



# musawah

For Equality in the Muslim Family

## **Musawah Thematic Report on Article 16: Afghanistan**

**55th CEDAW Session  
Geneva, Switzerland  
*July 2013***

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# **Musawah Thematic Report on Article 16: Afghanistan**

## **55<sup>th</sup> CEDAW Session**

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## **I. INTRODUCTION**

### **A. Purpose and Objective of Report**

This sixth Musawah Thematic Report takes a critical look at the status of marriage and family relations, as encapsulated in Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'), in Afghanistan, reporting before the 55th Session of the Committee on the Elimination of Discrimination against Women ('CEDAW Committee').

This is the first report to be submitted by the Government of Afghanistan which has notably ratified CEDAW in 2003 without reservations.

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

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

This Thematic Report looks at several critical issues related to marriage and family relations within Muslim contexts raised in the State party report, the CEDAW Committee List of Issues and State party written replies and other secondary sources related to the status of women in Afghanistan. The issues include:

- Equality of spouses in marriage
- Minimum age of marriage
- Forced marriage
- Polygamy
- Divorce
- Custody and guardianship of children
- Inheritance

The report closes with recommendations for measures the State party can take in order to meet its obligations of promoting, protecting and fulfilling equality and non-discrimination in the area of marriage and family relations. These recommendations are based on application of the Musawah Framework for Action, with emphasis on the Islamic arguments to justify why change is possible in Islam to directly deal with the particular challenge of the State party report which acknowledges that equality and justice for women remain difficult because of common misunderstandings and misinterpretations of Islam and Islamic law that continue to justify discrimination against women.

## B. The CEDAW Committee and Article 16 on Marriage and Family Relations

In the Musawah report, *CEDAW and Muslim Family Laws: In Search of Common Ground*<sup>1</sup>, it was noted that the CEDAW Committee generally addresses three categories or topics related to Muslim family laws and practices.<sup>2</sup> First, the Committee has written and commented extensively on reservations to the Convention. Second, it notes with concern discrepancies between *Shari'ah* law and the CEDAW Convention and how States parties' legal systems deal with such discrepancies. Third, it regularly makes inquiries and recommendations on issues related to marriage and family relations in Muslim contexts, urging States parties to end discrimination against women in law and practice.

The Committee has elaborated on Article 16 of the CEDAW Convention in 1994 and 1998. In its 1994 General Recommendation number 21 on equality in marriage and family relations,<sup>3</sup> the Committee made a number of assertions that can be applied to Muslim contexts, including in relation to polygamy, division of matrimonial assets; inheritance, right to choose a spouse, and right to pass nationality to one's spouse. On polygamy, for example, the CEDAW Committee stated, '[p]olygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited'.<sup>4</sup> On a woman's right to marry, it stated, '[a] woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being'.<sup>5</sup>

In its 1998 statement on reservations,<sup>6</sup> the CEDAW Committee noted 'with alarm' the number of States parties that have entered reservations to Article 16. Many of these 'claim[] that compliance may conflict with a commonly held vision of the family, based, inter alia, on cultural or religious beliefs'.<sup>7</sup> In response, the Committee unequivocally asserted that States should discourage any notion of inequality in the home, and that 'neither traditional, religious or cultural practice ... can justify violations of the Convention'.<sup>8</sup> It went on to find that reservations to Article 16 'are incompatible with the Convention and therefore impermissible and should be reviewed and withdrawn'.<sup>9</sup> The Committee has also increasingly noted in Concluding Observations that reservations to Article 16 go 'against the object and purpose' of the Convention, and therefore must be withdrawn.<sup>10</sup> It has also done so in instances where the reservations were based on arguments related to Islam or because of sensitivities of minority Muslim communities.<sup>11</sup>

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<sup>1</sup> Musawah, *CEDAW and Muslim Family Laws: In Search of Common Ground* (2011), available at <http://www.musawah.org/cedaw-and-muslim-family-laws-search-common-ground-0>

<sup>2</sup> *Ibid.*, *supra* note 1, pp. 6-10.

<sup>3</sup> CEDAW General Recommendation Number 21: Equality in marriage and family relations (1994), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>

<sup>4</sup> *Ibid.*, para. 44.

<sup>5</sup> *Ibid.*, para. 16.

<sup>6</sup> See 'Report of the Committee on the Elimination of Discrimination Against Women (Eighteenth and nineteenth sessions)', A/53/38/Rev.1 (1998), pp. 47-50, available at <http://www.un.org/womenwatch/daw/cedaw/reports/18report.pdf>

<sup>7</sup> *Ibid.*, para. 12.

<sup>8</sup> *Ibid.*, paras. 12 and 17.

<sup>9</sup> *Ibid.*, para. 17.

<sup>10</sup> See e.g., Algeria Concluding Observations, U.N. Doc. CEDAW/C/BHR/CO/2 (2005), para. 23; Bahrain Concluding Observations, U.N. Doc. CEDAW/C/BHR/CO/2 (2008), para. 16; and United Arab Emirates Concluding Observations, U.N. Doc. CEDAW/C/SR.914 (2010), para. 21.

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

### C. Musawah Framework for Action

Musawah believes that Islamic teachings and universal human rights standards, including the CEDAW Convention, are fully compatible, and that both are dynamic and constantly evolving, based on changing times and circumstances.<sup>12</sup>

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

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

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

The Musawah Framework for Action refutes this argument, declaring that equality in Muslim family laws is possible, and that such laws must change to ensure equality, fairness, justice and dignity for men, women and children within family relationships. Several basic concepts in Islamic legal theory lay the foundation for this claim:<sup>13</sup>

- The distinction between *Shari'ah*, the revealed way, and *fiqh*, the science of Islamic jurisprudence. Much of what is deemed to be 'Islamic law' today is *fiqh* and not divine law, and therefore is human, fallible and changeable.<sup>14</sup>
- The categorisation of legal rulings into '*ibadat* (devotional/spiritual acts) and *mu'amalat* (transactional/contractual acts). The laws regulating marriage and family come under the *mu'amalat* category, which regulate relations between humans, and therefore remain open to rational consideration and change.<sup>15</sup>
- Diversity of opinion (*ikhtilaf*) in the *fiqh* tradition has led to multiple schools of law, resulting in the huge variety and diversity of provisions in Muslim family laws today. There is no one unified, monolithic, divine Islamic law governing human relations. Within the context of the

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<sup>12</sup> See [Musawah Framework for Action](#), *supra* note 5.

