created under section 12 of the IFLA where, according to the judge's discretion if he/she considers it in accordance with Islamic law (*fiqh*) then the marriage may be registered nonetheless.

¹⁵ CEDAW Committee, General Recommendation No. 21, paragraph 36.

¹⁶ CEDAW Committee General Recommendation No. 21, paragraph 38.

¹⁷ Section 2 of the Child Act 2001.

¹⁸ Coordinated by the National Council for Women's Organizations (NCWO) in collaboration with the Women's Aid Organization (WAO). Prepared by the NGO Shadow Report Group 2005.

Data also shows that the numbers of child marriage have increased. Based on the 2010 Census - 80,000 married women in Malaysia were between 15 and 19 years of age, while there were 70,000 young married men.¹⁹ Figures for those between the ages of 10-14 who were married, widowed or separated have been removed from the 2010 census data following shocking revelations from the 2000 Census that there were 10,267 children in that age group who were married.

2. Guidelines for justifying underage marriage is undefined

Section 8 of IFLA²⁰ provides that: *“No marriage may be solemnized under this Act where either the man is under the age of eighteen or the woman is under the age of sixteen except where the Syariah judge has granted his permission in writing in certain circumstances.”*

- A key concern is there have been no attempts to clarify what constitutes “certain circumstances.” Furthermore, Section 8 of the IFLA is silent on the issue of consent of the child. In practice, consent is not necessarily requested in each case. There are circumstances where the child is not called in by the Court for an interview.
- Frequently, the parents’ testimonies are accepted as sufficient. Section 8 is also silent on requiring the court to decide in the best interest of the child. This has resulted in cases when marriage of a rapist to his victim was approved while the man was being prosecuted for rape (see box below).²¹

While the State party in its reply to the List of Issues and Questions stated that strict regulations and procedures are in place to control child marriage and many applications are rejected²², data shows that a majority of applications are approved.

In 2012, it was reported that there was a total of 1,022 approvals out of 1,165 child marriage applications filed in the Syariah Courts, making the approval rate approximately 88%.²³ A 2014 research study conducted by the Centre for Research on Women and Gender (KANITA) at Universiti Sains Malaysia (USM), found that getting permission from Syariah Courts had not been difficult (Endut and Mohd Hashim 2014).

Lived realities of child marriage cases are difficult to document as in most cases, the parties involved are unwilling to expose their situation. A particularly harrowing incident in 2013 was the case of Riduan Masmud who was charged for raping a 13-year-old girl. When the matter was brought to court, he informed the court that he had married the victim.

The Public Prosecutor at that time decided to withdraw the case on the basis that he had married the girl. This caused a public outcry, which led prosecutors to pursue the rape charge, which resulted in a conviction in 2014. Separately, Riduan was also facing bribery charges for paying the girl's father RM5000 (\$1269) to give his consent to the marriage.

More info: <http://www.dailyexpress.com.my/news.cfm?NewsID=85483>

¹⁹ Marriage trends and legal ages in Malaysia. <http://www.themalaymailonline.com/malaysia/article/three-things-about-child-marriages-in-malaysia#0BBWyQ0ipLTCsOSE.97>

²⁰ Islamic Family Law (Federal Territories) Enactment 1984

²¹ Malaysian rape accused marries 13-year-old alleged victim <https://www.theguardian.com/world/2013/may/22/malaysian-rapist-marries-victim-girl>

²² See page 5 List of issues and questions in relation to the combined third to fifth periodic Reports of Malaysia [Date received: 16 November 2017] :20.The parties in order to obtain such permission must prove to the court circumstances or reasons that necessitate such marriage and the court has the duty to properly scrutinise and examine the application before deciding whether to grant the permission. In order to make sure that the court observes the duty, the Department of Syariah Judiciary Malaysia that coordinates Syariah Court has taken up certain approaches:(a) Organising seminars and workshops to train judges and Syariah officers when handling cases of child marriage; (b) Carrying out of courses and discussions on the issue of child's marriage; (c) Establishing strict rules in the process of handling trial proceeding of application of child's marriage; (d) Forming a Standard of Operation (SOP) on application filed under Section 18 of the Islamic Family Law Act (Federal Territories) Act 1984 as a reference for Syarie judges. 21. Due to the setting up of strict regulations and procedures by the Syariah law of the country, many applications for child's marriage are rejected by the Syariah Court, due to: (a) Failure of the applicant bridegroom to prove that he can sustain and maintain the bride should he be allowed to marry; (b) Report on the applicants' conduct obtained from authorised body proved that they are morally unsatisfactory; (c) Inadequacy of applicants' knowledge on the religion and, their duties and responsibilities as a spouse in a marriage.

²³ The Star Online, 6 October 2013

MUSAWAH JUSTIFICATION FOR REFORM

Attempts to set and strictly enforce the minimum age of marriage at 18 for both men and women are often met with resistance from conservative religious authorities, who claim that this is 'un-Islamic.'

NEW HISTORICAL EVIDENCE NOW AVAILABLE

- Commonly, the example of the Prophet Muhammad's marriage to Aishah is used to justify child marriage. The marriage was supposedly consummated when Aishah was nine years old.
- However, there are new studies asserting that Aishah was likely to have been 19 at the time of her marriage (source: <http://www.sistersinislam.org.my/news.php?item.997.41>).
- 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.

QUR'AN STATES CONDITION OF PERSON FIT FOR MARRIAGE

- 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, forces adulthood on children under 18, even onto those who start menstruating at the age of nine.
- The onset of puberty is no indication of sufficient maturity for marriage.