<sup>13</sup> 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'.

<sup>14</sup> In Islamic theology, *Shari'ah* (lit. the way, the path to a water source) is the sum total of religious values and principles as revealed to the Prophet Muhammad to direct human life. *Fiqh* (lit. understanding) is the process by which humans attempt to derive concrete legal rules from the two primary sources of Islamic thought and practice: the Qur'an and the *Sunnah* of the Prophet. As a concept, *Shari'ah* cannot be reduced to a set of laws—it is closer to ethics than law. It embodies ethical values and principles that guide humans in the direction of justice and correct conduct. Musawah Framework for Action, *supra* note 5.

<sup>15</sup> See Musawah, *CEDAW and Muslim Family Laws*, *supra* note 1, p. 23.

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 in today's world.

- Justice is inherent to the philosophy of law in Islam; thus laws or legal amendments introduced in the name of *Shari'ah* and Islam should reflect the values of equality, justice, love, compassion and mutual respect among all human beings.

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

Since these interpretations and laws are human-made and concern relations between humans, they can change within the framework of Islamic principles, in conjunction with international human rights standards and constitutional guarantees of equality, and in accordance with the changing realities of time and place. Positive reforms in Muslim family laws and evolutions in practices provide support for this possibility of change. For instance, as the injustice of slavery became increasingly recognised and the conditions emerged for its abolishment, laws and practices related to slavery were reconsidered and the classical *fiqh* rulings that recognised slavery became obsolete. Likewise, Muslim family laws and practices can and must evolve to reflect the justice of our times.

## II. AFGHANISTAN - ARTICLE 16 ON MARRIAGE AND FAMILY RELATIONS

This section identifies major issues of discrimination against women under Article 16 raised by the Afghanistan State party report,<sup>16</sup> the CEDAW Committee List of Issues and Questions<sup>17</sup> and the Government's Response (or lack of)<sup>18</sup>. The section also provides the Musawah issues of concern which includes data from other sources on the status of women in Afghanistan. Each section then ends with recommendations and justification for reform based on arguments within the Islamic framework that argues for the possibility and necessity of change. It is hoped that these arguments would assist the State party, the CEDAW Committee and NGOs working on the ground to advocate for equality and justice for women in Afghanistan. The section further provides a listing of good practices in member countries of the Organisation of Islamic Cooperation (OIC) to show that reform is possible in Muslim contexts.

### A. Background: Governing Legal Structure

#### a. State Party Report

- *Customs*: Even though Islam has given extraordinary importance to the family, unfortunately some women are not treated fairly in society. Traditional practices in the country have restricted women from benefiting their legitimate rights and access to the courts. (para. 17)

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<sup>16</sup> CEDAW 55<sup>th</sup> Session, Combined initial and second periodic reports of State parties, Afghanistan, CEDAW/C/AFG/1-2 (December 2011) [hereinafter Afghanistan State Party report], available at <http://daccess-ods.un.org/TMP/5060366.39213562.html>

<sup>17</sup> CEDAW 55<sup>th</sup> Session, List of issues and questions with regard to the consideration of periodic reports, CEDAW/C/AFG/Q/1-2 (November 2012) [hereinafter CEDAW Committee List of Issues and Questions], available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/572/15/PDF/N1257215.pdf?OpenElement>

<sup>18</sup> CEDAW 55<sup>th</sup> Session, Responses to the list of issues and questions with regard to the consideration of the first and second periodic reports, CEDAW/C/AFG/Q/1-2/Add.1 (January 2013) [hereinafter Government Response], available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/572/15/PDF/N1257215.pdf?OpenElement>

- Family in Afghanistan is subject to laws and regulations which derive from Islamic *Shari'ah*, formal regulations, customs and acceptable social traditions. (para. 350)
- *Shari'ah*: According to the religion of Islam, family relationship is a holy relationship and Islam encourages all its followers towards the establishment of family through legitimate marriage. (para. 350)
- *Civil law*: According to Article 54 of the Constitution, family is the base of society, and the Government has the responsibility to protect families both physically and spiritually, and to protect mothers and infants. (paras. 15, 24, 350)
- Laws in Afghanistan concerning family matters include the first volume of Civil Law 1355 (1976), LEVAW (Law on the Elimination of Violence against Women and Family), Regulation on Protection and Nutrition of Children with Mother's Milk, and Shiite Personal Status Law. The Family Protection Law will be sent to the National Assembly very soon. (paras. 27, 351)
- *Informal law (Jirgas and Shuras)*: Although the Constitution and other mentioned laws emphasise that disputes should be solved in the courts, most family disputes are currently solved by local councils and elders' gatherings, some of whom might make discriminatory decisions against women. (para. 351)
- *The Shiite Personal Status Law*, which was passed by the National Assembly, contained some discriminatory issues. After objections of many women activists, it was reviewed by the Ministry of Justice. More than 70 points were amended, and the law became effective after a presidential legislative decree in 2009. (para. 352)

#### **b. CEDAW Committee List of Issues and Questions, and Government Response**

- The Committee asked the Government to provide detailed information on steps taken to harmonise the different systems of law prevailing in the State party, namely, State law, Islamic law and customary law, with international human rights standards, in particular with the provisions of the Convention. (para. 2)
  - The Government did not respond to this.
- The Committee asked the Government to provide details on the content of the draft family law. (para. 21)
  - The Government did not respond to this.
- The Committee asked the Government to provide information on measures taken to increase women's access to formal justice mechanisms, especially in rural areas, and to explain how the State party envisages ensuring that any proposed law defining the relationship between the formal justice system and traditional mechanisms for dispute resolution will comply with all international standards. (para. 3)
  - The Government responded that more judicial and attorney offices and Women Affairs Directorates have been established in the provinces of the country, and the Ministries of Interior and Defense have employed women in different military positions including city police stations and provinces, for the purpose of registration and filing of women's complaints. Similarly, women who file complaints according to LEVAW (Law on Elimination of Violence Against Women) are provided with legal facilitation, including free legal services, legal consultations, free defense lawyer, introduction to a shelter house, holding of family meetings, and information regarding their rights. (paras. 26-28, 55)

## **B. Critical Issues Related to Marriage and Family Relations**

### **1. Equality of Spouses: Rights and Responsibilities**

#### **a. State Party Report**

##### ***Legal and customary recognition of husband's right to supervise***

- Supervising the family is the husband's right, but he does not have the right to prevent the wife from going outside for legitimate and common purposes. However, some families think that women cannot go out of home without the permission of husband or head of family. (paras. 348, 366)
- Generally, in Afghan families, the father, the husband, or the son is the head of the family and has greater responsibility towards the other members of the family. At home, men are the main decision-makers; their authority to make decisions include the marriage of their sons and daughters. (para 106)

##### ***Legal and customary recognition of husband's responsibility to provide***

- According to Civil Law and Islamic Jurisprudence, the husband is responsible for providing financial maintenance ("alimony") for his wife and children. Maintenance includes food, housing, health treatment, and clothing, which are paid to the wife appropriate to the husband's financial abilities. Providing maintenance for the minor son until he is able to work, and for the daughter until she marries is the responsibility of the father. If the husband avoids providing maintenance, the court can compel the husband to do so. (para. 300, 356)

##### ***Customary recognition of wife's responsibility to rear children***

- Traditionally, in most parts of the country, mothers are responsible for house chores and the rearing of children. Men do not effectively contribute to these affairs due to cultural reasons and outside work. (paras. 98, 106)

#### **b. CEDAW Committee List of Issues and Questions, and Government Response**

- The Committee asked the Government to provide detailed information on measures taken to eliminate discriminatory social and cultural patterns and pervasive patriarchal attitudes regarding the roles and responsibilities of women and men in the family and in society. (para. 9)
  - Government response: The Ministry of Women's Affairs has launched a vast campaign throughout the country—including workshops, seminars, audio, video and picture advertisements—against traditional practices, including social and cultural discriminatory roles. (para. 48)
- The CEDAW Committee asked the Government to provide information on measures taken to repeal discriminatory provisions in the Civil Code regarding marriage and family law. (para. 9)
  - Government response: Measures taken to eradicate discriminatory laws related to marriage and family rights include drafting of laws, particularly LEVAW (Law on the Elimination of Violence Against Women). (para. 89)



### c. Musawah Framework for Action

#### Issues of Concern

- Husband's legal right to authority over wife and children.
- Husband's legal responsibility to provide comes with corollary privileges.
- Husband's legal right to not provide his wife maintenance when she leaves the home without his permission,<sup>19</sup> or withholds sex.<sup>20</sup>
- Women encouraged to have male guardian during travel.<sup>21</sup>

#### Justification for Reform

- **On the husband's right to authority.** This concept of male authority over women plays a central role to this day in institutionalising, justifying, and sustaining a patriarchal model of families in Muslim contexts.<sup>22</sup> It justifies and perpetuates numerous discriminatory provisions and practices towards women in Afghanistan as seen in the State party report.

*Musawah believes that several verses in the Qur'an that dwell on the values of love, compassion, closeness, and protection between men and women and the general principles of equality and justice should form the basis of marriage and family in Islam. Repealing the codification of unequal and discriminatory rights and responsibilities within the marriage is not against Islam—it is in fact consistent with Qur'anic principles of justice ('adl), equality (musawah), dignity (karamah), and love and compassion (mawaddah wa rahmah).*

- **On the husband's duty to financially provide for the family.** In Muslim legal tradition, the husband's duty to maintain his wife and children comes with a corollary condition – that the wife is required to be obedient to him. Her failure to obey (*nushuz*) could lead to her losing her right to maintenance. In reality today, many men fail to fulfill their duty to provide, and yet do not lose their right to demand obedience from their wives.

*Musawah argues that the logic of such a law, maintenance in return for obedience, is discriminatory in practice. The Qur'an introduced numerous reforms to existing cultural practices relating to the financial rights of women, including allowing women to own and inherit property. This was the beginning of a trajectory of reform which, carried forward 1,400 years later to reflect changing time and context, should lead to elimination of the legal logic of maintenance in exchange for obedience and to the introduction of equality between men and women in all areas, including financial matters.*

- The idea that “complementarity” or “reciprocity” of rights and obligations do not constitute discrimination in the Muslim Personal Status laws must be challenged.

**Recommendation:** The husband and the wife have equal rights and responsibilities in marriage.

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<sup>19</sup> Article 122 of the Civil Code explicitly enables a man to not pay his wife's maintenance 'when she leaves the residence without the permission of the husband or when she goes out for illegal purposes' See Musawah, *Home Truths: A Global Report on Equality in the Muslim Family* (2009), p.2.

<sup>20</sup> Stop Violence Against Women (A project of The Advocates for Human Rights), 'Violence Against Women in Afghanistan' (18 May 2011), available at <http://www.stopvaw.org/afghanistan>

<sup>21</sup> Emma Graham-Harrison, 'Afghan clerics' guidelines "a green light for Talibanisation"' *The Guardian* (5 March 2012), available at <http://www.guardian.co.uk/world/2012/mar/05/afghanistan-women?newsfeed=true>

<sup>22</sup> Musawah is currently undertaking a major research project on the Qur'anic concepts of *qiwamah* and *wilayah*, which are commonly understood as male authority and guardianship over women and children. For more information, see: <http://www.musawah.org/what-we-do/qiwamah-and-wilayah>

## Good Practices<sup>23</sup>

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

## 2. Minimum Age of Marriage

### a. State Party Report

#### ***Legal permissibility of child marriage***

- Article 70 of the Civil Law has determined 18 years of age for men and 16 for women as the minimum age for marriage. The Shiite Personal Status Law has determined the same age for marriage. (para. 359)
- Article 70 of the Civil Law allows for marriage of girls between the ages of 15 and 18, only by permission of a legally competent father. (para. 359)

#### ***Customary permissibility of child marriage***

- There is a high rate of girls and boys forced to marry below the legal age of marriage by parents or relatives. This is particularly so in rural areas. According to the Afghanistan Human Development Report (2007), girls are between the ages of 6 and 16 in many marriages, and some of the marriages are done without the consent of both the girl and the boy. (para. 55)

#### ***Government attempt to limit marriage of children below 15***

- According to LEVAW (Law on the Elimination of Violence Against Women), those who force girls to marry under age of 15 are sentenced to punishment for at least two years, depending on the conditions. According to Article 28 of LEVAW, a girl's marriage is legally terminated if she requests for termination. However, the implementation of such request is challenging in traditional Afghan society. (para. 55)

### b. CEDAW Committee List of Issues and Questions, and Government Response

- The CEDAW Committee asked the Government to provide information on measures taken to repeal discriminatory provisions in the Civil Code regarding marriage and family law, including minimum age of marriage. (para. 21)
  - Government Response: Measures taken include drafting of laws, particularly LEVAW (Law on the Elimination of Violence Against Women). The Government did not respond specifically on age of marriage. (para. 89)

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<sup>23</sup> Musawah, *CEDAW and Muslim Family Laws*, Annex 2: Table of Rights-Based Laws in the Muslim World, p. 45.