RECOMMENDATIONS

We recommend the CEDAW committee to urge the State party to:

- ❖ Enforce 18 years as the absolute minimum age of marriage for both girls and boys, and remove all legal loopholes that allow for exceptions to this rule;
- ❖ Enact strict legislation to criminalize child and forced marriages, and enforce punishments for planning, conducting, and failing to prevent child and forced marriages;
- ❖ Initiate better collection of data on the nature, extent and prevalence of child marriage in Malaysia and undertake a socio-economic and legal analysis on the root causes and reasons for the practice, which can in turn contribute to policy formulation, law reforms and effective educational campaigns.

MINIMUM AGE OF MARRIAGE

POSITIVE DEVELOPMENTS IN MUSLIM FAMILY LAW GLOBALLY

MINIMUM AGE OF MARRIAGE 18 (OR ABOVE) & NO EXCEPTIONS

EGYPT

The minimum age for marriage is 18 for both females and males. The registration of the marriage of a person below 18 is prohibited and penalised.

KENYA

The minimum age for marriage is 18 for both females and males. Any person who marries or knowingly celebrates or witnesses the marriage of a person below 18 commits an offence and will be liable to a penalty (imprisonment, fine or both).

PAKISTAN (Sindh Province):

The minimum age for marriage is 18 for both females and males. The law criminalises and penalises the following: (i) males over 18 who contracts a child marriage; (ii) whoever performs, conducts or directs a child marriage; and (iii) parents or guardians who promote a child marriage, permit it to be solemnised or negligently fail to prevent it from being solemnised.

5. POLYGAMY

CRITICAL INFORMATION

According to Malaysia State party report to CEDAW Committee:
'In Shari'ah, Muslim men are allowed to have four wives and the Shari'ah's primary sources require the men to be just to all the wives. The Syariah Courts have been accorded the power to determine what would be deemed just for the wife and will consider collaborative evidence such as the man's occupation earnings as well as seeking medical reports for cases of infertility.'

CEDAW/C/MYS/3-5

Polygamy contravenes Article 5(a) of CEDAW regarding prejudicial customary practices as well as Article 16(1)(a) concerning the same rights to enter into marriage. The Malaysian government maintains its reservation to the latter.

In Malaysia, polygamy was practised by the major communities until the Law Reform (Marriage and Divorce) Act 1976 banned polygamy for non-Muslims. Since then, polygamy has increasingly come to be associated with Islam, making it even more difficult to campaign for reform. This is due to the prevalent belief among those in religious authority and within Malaysia's patriarchal society that polygamy is a divine right of men and therefore the state has no right to intervene and restrict the practice. Little regard is given to the documented harmful effects of polygamy to the wife and children and overall family well-being.

1. Amendments to IFLA rolled back conditions for polygamy

As stated previously, two rounds of law reform to the IFLA have made it easier for Muslim men to commit polygamy in Malaysia. In 1994, the Act was amended repealing the fifth condition (no drop in standard of living of the existing family) that has to be fulfilled before the Syariah Court can permit polygamy. Additionally, while the 1984 law only allowed polygamy with the permission of the court, another 1994 amendment allows an illegal marriage without the court's permission to be registered upon payment of a minimal fine.

Amendments in 2005 resulted in further leniency in a man's ability to commit polygamy. The first condition that he must prove the proposed marriage was both "just AND necessary" was amended to "just OR necessary". Implementation of the remaining conditions for polygamy also remains weak. Currently the four existing conditions to be met are: the proposed marriage is just or necessary; the man has the financial ability to support his existing and future dependents; he is able to treat all wives equally and; the marriage will not cause harm to the existing wife.

Often times, judges do not apply the conditions strictly, and if at all place emphasis mainly on the man's ability to financially support a second family. Thus permission is given even though all conditions are not met. Although the law requires that the existing wife and their prospective wife and families are to appear before the judge, often this is ignored or the existing wife is intimidated into agreeing.

2. Data on polygamy indicates widespread prevalence with serious impact on women and children

- In March 2017, the Minister in Prime Minister's Department, in response to a Parliamentary question, stated that the Syariah Courts have allowed 8,808 cases of Muslim husbands who applied for polygamy between 2010 and 2016²⁴
- Increasingly, polygamous marriages are being conducted on the border of Thailand to escape the need to obtain Syariah Court approval prior to a polygamous marriage. The Malaysian consulate in Thailand's Songkhla district recorded 4,178 such marriages in 2016, an increase from 4,081 in 2015 and 3,831 in 2014²⁵

²⁴ Over 8,000 polygamy applications given green light since 2010, Putrajaya reveals
<http://www.themalaymailonline.com/malaysia/article/over-8000-polygamy-applications-given-green-light-since-2010-putrajaya-reve#2J65x4IMW4atCb4R.99>

²⁵ The best spot to keep polygamous marriages secret <http://www.freemalaysiatoday.com/category/nation/2017/03/27/the-best-spot-to-keep-polygamous-marriages-secret/>

- In the State party reply to the List of Issues and Questions²⁶, it reported that to deter illegal polygamous marriages, the Courts “recorded 9,233 cases of prosecution on men accused of committing polygamous marriage without Syariah Court’s permission from 2010 to 2016”. While the State party presents this data as evidence of its zealotry to prosecute these errant men, in truth, this figure, which is higher than legal polygamous marriages, reflects the ease with which Malaysian men can register their illegal marriage. The minimal fine they have to pay to legalize the marriage, does not act as a deterrent.
- Documented cases for polygamy under Sisters in Islam’s Telenisa statistics are on the rise: in 2015 there were 32 cases while 2017 there were 55 cases.