### c. Musawah Framework for Action

#### Issues of Concern

- Different minimum age of marriage: 18 for boys, 16 for girls.
- Discretion given to male guardians to allow for marriage under 16 is often abused: 57% of girls are married under the age of 16, and midwives report treating pregnant mothers as young as 12.<sup>24</sup>

#### Justification for Reform

- **On setting minimum and equal age of marriage at 18.** Attempts to set a minimum age of marriage at 18 for both men and women are often met with resistance from conservative religious authorities, claiming that this is 'un-Islamic.' Commonly, the example of the Prophet Muhammad's marriage to Aishah is used to justify child marriage. Reportedly, Aishah was 6 years old when she was betrothed, and 9 when the marriage was consummated. However, there are new studies asserting that Aishah was more likely to have been 19 at the time of her marriage.<sup>25</sup> Furthermore, the question arises as to why the Prophet's marriage to Aishah is used as a model, while his marriage to Khadijah, a widow fifteen years older than him, or his marriage to other widows and divorcees, are ignored as exemplary practices. The justification for child marriage quoting the precedent of Aishah's marriage to the Prophet must be challenged.

*While the Qur'an does not provide any specification for the age of marriage, Surah an-Nisa' 4:6 requires that orphans should be of sound judgment before they marry. This indicates that a person must have sufficient judgment and maturity to marry. Equating the age of majority with the age of puberty and/or rationality (baligh), as is traditionally done, fixes adulthood on children under 18, and even onto those who start menstruating at the age of nine or ten. The onset of puberty is no indication of sufficient maturity for marriage.*

**Recommendation:** Equal and minimum age of marriage for both men and women, set at 18.

#### Good Practices<sup>26</sup>

- **Algeria:** The minimum age of marriage is 19 for both males and females. The judge can grant an exception on the grounds of benefit or necessity.
- **Bangladesh:** The minimum age of marriage is 18 for females and 21 for males; exceptions are not permitted.
- **Morocco:** The minimum age is 18 for both males and females. The judge may grant an exception with the assistance of medical expertise, or after having conducted a social enquiry.
- **Sierra Leone:** The minimum age is 18 for both males and females.
- **Turkey:** The minimum age is 18 for females. The courts can permit the minimum age to be lowered to 16, under exceptional circumstances.

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<sup>24</sup> UN News Centre, 'Afghanistan: Maternal health factors improve, but high death rate continues' (26 January 2009), available at <http://www.un.org/apps/news/story.asp?NewsID=29663&Cr=maternal&Cr1#.UdE2wT78-BU>

<sup>25</sup> Muhammad Khalid Masud (trans), 'Prophet Muhammad's wife A'isha: How Old was She at the Time of her Marriage?' available at <http://www.sistersinislam.org.my/news.php?item.997.41>

<sup>26</sup> Musawah, *CEDAW and Muslim Family Laws*, Annex 2: Table of Rights-Based Laws in the Muslim World, p. 45.

### **3. Forced Marriage (Child Marriage, *Baad*, *Badal*, and of Widowed Women)**

#### **a. State Party Report**

##### ***Legal Protection against forced marriage***

- Article 517 of the Afghanistan Penal Code states that the person who makes a widowed woman or an adult woman (over 18) marry without her consent, depending on the conditions, can be sentenced up to one-year imprisonment. However, the Civil Law does not state whether or not such marriages are actually valid, or if the women concerned have the right for separation. (para. 36)
- According to Islamic Shari'ah and Afghanistan Civil Law, girls cannot be exchanged in marriage. If a sister and brother, respectively, marry a brother and a sister of the other family, dowry should be determined for each girl separately. (para. 357)

##### ***Forced marriages and effects (Tradition)***

- The definition of the forced marriage in international conventions includes all those marriages that one party to the marriage does not have consent. Based on this definition, underage marriage, *baad* marriage (exchanging girls and women to settle disputes; as "blood price";), *badal* marriage (marriage of one boy and one girl with another girl and boy from the other family respectively), exchange of girls for money/property/land/loans, and marriages of widowed women without their consent, are considered forced marriages. (para. 54)
- Unfortunately, wrong interpretations of the *Shari'ah* have resulted in discriminatory traditions in most parts of the country, including forced marriage. Afghanistan Independent Human Rights Commission (AIHRC) has reported 6.7% of the marriages are forced marriages. (paras. 54-55, 98)
- In some areas, widowed women do not have the right to choose their husband, and must stay at the house of their deceased husband; furthermore, in many regions, widowed women are considered inheritance, and are forced to marry one of their deceased husband's relatives. (para. 360)

##### ***Government response: Marriage registration and other initiatives***

- In order to prevent forced marriages and early marriages, marriages and divorces can be registered at formal agencies. While the Government has increased the number of registering organizations, registration of marriage and divorce remains voluntary. The process is complicated and needs time; therefore, people are reluctant to register their marriage in the courts, and do not consider the matter seriously. (paras. 355, 356)
- Without registration, problems arise when women want to access their rights such as dowry (*mahr*), alimony, child fosterage and remarriage after divorce. (para. 356)

#### **b. CEDAW Committee List of Issues and Questions, and Government Response**

- The CEDAW Committee acknowledges that child and forced marriage are serious concerns in the State party report, and asks what concrete measures have been taken to eliminate such harmful traditional practices and to provide adequate support to victims. (paras. 9, 22)
- Government response: Measures include the enactment of laws, polices, and programmes like the National Action Plan for Women, implementation of the Law on the Elimination of Violence Against Women (LEVAW) and the Penal Code. Important information in these laws is presented to the public to increase awareness (audio and video advertisements, radio discussions, and print media; through mosques and religious sources; national

gatherings with the help of religious clerics, saints and influential personalities). (paras. 46, 89-90)

- The CEDAW Committee asks the Government to provide steps taken to improve the registration of marriages. (para. 22)
  - The Government did not respond to this.

### c. Musawah Framework for Action

#### Issues of concern

- Legal protective measures against forced marriages<sup>27</sup> are routinely ignored by the judiciary. In a 2009 case, a 14-year-old girl was sold twice, first for \$2000, and then to another man for \$5000. The judges ruled that the girl should marry the man who paid the highest amount.<sup>28</sup>
- Police and justice officials routinely arrest and prosecute women who attempt to flee forced marriages.<sup>29</sup> According to UNIFEM, 70-80% of all marriages in Afghanistan are forced.<sup>30</sup>
- Many women prefer suicide to abiding by customary court orders that force them to marry. From March 2008-2009, there were 100 cases of self-immolation in south-western Afghanistan alone, and one woman who was awaiting the provincial court verdict on her divorce petition set fire to herself in protest against the institution. Despite the increase in female self-immolation since 2001, the government has taken no concrete measures to address the injustices women suffer and that lead to suicide.<sup>31</sup>
- Young girls are often exchanged to settle disputes (*baad*), for money/property/land/loans, and for girls from other families (*badal*).<sup>32</sup> Recently, a dispute arose over water allocation between two members of the Wazir tribe; Haji Sardar's son killed Shah Tofan's son. The village elders mediated the dispute, and determined that Haji Sardar's family give two girls and pay a fine to the family of Shah Tofan. Additionally, the *jirga* ordered Shah Tofan to have a girl of his family marry a member of Haji Sardar's family. Shah Tofan accepted this resolution.<sup>33</sup>
- More than 80% of dispute cases are referred to customary resolution mechanisms, which are male-dominated and often biased against women,<sup>34</sup> and which order women to be given in compensation for their male relatives' criminal acts.<sup>35 36</sup>

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<sup>27</sup> Legal protective mechanisms against forced marriage include: Consent defined as basis for marriage; illegal to exchange girls in marriage; provisions against exchange of girls between two families (dowry must be different); widowed women free to choose husband; up to 1-year imprisonment for forced marriage of a widowed woman or an adult woman (over 18); voluntary registration of marriage and divorce. (State Party Report, paras. 54, 354, 357, 360). Full text of Afghan Penal Code available at: [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=246510](http://www.wipo.int/wipolex/en/text.jsp?file_id=246510)

<sup>28</sup> International Center for Human Rights and Democratic Development (Rights and Democracy), 'Measure of Equality for Afghan Women: Rights in Practice,' available at <http://www.violenceisnotourculture.org/content/measure-equality-afghan-women-rights-practice>

<sup>29</sup> CEDAW Committee List of Issues and Questions, paras. 3 and 5; Government Response, paras. 27, 30-31, 33-34.

<sup>30</sup> UNIFEM, 'Afghanistan Fact Sheet 2008,' available at [http://www.wunrm.com/news/2009/08\\_09/08\\_17\\_09/081709\\_afghanistan.htm](http://www.wunrm.com/news/2009/08_09/08_17_09/081709_afghanistan.htm)

<sup>31</sup> International Center for Human Rights and Democratic Development (Rights and Democracy), 'Measure of Equality for Afghan Women: Rights in Practice.'

<sup>32</sup> Afghanistan State Party Report, para. 55.

<sup>33</sup> Afghanistan Legal Education Project (ALEP) at Stanford Law School, 'An Introduction to the Law of Afghanistan, 3<sup>rd</sup> Edition,' p. 199, available at: <http://alep.stanford.edu/wp-content/uploads/2011/02/Intro-Book-3d-Edition.pdf>

<sup>34</sup> International Center for Human Rights and Democratic Development (Rights and Democracy), 'Measure of Equality for Afghan Women: Rights in Practice.'

<sup>35</sup> *Ibid.*

- Widowed women are often forced to marry relatives of their deceased husband.<sup>37</sup>
- Despite protections offered by international law, the 2004 Constitution, Islamic law, and various provisions of Afghan criminal statutes, many local systems still deprive women of equal protection under the law.

### Justification for Reform

- **On consent to marriage.** The different forms of forced marriage in Afghanistan have no basis in the Qur'an or Traditions of the Prophet. The power of constraint in marriage, known as *wilayat al-ijbar*, under which the guardian has the right to determine a spouse and compel a ward to marry, is most likely rooted in social customs of Arab society that survived and were eventually adopted by the [classical] jurists. In other words, it is a pre-Islamic custom that was incorporated into *fiqh* by humans.<sup>38</sup>

The Government claims that change is difficult in the face of the traditional practice of forced marriage. Culture, customs, or traditions are often used as an excuse for not fulfilling international obligations. The consequence of such arguments is that women's rights are sacrificed in favor of 'culture', which is socially constructed and evolves over time. This fuels a false dichotomisation of culture and women's rights, and often results in discrimination and inequality before the law. In the majority of cases, what lies behind the State's refusal to act are political considerations rather than regard for religious principles; there is actually room for recognition of women's rights within the culture, tradition and religion.

### Recommendations:

- Abolition of forced marriage in practice; revision of laws and regulations that allow forced marriage.
- Amend the Penal Code to include penalisation of forced marriage of girls under 18.
- Enforce mandatory registration of marriage, and improve existing registration mechanisms.
- Allow women forced into marriage the retroactive right to invalidate the marriage, or the right to divorce.
- The arrest of women who flee from their homes should be made an offence.