Sisters in Islam, in collaboration with Universiti Kebangsaan Malaysia, Universiti Sains Malaysia and Universiti Malaya conducted a national survey on “*The Impact of Polygamy on Muslim Families in Peninsular Malaysia*” from 2007-2012. During the research they interviewed a total of 1224 individuals including husbands, first wives, second wives, children of first wives and children of second wives.

The findings were as follows:

- Nearly 65% of first wives in the study were unaware of their husbands’ intentions to marry another woman;
- Most polygamous husbands could not fulfill financial and familial demands
 - 40% of husbands’ intentionally reduced monetary contributions to their children, wives, and towards the household expenditure after engaging in polygamy
 - 44% of first wives started working longer hours to supplement the family income. About 40% of them ‘always’ or ‘often’ felt financially insecure since their husbands’ second marriage
 - 64% of first wives said their husbands had not complied with the ‘turn-taking’ agreements
 - 77% of children of first wives were unhappy with their fathers’ time allocation
- The Syariah Courts have not strictly enforced the requirements for polygamous marriages
 - 45% of husbands did not submit applications to become polygamous to the courts
 - 50% of husbands said that no financial or health documents were asked by the court
 - 60% of first wives were not called by the courts and asked for their views, prior to these courts granting permission to their husbands to take on another wife
- Over 90% of children of both the first and second wives said they would not recommend polygamy as a form of marriage or family institution
 - 87% of children said their experience of polygamy had left negative emotional/psychological impact on them. Their life situations had also negatively affected their belief in the institution of marriage
 - 60% of children were involved in problematic activities such as excessive drug abuse, truancy and alcohol consumption

3. Inadequate penalties for offenders

Although there are penalties for an illegal polygamous marriage, they are lenient and do little to deter illegal polygamy. The IFLA considers it an offence if a polygamous marriage takes place without the permission of the Court. However, the marriage eventually gets registered, with a minimal penalty imposed upon the husband (section 123).

It is very rare for a man to be sentenced to jail for such an offence, and in most cases, he is merely sentenced to pay a fine. The fines are usually about RM1000 (USD255). Many argue that this kind of penalty only makes it easier for husbands to contract illegal polygamous marriages first, and inform the court after the fact, because they know that all they need to do is to pay a small fine to make the marriage legal.

²⁶ CEDAW/C/MYS/Q/3-5/Add.1

MUSAWAH JUSTIFICATION FOR REFORM

Musawah believes Islam promotes monogamy and only permits polygamy as an alternative in exceptional circumstances. *Surah an-Nisa' 4:3* in the Qur'an states: 'If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two, or 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'.

QUR'AN PROMOTES MONOGAMY

- When the Qur'an was revealed, it imposed limitations upon the pre-Islamic practice of polygamy.
- The verse in Surah an-Nisa' that allows polygamy if a man can treat all his wives justly was revealed after a battle which had resulted in many men being killed, leaving behind war widows and orphans.
- As men were breadwinners in that society, the widows found it difficult to provide for their children. It was in this context that polygamy was tolerated in Islam: to provide for the welfare of widows and the orphaned children.

CHALLENGING POLYGAMY

- Polygamy is not an intrinsically 'Islamic' practice, as some Muslims believe.
- Polygamy was a practice that existed in various civilizations, religions, and cultures in many parts of the world until it was abolished by law as governments acknowledged the injustices it inflicted on women and children.
- Tunisia has forbidden polygamy on the ground that it is impossible for a man to deal justly with more than one wife. Thus, the continuum of reform suggests that polygamy should be even more restricted than it was in the situation discussed in the Qur'an.

RECOMMENDATIONS

We recommend the CEDAW committee to urge the State party to:

On polygamy

- ❖ Amend Section 123 of the IFLA:
 - To impose a more stringent fine and a mandatory minimum four-week prison sentence (maximum one year) as a deterrent to the practice of husbands entering into polygamous marriages without the permission of the court;
 - To make mandatory consideration of first wife's representation in the decision to grant approval for polygamy;
- ❖ Reinstate the repealed provision (Section 23(3)(e)) that required a polygamous marriage not to reduce, directly or indirectly, the standard of living of the man's existing wife (or wives) and children;
- ❖ Include polygamy as grounds for divorce. This will enable a wife who is unable to live in a polygamous married to apply for a ta'liq divorce, which the court should automatically grant;

On matrimonial assets

- ❖ Protect property interests of an existing wife by providing that she is entitled to claim a share of the matrimonial assets before the husband may be permitted to marry another wife;
- ❖ Amend Section 23 of the IFLA to state that prior to allowing a husband to enter into an additional marriage, the court will decide the amount of maintenance payments for the existing wife and children, and assets owed to the existing wife. This allocation of payments and assets should occur automatically, without requiring the first wife to file a special application for this relief.

**POLYGAMY
PROHIBITED**



**KYRGYZSTAN, TAJIKISTAN, TUNISIA,
TURKEY, UZBEKISTAN**

COURT AUTHORIZATION AND CONSENT OF EXISTING WIVES NEEDED:

ALGERIA

Polygamous marriages must be authorized by the court and may only be concluded with the agreement of existing wives.

Court permission is only granted if the husband is able to provide justification for entering into multiple marriages as well as proof of his ability to be fair to all wives and meet the necessary conditions of married life with regard to all his marriages.

INDONESIA

Polygamous marriages must be authorized by the court and may only be concluded with the agreement of existing wives.