### Good practices<sup>39</sup>

- **Algeria:** It is forbidden for the *wali* (guardian) to compel a woman to marry; he may not give her in marriage without her consent.
- **Morocco:** Couples may not be coerced into marriage under any circumstances.
- **Nigeria:** For Maliki communities (the majority of Nigerian Muslims), a biological father has the power of *ijbar*. However, the *wali* cannot compel his daughter to marry a man suffering from contagious diseases, insanity, or reproductive problems. Case law is clear that *ijbar* cannot be enforced for adult women, and the courts generally accept a variety of circumstances that overrule of the possibility of *ijbar*, including where the woman earns money herself.
- **Pakistan:** Case law provides that marriage without the consent of the spouses is void.
- **Saudi Arabia:** In April 2005, the top religious authorities banned the practice of forcing women to marry against their will, stating that it contravenes the provisions of the *Shari'ah*. The clerics

<sup>36</sup> Stop Violence Against Women (A project of The Advocates for Human Rights), 'Violence Against Women in Afghanistan,' available at <http://www.stopvaw.org/afghanistan>

<sup>37</sup> Afghanistan State Party Report, para. 360.

<sup>38</sup> Musawah, *CEDAW and Muslim Family Laws*, p. 32.

<sup>39</sup> Musawah, *CEDAW and Muslim Family Laws*, Annex 2: Table of Rights-Based Laws in the Muslim World, p. 46.

said that whoever forces a woman to marry against her will is disobeying God and His Prophet, and that coercing women into marriage is 'a major injustice' and 'un-Islamic.'

- **Tunisia:** There is no marriage without the consent of both spouses. A marriage contracted without such consent is declared null and void.

#### 4. Polygamy

##### a. State Party Report

###### ***Legal permissibility of polygamy***

- Men can have up to four wives only if they can share maintenance between wives equally, there is a legal excuse, and there is no fear of violation of justice. (paras. 300, 369)

###### ***Criteria for entry into a polygamous marriage***

- If a man has more than one wife, he cannot have his wives in one house if they do not show consent. (para. 365)
- In case the marriage occurs without existence of above mentioned reasons, and if the first wife has stated in her marriage that the husband should not marry another women, she can ask the court for divorce when her husband marries the second wife. (para. 369)
- According to the Civil Law, if the husband hides the second marriage or does not observe the requirements for the second marriage, the second wife has the right to request for separation, but the first wife does not have this option. (para. 369)

###### ***Lack of consideration of conditions (Tradition)***

- However, due to lack of registration process in courts and the wrong interpretations of *Shari'ah*, the legal conditions for polygamy (financial ability, lawful excuse, and justice) are rarely considered. (paras. 55, 369)

##### b. CEDAW Committee List of Issues and Questions, and Government Response

- The CEDAW Committee asked the Government to provide information on measures taken to repeal discriminatory provisions in the Civil Code on polygamy, on measures taken to harmonise all laws on marriage and family relations with the Convention, and on details on the content of the draft family law and the current status of adoption. (para. 21)
  - The Government did not respond on specific measures taken to repeal polygamy provisions, or whether or how the draft laws address this issue.

##### c. Musawah Framework for Action

###### **Issues of Concern**

- The legal criteria for polygamy is rarely met.<sup>40</sup>
- Legal protection for first/successive wives is limited,<sup>41</sup> and even then rarely implemented. Fair and equal treatment of spouses by the husband is rare, and polygamy often results in abuses

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<sup>40</sup> Afghanistan State Party Report, paras. 55 and 369.

<sup>41</sup> If a second marriage occurs without meeting the criteria AND the first wife has stipulated that the husband cannot marry again, the first wife can ask for a divorce; if a second marriage occurs without meeting the criteria OR the husband hides the second marriage, the second wife has the right to request for separation (Afghanistan State Party Report, para. 369).



such as home detention, prevention of living in the house of the husband, and discriminatory child custody and inheritance outcomes.<sup>42</sup>

- Polygamy has increased in the past 15 years, especially amongst wealthy and illiterate Afghans. This latter demographic tends to have strong political ties with warlords and smugglers, who provide them with the financial means to support several wives.<sup>43</sup>
- Consent from either the first or successive wives is often rare. For example, in 2002, Naqiba learned after her engagement to 64-year-old Alha Sardar Ebadi that he already had a wife. ('Of course I was upset. But I could do nothing about it because we are Afghans.')44. In 2006, 45-year-old Mohammed Fazal was urged by village elders to take as his second wife, 13-year-old Majabin, in lieu of money owed him by Majabin's father.<sup>45</sup>
- Only educated and wealthy women (who are in the minority) are able to divorce easily if their husbands do not meet criteria for polygamy.<sup>46</sup>

### Justification for Reform

- **On discouraging or prohibiting polygamy.** Musawah maintains that Islam promotes monogamy, as can be seen in *Surah an-Nisa'* 4:3: 'If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two, three or four but if you fear that you shall not be able to deal justly [with your wives], then marry only one ... That will be more suitable, to prevent you from doing injustice.' Some Muslim countries have also prohibited polygamy on the basis of this verse. In others, women are entitled to add a stipulation in their marriage contracts that their husbands cannot take other wives without their permission and that this could be a ground for divorce. It is thus also possible for this clause to become a standard stipulation in marriage contracts. In this manner, States may discourage or prohibit polygamy as recommended by the CEDAW Committee under General Recommendation number 21.

*Although the Prophet had multiple wives, he was monogamous for more than 25 years—i.e. throughout the lifetime of his first wife, Khadijah. This practice could be used as a source to emulate. There is also an authentic Tradition that the Prophet forbade his son-in-law, Ali ibn Abi Talib, from marrying another woman unless Ali first divorced the Prophet's daughter, Fatimah, his existing wife. A great-granddaughter of the Prophet, Sakinah binti Hussayn, a granddaughter of Ali and Fatimah, included the condition in her marriage contract that her husband would have no right to take another wife during their marriage.*

- Polygamy is not intrinsically 'Islamic.' In fact, it was an institution that existed in various civilizations, religions, and cultures in communities throughout the world, including among Jews, the Chinese, Indians, and Mormon Christians.

**Recommendation:** Prohibition of polygamy in law and practice.

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<sup>42</sup> Max Planck Institute for Foreign Private Law and Private International Law, *Family Structures and Family Law in Afghanistan – A Report of the Fact-Finding Mission to Afghanistan (January – March 2005)*, p. 20, available at

[http://www.mpipriv.de/files/pdf3/max\\_planck\\_manual\\_on\\_afghan\\_family\\_law\\_english.pdf](http://www.mpipriv.de/files/pdf3/max_planck_manual_on_afghan_family_law_english.pdf)

<sup>43</sup> *Ibid.*, p. 22.

<sup>44</sup> Worldwide Religious News, 'In Afghanistan, Polygamy on Rise' (20 January 2002), available at

<http://wwwn.org/articles/13901/?&place=afghanistan&section=polygamy>

<sup>45</sup> The New York Times, 'The Bride Price,' (9 July 2006), available at

<http://www.nytimes.com/2006/07/09/magazine/09BRI.html>

<sup>46</sup> Interview with Sima Samar, Minister of Women's Affairs, available at

<http://wwwn.org/articles/13901/?&place=afghanistan&section=polygamy>



## Good Practices<sup>47</sup>

- **Tunisia, Turkey, Kyrgyz Republic, Tajikistan, Uzbekistan:** Polygamy is prohibited.
- **Saudi Arabia, Syria, Jordan, Egypt, Lebanon, Bahrain (for Sunnis only):** A woman can stipulate in the marriage contract that her husband cannot take another wife. If the husband breaches this term of the marriage contract, the woman has the right to divorce.

## 5. Divorce

### a. State Party Report

#### ***Husband's legal right to unilateral divorce***

- According to Article 31 of the Civil Law, divorce is the right and authority of the man. (para. 370)
- The registration of divorce in the court is not required for Sunnis; it is required according to the Shiite Personal Status Law. (para. 370)

#### ***Unequal legal conditions for wife's right to divorce***

- A wife can ask for separation in an authorised court based on the following four reasons: (1) *Separation due to disability*: If the husband is affected by disease that cannot be treated or requires a long time to heal; (2) *Separation due to harm*: If any harm is inflicted upon the wife by the husband, including beating that makes life difficult for the wife; (3) *Separation due to lack of maintenance*: If the husband defaults on his responsibility to provide maintenance; (4) *Separation due to husband's absence*: If the husband is absent for more than three years, without any correspondence to his family, or he is sentenced to more than 10 years imprisonment. (para. 371)
- Another option the wife has for terminating her marriage contract is compensated divorce (*khul'*), in which the marriage is terminated against the amount of money the wife pays to the husband to agree for separation. However, the decision is with the husband whether to accept the proposal or not. (para. 375)

#### ***Challenges to exercising wife's right to divorce***

- Although women have the right to ask for separation based on lawful reasons, most women are not aware of their right, and separation is deemed unfavorable in Afghan culture. (para 372)
- Since most of Afghanistan women live under the poverty line and have no financial independence, occurrences of compensated divorce (*khul'*) are rare. (para 375)

#### ***Ambiguous and limited maintenance after divorce***

- In case of divorce, the husband is liable for payment of alimony to his divorced wife until completion of the *iddah* (70-day divorce period, during which the woman cannot remarry). However, elsewhere the State party report indicates that the *iddah* period is 3 months and 10 days and 4 months and 10 days. (paras. 356, 363, 374)
- If the divorced wife is responsible for child fosterage, the husband is liable for payment of fostering wage. (para. 374)
- When women refer to courts for divorce, the government provides services such as legal aid and consultations, reference to organisations, and provision of shelters. However, after the divorce, the divorced woman is responsible to make her living. (para. 373)

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<sup>47</sup> Musawah, *CEDAW and Muslim Family Laws*, Annex 2: Table of Rights-Based Laws in the Muslim World, p. 47.

- Lack of marriage and divorce registration prevents women from accessing such rights as dowry (*mahr*), alimony, child fosterage and ability to remarry once divorced. (para. 356)

## b. CEDAW Committee List of issues and Questions, and Government Response

- The CEDAW Committee asked the Government to provide information on measures taken to repeal discriminatory provisions in the Civil Code regarding marriage and family law, including on divorce. (para. 21)
  - The Government did not address the specific measures taken to repeal discriminatory divorce laws, including whether or how the draft family law addresses this issue. (para. 89)

## c. Musawah Framework for Action

### Issues of Concern

- Husband's legal right to unilateral divorce.
- Wife's unequal and limited legal right to divorce. She must secure the approval of her husband and produce witnesses in court to testify that the divorce is warranted.<sup>48</sup>
- Wife's access to divorce further hampered by lack of awareness of rights and stigma of divorce.<sup>49</sup> Going to court is considered a shameful act.<sup>50</sup> Families often circumvent women's requests for divorce. Abuses perpetuated by husband and in-laws (including rape, mistreatment, house imprisonment, and even murder) that provide sufficient legal grounds for divorce rarely reach the *jirga*/courts.<sup>51</sup> According to one report, a man was absent for seven years; his wife wanted to get a divorce, as her in-laws were mistreating her. She asked for help from the Department of Women's Affairs. However, her in-laws prevented her, telling her their son was still alive, and warned legal officials not to intervene in this case.<sup>52</sup>
- The stigma of divorce is such that women are much more likely to enter polygamous marriages as successive wives than be a divorcee.<sup>53</sup>
- Lack of registration of marriage and divorce prevents women from accessing their rights under the law.<sup>54</sup>
- Limited financial resources after divorce (from both the State and ex-husband), severely limit a woman's ability to exercise her right to divorce.<sup>55</sup>

### Justification for Reform

- **On equal right to divorce.** The Qur'an calls on parties to the marriage "either hold together on equitable terms (*ma'ruf*), or separate with kindness (*ihsan*)" (*Surah al-Baqarah* 2:229). The proceedings for arbitration and mediation in *Surah an-Nisa* 4:35 places both spouses on an

<sup>48</sup> Stop Violence Against Women (A project of The Advocates for Human Rights): <http://www.stopvaw.org/afghanistan>

<sup>49</sup> Afghanistan State Party Report, para. 372.

<sup>50</sup> Afghanistan Legal Education Project (ALEP), 'An Introduction to the Law of Afghanistan, 3<sup>rd</sup> Edition,' p. 94.

<sup>51</sup> Max Planck Institute, *Family Structures and Family Law in Afghanistan – A Report of the Fact-Finding Mission to Afghanistan (January – March 2005)*.

<sup>52</sup> Afghanistan Legal Education Project (ALEP), 'An Introduction to the Law of Afghanistan, 3<sup>rd</sup> Edition,' p. 94.

<sup>53</sup> Max Planck Institute for Foreign Private Law and Private International Law, *Family Structures and Family Law in Afghanistan – A Report of the Fact-Finding Mission to Afghanistan (January – March 2005)*, p. 20.