Court permission is only granted if the husband's existing wife:

- (i) is unable to perform her conjugal duties;
- (ii) suffers from a physical infirmity or an incurable disease; or
- (iii) cannot bear children.

IRAQ (KURDISTAN REGION):

Polygamous marriages must be authorized by the court and may only be concluded with the agreement of the existing wives. Court permission is only granted if certain conditions are met:

- (i) the first wife has to agree before the court to her husband marrying a second wife;
- (ii) if the wife is diagnosed with an incurable disease that prevents sexual intercourse or if the wife is infertile;
- (iii) the man has the financial capacity to support more than one wife;
- (iv) the husband signs a contract promising to deal with both wives fairly and equally in terms of sexual intercourse and other marriage relations;
- (v) the first wife does not have a condition in the marriage contract that the husband will not take a second wife.

A man who concludes a polygamous marriage without the authorization of a judge will be subject to a penalty of imprisonment and fine and judges are prohibited from suspending the penalties.

POLYGAMY AS GROUNDS FOR DIVORCE

ALGERIA, BAHRAIN, EGYPT, JORDAN, LEBANON, MAURITANIA, MOROCCO, PALESTINE:

A woman can stipulate in the marriage contract that her husband cannot take another wife. If her husband breaches this term of the marriage contract, the woman has the right to divorce.

AFGHANISTAN (SUNNI), EGYPT:

A woman may petition the court for a divorce if she is able to show that her husband's polygamous marriage is causing her harm.

BANGLADESH, PAKISTAN:

A wife may seek a divorce if her husband has taken an additional wife in contravention with the requirements of the law.

6. DIVORCE RIGHTS

CRITICAL INFORMATION

Muslim men and women do not have equal rights to divorce in Malaysia. Under the IFLA, a husband can divorce his wife at will without any conditions, while women are provided limited grounds for divorce, which require specific conditions and/or consent of husbands. The Act provides for five different mechanisms for divorce: (i) unilateral repudiation (*talaq*); (ii) conditional divorce (*cerai ta'liq*); (iii) judicial divorce (*cerai fasakh*); (iv) redemptive divorce (*cerai tebus talaq* or *khul'*) and (v) mutual repudiation divorce (*cerai secara li'an*). The marriage may also be annulled.²⁷

Under Section 47 of the Act, a husband or wife may apply to the court for a divorce, and if the court is satisfied with the divorce and/or both parties consent, the court may ask the husband to pronounce *talaq* in the court. If the desire for the divorce is not mutual, the court may direct the parties to attempt reconciliation; except in cases where a spouse has been deserted, the other spouse has been imprisoned, is suffering from mental illness, or there are exceptional circumstances that make reconciliation impracticable.

1. *Talaq* - Unilateral repudiation by the husband:

As per the IFLA, a Muslim man does not need specific grounds to divorce his wife. The critical issue that requires reform is the ability for a man to unilaterally divorce his wife merely by pronouncement of the *talaq*, whether to the face or even through text messages and other non-verbal means. This has caused grave injustice and distress to many women and children.

Examples of cases received via the Sisters in Islam's Televised legal clinic includes cases where the husbands pronounced *talaq* in the middle of a fight but later retracted it leaving their wives concerned whether "as per Islam" they remain married to their husbands or have been divorced.

2. *Fasakh* - Judicial divorce:

For the wife, the most common way to institute a divorce is by *fasakh*, particularly when the husband refuses to grant a divorce. This form of divorce is conditional and therefore is markedly different from the right of a man to unilaterally divorce the wife through *talaq*.

Conditions on which a woman may apply to the court for *fasakh* include if her husband: has failed to provide maintenance; has been insane or has a communicable sexually transmitted disease; treats her cruelly, including habitual assaults or making her life miserable by cruel conduct; does not treat her equally with other wives (if he has multiple wives); disposes of her property or hinders her legal rights over her property; attempts to force her to lead an immoral life; or associates with "women of ill repute."

The Syariah Court requires the wife to provide strong grounds before pronouncing divorce through *fasakh*. *Fasakh* divorce takes a much longer time. The normal range is between six months to a year but there have been cases, which have stretched from five to ten years. These extensive delays are often the result of husbands using technical legal processes to delay the hearing of the case, husband not turning up for hearing, husband filing significant numbers of matters so as to disrupt the hearing of the matter at hand and so on.

Women seeking legal advice from Telenisa complain about the complexity of the procedure for *fasakh* divorce. They are often intimidated by the process which involves proving conditions and discussing marital issues before mostly all-male judges.

There are also complaints of a biased court system where women are pressured to accept low financial maintenance or compensation, forced to reunite with their husbands on the premise that they have no strong grounds for divorce, required to adhere to the husband's visitation rights notwithstanding that he does not provide any maintenance for the children etc. (in some cases, women resort to denying visitation rights until the husband provides maintenance as ordered by the court. Whilst it is not a correct course of action, the women feel compelled to do so given that they have no strong and conclusive legal recourse).

²⁷ Sections 47, 49, 50, 50A, 52 of the Islamic Family Law (Federal Territories) Act (1984), <http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20303.pdf>

The Courts are not gender sensitized to issues faced by women. Moreover, the number of women judges is very low. Official statistics reveal only 11 of the 174 Syariah judges are women.²⁸ This represents a mere 5.9%, compared to the civil courts where women make up 48% of High Court judges,²⁹ 51.8% of Court of Appeal judges and 20% of Federal Court judges.³⁰ Most of these women are Muslim. If they are good enough for the civil court, which has much wider jurisdiction and deal with far more varied and complex cases, there is no reason why they cannot dispense justice in Syariah matters.