<sup>54</sup> Afghanistan State Party Report, para. 356.

<sup>55</sup> According to the Afghanistan State Party Report, after the divorce and limited period of alimony (70 days to 3 months and 10 days), the divorced woman is responsible to make her living. If in the case of divorce, the woman's only experience as mother and caretaker in the home makes it difficult to find work and provide for herself and her family (paras. 356, 363, 373-374).

equal footing: “If you fear a breach between a married couple appoint (two) arbiters, one from among his people, and the other from among her people”.

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

### **Recommendations:**

- Equal rights and access for both men and women to matters related to the dissolution of marriage, including the grounds for divorce and standards of proof.
- All divorces must take place in court and must be registered. The husband’s right to unilaterally divorce his wife should be abolished.

### **Good Practices<sup>56</sup>**

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

## **6. Custody and Guardianship of Children**

### **a. State Party Report**

#### ***Fosterage of young children***

- The child’s biological mother is given priority for fosterage during marriage and after separation, as long as she is wise, adult, and reliable. It ends at the age of seven for boys, and nine for girls. (paras. 361-362)
- The court can extend the duration of fosterage for two more years. (paras. 362)
- A woman can foster a child until she remarries. If she marries her husband’s uncle, cousin or someone who is a close relative of the child, she maintains the right to fosterage. (paras. 361)
- If the fosterage duration and possible extension are completed, and the child does not have a father, the court can give the child to his mother or any of his close relatives who can nurture him if the child does not have any objection. (para. 362)

#### ***Maintenance of Children***

- After divorce, the father is obligated to pay all expenses of the minor son until he can work, and of the minor daughter until she marries; this includes alimony, education, treatment, physical and mental training of the child. (paras. 361, 364)

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<sup>56</sup> Musawah, *CEDAW and Muslim Family Laws: In Search of Common Ground*, Annex 2: Table of Rights-Based Laws in the Muslim World, p. 47.

## b. CEDAW Committee List of Issues and Questions, and Government Response

- The CEDAW Committee asked the Government to provide information on specific measures taken to repeal discriminatory provisions on the custody and guardianship of children, including whether or how the draft family law addresses this issue.<sup>57</sup>
  - The Government did not respond to this.

## c. Musawah Framework for Action

### Issues of Concern

- Mother given custody only during early childhood, and until and unless she remarries.<sup>58</sup>
- State party report makes no mention of issues relating to guardianship of children. In most countries, the Islamic Family recognises only the father as having the right to guardianship and to make decisions on behalf of the children, even though the mother might have physical custody of the child. Fathers also seldom lose their right to guardianship, while mother's right to custody of her children are conditional.

### Justification for Reform

- **On equal right to custody and guardianship of children.** The Qur'an does not distinguish between fathers and mothers where the upbringing of children is concerned. Even parents who are divorced should still exercise 'mutual consent and due consultation' (*Surah al-Baqarah* 2:233) with each other regarding the upbringing of their children: '[...] No mother shall be treated unfairly on account of her child. No father on account of his child.'

*The classical jurists generally divided the rights and responsibilities of adults over their children into hadanah (physical care and custody) and guardianship. Hadanah was regarded as more suitable to be conferred upon women than men.*

*Loss of custody on the ground of the mother's remarriage is based on a Tradition of the Prophet, where he said to a divorced wife, "You have the first right to look after [your child] unless you marry". It is unfortunate that this Tradition has often been interpreted to mean that the mother loses the right to custody upon her remarriage, and that custody reverts to the father, regardless of whether this is in the child's best interest. It is possible to interpret this Tradition as conferring upon the mother a prior right of custody over her young children before her remarriage, and if she remarries, then the mother and the father could have equal right to custody, or the case may be considered on its individual merits.*

**Recommendation:** Mothers should have equal custody and guardianship rights as fathers over their children.

### Good Practices<sup>59</sup>

- **Bangladesh, Central Asian Republics, Gambia, India, Malaysia, Pakistan, Senegal, Sri Lanka, Turkey**, determine custody through the courts on the basis of the best interests of the child. This has led to an expansion of mothers' rights, as compared to more conservative interpretations of Muslim laws.

<sup>57</sup> Afghanistan State Party Response, para. 89.

<sup>58</sup> *Ibid.*, paras. 361-364.

<sup>59</sup> Musawah, *CEDAW and Muslim Family Laws: In Search of Common Ground*, Annex 2: Table of Rights-Based Laws in the Muslim World, p. 48.

- **Central Asian Republics:** Custody and guardianship of children can be given to either parent, with the best interests of the child as the paramount consideration.
- **Tunisia:** Both parents have equal rights in custody and guardianship during marriage. Upon divorce, the court decides custody on the basis of the best interests of the child. If custody is awarded to the mother, she also has guardianship rights as regards travel, schooling, and management of finances. The court may award full guardianship to the mother if the father is deceased or unable to exercise his duties. Regardless, the mother has an equal right to supervise the child's affairs.
- **Turkey:** In the event of separation or divorce, the rules regarding custody and guardianship do not discriminate between the father and the mother.

### III. Musawah Vision

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

Musawah believes that Qur'anic teachings which encompass the principles of justice, equality, dignity, and love and compassion lay out a path towards reform of Muslim family laws and practices, in line with contemporary notions of justice, which includes equality between the sexes and equality before the law.<sup>60</sup>

It is our hope that the CEDAW Committee will encourage Governments everywhere, and particularly those purporting to speak for and in the name of Islam, to:

- Recognise the diversity of opinions, laws and practices in the Muslim world and the growing scholarship in Islam that recognises equality and justice and the possibility and necessity for reform of Muslim family laws today;
- Promote human rights standards as intrinsic to the teachings of Islam, and that national guarantees of equality and non-discrimination, and the lived realities of men and women today must be taken into consideration in the making of laws and policies in the name of Islam;
- Encourage open and inclusive public debate regarding diversity of opinion and interpretations in Muslim laws and principles relating to family laws and practices; and
- Support civil society groups and individuals engaged in family law reform campaigns, moving the family towards relationships of equality, justice, dignity and mutual respect.
- Take concerted action to translate laws into practice.

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<sup>60</sup> See the Musawah Framework for Action, *supra* note 5.