Moreover, the majority of the cases before the Syariah Courts relate to women and family. With more women than men studying in the law and Islamic studies faculties in the universities in Malaysia, there is no reason why the government cannot take immediate steps to appoint more women judges to the Syariah courts.

3. Payment of *muta'ah* (compensation) to divorced wife

The language of the statutory provision translates *muta'ah* as “consolatory gift”, thus giving the impression that it is merely a voluntary gift rather than as a mandatory form of financial compensation. Furthermore, the statutory provision also does not mention the factors to be taken into consideration in assessing a “fair and just” amount for *muta'ah* e.g. means and needs of the parties, duration of marriage and circumstances of the divorce.

4. *Harta sepencarian* / matrimonial assets (property acquired during marriage)

The traditional view on matrimonial assets is that a wife may claim one-third of the properties acquired by the husband during the marriage in recognition of her contributions in looking after the family. The gender-neutral language on matrimonial assets in the IFLA (section 122) enables either spouse to claim a share in the properties acquired by the other spouse during the marriage.

Given the realities on the ground, it is unjust and discriminatory against women to regard one-third as the “normal” share to be given to the wife. Even one-half may be inadequate in circumstances where the woman has carried a double burden i.e. financially providing for the well-being of the family as well as her non-financial contribution in doing most of the housework and looking after the children and husband. Moreover, divorced or widowed mothers often have to provide for their children’s needs without assistance (or adequate assistance) from the father or male relatives who were traditionally regarded as responsible for the children’s maintenance. There is no mechanism in the present legal system for women to obtain the redress based on their current realities and needs.

MUSAWAH JUSTIFICATION FOR REFORM	
<p>It is cruel and unjust to continue to allow men the right to divorce their wives at will. Given today's realities and contemporary conceptions of justice, the urgent necessity to provide equal and just grounds for divorce to both men and women must be undertaken.</p>	
<p>QU'RAN PROMOTES JUST & FAIR DIVORCE</p>	<ul style="list-style-type: none"> • The man’s unilateral right to divorce his wife at will contradicts Qur’anic teachings, and specifically the message of kindness, justice, fairness and to do what is right and good. • The Qur’an calls on parties to the marriage to ‘either hold together on equitable terms (<i>ma'ruf</i>), or separate with kindness (<i>ihsan</i>)’ (<i>Surah al-Baqarah</i> 2:229). • The proceedings for arbitration and mediation in <i>Surah an-Nisa</i>’ 4:35 place both spouses on an equal footing: ‘<i>If you fear a breach between a married couple appoint (two) arbiters, one from among his people, and the other from among her people.</i>’

²⁸ Statistics on Empowerment of Women in Selected Domains, Department of Statistics, 2017. Breakdown of statistics (women : men) : Director General/ Syarie Chief Judge (0 : 1), Judges of the Court of Appeal Syarie (0 : 5), State Syarie Chief Judge (0 : 14), Chief Register of the State Syariah Court (2 : 12), Syarie Judge (9 : 142)

²⁹ Department of Statistics, Malaysia (2017). Statistics On Women Empowerment In Selected Domains, Malaysia, 2017

³⁰ History made with appointment of four women judges to Federal, Appellate courts
<https://www.nst.com.my/news/nation/2017/09/284047/history-made-appointment-four-women-judges-federal-appellate-courts>

RECOMMENDATIONS

We recommend the CEDAW committee to urge the State party to:

On divorce

- ❖ Amend the IFLA to ensure that men and women have the equal right to divorce, including the grounds for and procedures in obtaining divorce;
- ❖ Ensure all divorces require knowledge and presence of both parties in court;
- ❖ Repeal section 55 (A) of the IFLA that allows for divorce outside the courts to be registered, upon payment of a fine and reinstate the original 1984 law that all divorces should take place in court.

In the meantime,

- ❖ Wives of men who divorce without the permission of the court should automatically be entitled to substantial *muta'ah* (financial compensation);
 - Ensure clear guidelines on the calculation of *muta'ah* are available and limit judicial discretion of arbitrary amounts;
- ❖ Ensure that penalties for entering into a unilateral *talaq* divorce outside of court are more severe, as the existing penalties have not been effective at ensuring that *talaq* divorces are conducted inside the court. These penalties should be enforced rigorously by the courts to deter men from divorcing women in this manner;
- ❖ Initiate data collection on the nature, extent and prevalence of divorce and undertake a socio-economic and legal analysis on impacts of discriminatory forms of divorce especially on women and children, which can in turn contribute to reforms efforts;

On Harta Sepencarian (matrimonial assets)

- ❖ Amend Section 58 of the IFLA to provide equal value to women's non-wage contributions, such as childcare and housework, and their financial contributions in determining the division of marital property;
- ❖ The financial security of the children should be considered in the division of matrimonial assets.

DIVORCE		POSITIVE DEVELOPMENTS IN MUSLIM FAMILY LAW GLOBALLY	
EQUAL RIGHT TO DIVORCE	TALAQ DIVORCE	TUNISIA, TURKEY: All divorces must go through the court. The grounds for divorce are equally available to both spouses. Divorce through unilateral repudiation (<i>talaq</i>) by husband is not recognized.	
		ALGERIA, MAURITANIA: A divorce by way of repudiation by the husband can only be effectuated through the court. BANGLADESH, PAKISTAN The standard marriage form includes a provision on the curtailment of a husband's right to divorce. MOROCCO: Divorce by <i>talaq</i> can only be effectuated under judicial supervision. The wife and children must have received all vested rights before it is authorized.	

POSITIVE DEVELOPMENTS IN MUSLIM FAMILY LAW GLOBALLY	
COMPENSATION (MUTA'AH)	
COMPENSATION UPON DIVORCE	<p>SINGAPORE</p> <p>Wives will almost always receive <i>muta'ah</i> payment even if she is the party petitioning for the divorce or she has “misconducted” herself. Arguments that a wife is “disobedient” (<i>nusyuz</i>) have generally not been accepted by the court to disqualify a wife from being entitled to <i>muta'ah</i> payment.</p>
COMPENSATION FOR UNREASONABLE DIVORCE	<p>ALGERIA, IRAQ, KENYA, PALESTINE (WEST BANK), SYRIA</p> <p>If the court finds that a man has divorced his wife in an arbitrary, unfair or unreasonable manner, the court can order him to pay his former wife compensation for the divorce in addition to the financial maintenance he has to pay her during the iddah period.</p>

POSITIVE DEVELOPMENTS IN MUSLIM FAMILY LAW GLOBALLY	
FINANCIAL RIGHTS	
DIVISION OF MATRIMONIAL ASSETS AFTER DIVORCE	<p>BRUNEI</p> <p>The court may order any assets acquired by the parties during the marriage (<i>harta sepencarian</i>) either through their joint efforts or by the sole efforts of one party to the marriage to be divided between them or any such assets to be sold and the proceeds of the sale be divided between the parties:</p> <p>Where the assets were acquired by the sole efforts of one party to the marriage, the court must have regard to:</p> <ul style="list-style-type: none"> (i) the extent of the contributions made by the party who did not acquire the assets, to the welfare of the family by looking after the home or family; and (ii) the needs of any minor children of the marriage. <p>Subject to these two considerations, the court may divide the assets or the proceeds of sale in such proportions that the Court thinks reasonable, but the party by whose efforts the assets were acquired will receive a greater proportion of the assets.</p>

7. GUARDIANSHIP AND CUSTODY OF CHILDREN

CRITICAL INFORMATION

1. Guardianship of Children

There are no equal rights in guardianship for Muslim men and women in Malaysia. The amendments to the Guardianship of Infants Act granting mothers the equal right to guardianship of their children only apply to non-Muslims as Muslim women come under the jurisdiction of the IFLA, which currently recognizes only the right of men to be guardians.

Pursuant to Section 88 of the IFLA 1984, the father is considered to be “the first and natural guardian” of the child/children, and if he is dead, guardianship passes on to a paternal grandfather. Traditionally, the legal guardians were persons associated with responsibility for the children’s maintenance. However, present day realities show that mothers contribute towards the family financial needs, even if it is not their legal duty to do so. Divorced or widowed mothers often face difficulties in obtaining financial assistance from the ex-husband or his relatives. There is no statutory provision for the father’s loss of guardianship in the case of irresponsibility regarding the children’s maintenance, while a mother loses her right to physical custody of the children on several grounds.

The fact that Muslim women were denied the benefit of law reform that granted men and women equal guardianship rights led to the government issuing an administrative directive to enable all mothers, including Muslim mothers, to sign official documents on matters related to their children. Notwithstanding this, the right of Muslim mothers to be guardians of their children must also be explicitly recognized by law.

2. Custody of Children

As per the IFLA the mother is presumed to be “*of all persons the best entitled to custody of her infant children*”³¹. However, the right of custody is also lost “*by her marriage with a person not related to the child within the prohibited degrees or if her custody in such case will affect the welfare of the child*”³².

Loss of custody on the ground of the mother’s remarriage is based on understanding of traditions of the Prophet Muhammad (hadith) where (it is presumed) he had said to a divorced wife, “You have the first right to look after [your child] unless you marry”. It is unfortunate that this hadith has often been interpreted as meaning that the mother loses the right to custody upon her remarriage. A legal provision on these grounds account for gross discrimination as it is possible to reinterpret this hadith as conferring a prior right upon the mother before her remarriage, and if she remarries, then the mother and the father would have equal rights to custody, and the case should be considered on its individual merits.

3. Child maintenance (*nafkah*)

The main issue faced by women is the non-payment of maintenance as agreed in the divorce settlement agreement. In many cases, the ex-husband disappears or just refuses to pay. Even when there is a court order for the father to maintain the children, it is rarely enforced. The onus then falls onto the mother to apply for an enforcement of the court order. Yet, there is no strong enforcement action taken against the father if he does not pay. Where there is payment made by the father, the amount is often inadequate.

The Family Support Division by the Department of Syariah Judiciary Malaysia was established in 2008 to facilitate the enforcement and implementation of child maintenance court orders by the Syariah Courts. Statistics on the success of this division is not readily available but in 2012 the Chief Syariah Judge of the state of Selangor stated that about 57.5% of cases referred to the division was resolved through mediation. However, there no public information available with regard to the number of cases referred as compared to the number of cases where maintenance is not paid.

In Sisters in Islam’s Telenisa engagements with the women who seek legal assistance, either women are not aware that the Family Support Division exists or they are not willing to undergo a lengthy process with the Division and thus give up their rights to maintenance and find other means to support their children.

According to the Telenisa statistics, in 2016 maintenance of the children account for 30% of the cases affecting children in marriage. Within these cases, 40.5% of fathers do not pay maintenance and 28.6% of fathers provide inadequate maintenance.

4. Children born out of wedlock

The IFLA provides that where a child is born to a couple that have been married for less than six months, that child is deemed to be born out of wedlock. The impact on this is that the father cannot be ‘wali’ or guardian to the child. If it is a girl child it becomes a problem as the father, who is required by law, to consent to the daughter’s marriage, cannot do so. The child born out of wedlock also does not have the right to inherit from the father.

³¹ IFLA Section 81(1) Subject to section 82, the mother shall be of all persons the best entitled to the custody of her infant children during the connubial relationship as well as after its dissolution.

³² IFLA Section 83 (A) The right of hadhanah of a woman is lost— (a) by her marriage with a person not related to the child within the prohibited degrees if her custody in such case will affect the welfare of the child but her right to custody will revert if the marriage is dissolved.

The custody of children born out of wedlock appertains exclusively to the mother and her relatives, and the court may order a woman to pay maintenance to her illegitimate child. Prior to an amendment made to the IFLA in 1994, a court could order a man to contribute towards the maintenance of his illegitimate child, but this provision has been repealed and currently, there is no provision in the IFLA for the Syariah Court to order a man to pay maintenance or to contribute towards the maintenance of his illegitimate child. The lack of legal responsibility may encourage irresponsible men to indulge in illicit affairs, secure in the thought that even if a child is born as a result of the union, only the unfortunate mothers will have to be responsible for it.

Another major contentious issue on the rights of children born out of wedlock is the practice of the National Registration Department (NRD) to refuse to register the name of the biological father, and instead enter the arbitrary name of “Abdullah” as the father in the child’s birth certificate. This practice violates the Births and Deaths Registration Act 1957, which clearly states that the father’s name may be entered into a child’s birth certificate, upon the joint request of both the father and mother of the child. However, the NRD has chosen to abide by a national fatwa that requires surname “Abdullah” to be entered in order to ensure that the child’s out of wedlock status is formalised. This is traumatic for the new parents and discriminates against the child. The cases that have been forwarded to Telenisa often involve parents who had married after the woman became pregnant. They continued as a family, having additional children. In these cases, the eldest child would have a different surname from the younger children.

In July 2017, the Court of Appeal³³ issued a landmark decision that the National Registration Department was not bound to follow the fatwa on children born out of wedlock in naming of children in their birth certificate and identification certificate as “bin Abdullah”, but instead may ascribe the father’s name as the child’s surname, if the father and mother so agree.

The Court of Appeal issued the decision on the basis of compassion and in the interest of the child. *“Herein lies the injustice because the sad truth is, there is a stigma attached to the surname “bin Abdullah” among the Muslim community.*

However, this was immediately met with consternation from the conservative Muslim proponents, branding this as a move towards legitimizing *zina* (sexual intercourse outside of marriage).³⁴ Ignoring the court decision, the National Registration Department said it would continue to register such births as “bin Abdullah”, and proceeded to file an appeal in the Federal Court.³⁵ The matter is awaiting decision of the Federal Court.

³³ Civil Appeal number W-01(A)-365-09/2016

³⁴ <https://www.thestar.com.my/news/nation/2017/08/01/perak-mufti-its-zina-if-illegitimate-kids-take-on-fathers-names/#bv5KqDmqberTE6CM.99>

³⁵ The Deputy Prime Minister, Datuk Seri Dr Ahmad Zahid Hamidi agreed with the move and stated that the National Registration Department was carrying out its tasks according to the Fatwa Committee of the National Council for Islamic Affairs’ ruling which did not allow children conceived out of wedlock to take the name of the father .

RECOMMENDATIONS

We recommend the CEDAW committee to urge the State party to:

On guardianship

- ❖ Recognize that both men and women under the *Shari'ah*- based law should have equal rights with respect to their children, Section 88 of the IFLA should be amended to grant equal rights of legal guardianship to both mothers and fathers based on the best interest of the child;
- ❖ Ensure all forms requiring signatures of guardians need to be edited to include the words: 'guardian: father/mother', where the signature of either one is legally recognized;
- ❖ Continually monitor this process to ensure that all institutions are upholding women's right to guardianship;

On custody

- ❖ Amend section 83 (A) to remove all reference to a woman's loss of custody as a result of remarriage. Reference should only be made with regard to the welfare of the child.

On child maintenance

- ❖ Empower the court to impose a wide range of measures against defaulters, including: (i) imposing penalties such as fines or imprisonment; (ii) mandatory collection of maintenance through salary deductions etc;
- ❖ Compel government agencies and private sector to apportion part of salary, monies in their provident fund; etc. to be claimed and paid to the wife for child maintenance;
- ❖ Introduce other forms of deterrence to punish errant fathers and ex-husbands who fail to comply with court orders. This can include prohibiting the renewal of driving or business licences, passports and other permits until their arrears are settled;
- ❖ Obligate men to declare to their prospective wives (prior to remarriage), their maintenance debts and obligations towards their former wives and/or children;
- ❖ Widen the operation of the Family Support division of the Syariah Court System to claim against errant husbands;
- ❖ Develop an effective mechanism at the Federal level – such as a National Child Support Agency that would function as an independent body to assess, review, enforce and arrange child support payments;

On children born out of wedlock

- ❖ The National Registration Department should comply with its own law to allow Muslim fathers to ascribe paternity to their children, in agreement with the mothers;
- ❖ Revert to the original 1984 law, which allows the courts to compel the father of a child born out of wedlock to provide for the maintenance of the child. The best interest of the child must be paramount at all times.

GUARDIANSHIP OF CHILD	POSITIVE DEVELOPMENTS IN MUSLIM FAMILY LAW GLOBALLY
EQUAL RIGHT TO GUARDIANSHIP	<p>INDONESIA, KENYA, SINGAPORE, TURKEY</p> <p>Ultimately, guardianship of children is determined by the courts on the basis of the best interest of the child.</p>
CUSTODIAN'S GUARDIANSHIP RIGHTS	<p>ALGERIA</p> <p>Upon divorce, a mother can be appointed as guardian of her child if she has been granted custody of the child.</p>
	<p>BRUNEI</p> <p>A court is mandated to grant the custodian the right to decide all questions relating to the welfare, guidance, upbringing and education of the child subject to what-ever conditions that the court thinks fit to impose.</p>
	<p>TUNISIA</p> <p>Mothers who have custody of their children also has guardianship rights as regards travel, schooling, and management of finances. The mother has an equal right to supervise the child's affairs.</p>

8. INHERITANCE RIGHTS

CRITICAL INFORMATION

Generally, inheritance rights between Muslim women and men are unequal. There are no substantive codified laws relating to inheritance rights of Muslims, which, in practice, are loosely based on Islamic jurisprudence (*fiqh*).³⁶ In many instances, for example in the cases involving widows and widowers as well as siblings, a woman is entitled to half the share of a man. However, division of the deceased's property can be changed in whatever manner if all heirs agree to such division.³⁷

Regarding the *Fara'id* (rules of inheritance), it is unfortunate that the present administration of the *Shari'ah*-based laws on inheritance emphasize the provision that male heirs be given a double share, without emphasizing on the rationale for this rule -- that the man has the legal responsibility to provide maintenance for the family, and thus every female should always have a man to provide for her needs, be he a father, a brother, a husband or a son.

In today's society, however, many women have to earn a living and contribute towards the family needs. Moreover, divorced or widowed mothers often have to provide for their children's needs without assistance from the ex-husband or other male relatives. There is no mechanism in the present legal system for women to obtain redress that would reflect the balance and justice originally intended by the *Shari'ah*.

In the past, the concept of men receiving a greater share in inheritance was not a feature that was special to Islamic law. For instance, the Distribution Act 1958 for non-Muslims previously provided that the husband of a deceased woman would receive the whole of her estate, while the wife of a deceased man would only receive one third of his estate if he had children, or one half if he had no children.

³⁶ Farid S. Shuaib, "The Islamic Legal System in Malaysia", (Pacific Rim Law & Policy Journal, 21:1, 2012), pp. 94-95, <https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1094/21PRPLJ085.pdf?sequence=1>

³⁷ Musawah, "Thematic Report on Article 16: Qatar", *Submission to the CEDAW Committee for the 57th Session*, 2014, p. 22, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/QAT/INT_CEDAW_NGO_QAT_16419_E.pdf

However, this discrimination against non-Muslim women was removed in the 1990s with the amendment to the Distribution Act. In fact, from the historical perspective of the *Shari'ah*, the introduction of the *fara'id* itself was regarded as revolutionary at a time when women could not inherit property under any religious or legal tradition.

As with the example of polygamy, while the rest of the world has progressed to recognize the harm caused by such discriminatory practices, Muslims continue to willfully believe that such practices are divine and inherently Islamic and therefore cannot be changed, no matter if the circumstances have changed and the original objective of ensuring just treatment to protect the welfare of women and children has today turned to harm.

MUSAWAH JUSTIFICATION FOR REFORMS

Reform of inheritance laws remains a most difficult issue as most Muslims believe that these inequitable shares are specified in the Qur'an and therefore unchangeable. However, the text was revealed within a context when men were sole providers and protectors of the family.

The reality today is that women are co-providers, and even the sole provider and protector of the family. And yet the law has not changed to recognize this changing reality and ensure that justice remains the objective of Islamic law and practice. It is important to note that the Qur'an accords the right of the father and mother of the deceased to inherit equally. So, the possibility for equality in inheritance cannot be considered unIslamic.

RECOMMENDATIONS

We recommend the CEDAW committee to urge the State party to:

- ❖ Amend the application of *fara'id* rules with regard to distribution of insurance and the Employees Provident Fund so as to allow women to inherit as dependents or beneficiaries where they are so named;
- ❖ Reforms to rules of inheritance to ensure that it does not discriminate based on gender. Amendments must embody the principles of Distribution Act 1958 to grant Muslims the same inheritance rights as non-Muslims in Malaysia.

INHERITANCE	POSITIVE DEVELOPMENTS IN MUSLIM FAMILY LAW GLOBALLY
EQUAL RIGHT TO INHERITANCE	<p>TURKEY Muslim inheritance law does not discriminate based on gender.</p> <p>SOUTH AFRICA If a Muslim dies intestate, the spouse is entitled to inherit from their deceased partner's estate in accordance with civil law.</p>
EXPANDED RIGHT TO INHERIT	<p>AFGHANISTAN, KUWAIT Sunni daughters and sons from the same mother inherit equally from their mother's estate.</p>

ANNEXE 1:

VISION FOR THE FAMILY

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 these family laws fail to fulfill the *Shari'ah* requirements of justice, but also 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 principles and the richness of the Islamic juristic tradition enable us to formulate Muslim family laws today that are egalitarian and reflect the needs of contemporary societies. Islamic teachings and universal human rights standards, including the CEDAW Convention, are fully compatible and are dynamic and constantly evolving, based on changing times and circumstances. Inspired by the Qur'anic vision of justice and gender relations, Musawah contends that gender equality and non-discrimination can only be achieved with laws that transform power relations in the family and in society in the direction of just outcomes.

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 and Muslim communities, to:

- Recognize the diversity of opinions, laws and practices in the Muslim world and the growing scholarship in Islam that recognizes 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.

