



Musawah Fact Sheet on Article 16: Algeria and Jordan

**51st CEDAW Session
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Musawah

c/o Sisters in Islam [SIS Forum (Malaysia)]
No. 7, Jalan 6/10, 46000 Petaling Jaya
Selangor, Malaysia
Tel: +603 7785 6121
Fax: +603 7785 8737
Email: musawah@musawah.org
Website: <http://www.musawah.org>



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I. Introduction

This Musawah report takes a critical look at the status of marriage and family relations, as encapsulated in Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW' or 'CEDAW Convention'), in Algeria and Jordan, two of the Organisation of Islamic Cooperation (OIC) member states reporting before the 51st Session of the Committee on the Elimination of Discrimination against Women ('CEDAW Committee').

It examines the two States parties' reports and how Islam is used to resist the demands for lifting the reservations and reforming provisions in the Personal Status Laws that discriminate against women to be in compliance with Article 16 of CEDAW.

Musawah hopes that the critical information, analysis and recommendations provided in Sections III and IV of this report can be used as a resource during the constructive engagements with States parties and in follow-up activities on the Concluding Observations.

This report looks at the following issues related to marriage and family relations within Muslim contexts: marriage, divorce, custody and guardianship of children, nationality and inheritance. It provides alternative views and arguments to justify why change is possible and necessary in accordance with the Musawah Framework for Action.¹

¹ See the Musawah Framework for Action, available at http://www.musawah.org/framework_action.asp

II. CEDAW Committee review of Algeria and Jordan

A. ALGERIA

a. MARRIAGE/DIVORCE

Current session

State party (State party report):

- The new Family Code requires both parties to a marriage contract to be 19 and to provide mutual consent. This requirement seems to do away with proxy marriages and *wali*.²
- In marriage, men and women have reciprocal rights and duties as spouses and parents.³
- Though polygamy is still permitted, the Family Code set the following restrictions:⁴
 - A man must have written consent from both his first wife and his future wife
 - He must also receive permission from a magistrate who must first determine if the man's reasons are justified and if the husband has the means and ability to provide for both wives and give them equal treatment
 - In the event of willful misrepresentation, either wife may bring a suit for divorce
- The grounds for a wife seeking divorce were broadened to include inconsolable differences or failure to observe conditions of marriage contract.⁵

CEDAW Committee (List of Issues and Questions):

- The Committee asked the Government to provide information with regards to whether the Government was contemplating the possibility of abolishing polygamy, and on women's matrimonial guardianship (*wali*) in the State party.⁶
- The Committee also asked the Government to provide the list of grounds on which women can seek divorce, and to the practice of the "*khol*" (monetary compensation paid by the woman to her husband to obtain a divorce without justification) and its impact on the woman's property rights as well as any other shared assets.⁷

Prior sessions

CEDAW Committee:

- The 1999 Concluding Observations noted with serious concern "the fact that the Family Code still contains many discriminatory provisions which deny Algerian women their basic rights, such as free consent to marriage, equal rights to divorce, sharing of family and child-rearing responsibilities, shared child custody rights with fathers, the right to dignity and self-respect and, above all, the elimination of polygamy."⁸
- The 2005 Concluding Observations the CEDAW Committee raised concerns that the then proposed amendments to the Algerian Family Code do not include the abolition of polygamy and of women's legal guardianship (*wali*).⁹

² CEDAW 51st Session, Initial Reports of State Parties, Algeria, CEDAW/C/DZA/3-4, p. 14 (Feb. 2010).

³ *Ibid.* at p. 15.

⁴ *Ibid.* at p. 15.

⁵ *Ibid.* at p. 15.

⁶ CEDAW 51st Session, List of Issues and Questions, Algeria, CEDAW/C/DZA/Q/, para. 6 (Feb. 2010).

⁷ *Ibid.*, para. 36.

⁸ CEDAW 20th Session, Concluding Observations, Algeria, Part of A/54/38, para. 91 (Jan. 1999).

⁹ CEDAW 32nd Session, Concluding Observations, Algeria, CEDAW/C/DZA/CC/2, para. 25 (Jan. 2005).

b. CUSTODY AND GUARDIANSHIP OF CHILDREN

Current session

State party (State party report):

- The Government reported that husbands get lower priority than wives in custody.¹⁰
- The Government also stated that the Family Code has made progress with regards to women's guardianship over their children.¹¹

Prior sessions

CEDAW Committee:

- The issue of women's guardianship was raised in both the 1999¹² and 2005¹³ constructive dialogue with Government. In 2005, CEDAW Committee member, Ms. Gnacadja, noted that although women could legally obtain guardianship of their children, the father still seemed to be in charge of the children, even if the parents are divorced and the mother has custody.¹⁴
- Discriminatory provisions between women and men in the Family Code including in the area of child custody was raised as another issue of concern in both the 1999¹⁵ and 2005 Concluding Observations.¹⁶

c. NATIONALITY

Current session

State party (State party report):

- In its Government report, Algeria stated that nationality may now be passed to the child from either the mother or father (as opposed to only through the father).¹⁷

CEDAW Committee (List of Issues and Questions):

- In its List of Issues and Questions, the CEDAW Committee asked the Government to clarify whether the changes to the nationality laws would permit women to pass their nationality to their children where they were married to a foreign national.¹⁸

Prior sessions

CEDAW Committee:

- In the 1999 Constructive dialogue, CEDAW Committee member Ms. Goonesekere urged the Algerian government to reassess their Family Code to allow an Algerian mother married to a foreigner to pass along her nationality to her children.¹⁹

¹⁰ CEDAW 51st Session, Initial Reports of State Parties, Algeria, CEDAW/C/DZA/3-4, p. 16 (Feb. 2012).

¹¹ *Ibid.*

¹² CEDAW 20th Session Summary Records, Morning Session, Algeria, CEDAW/C/SR.406, para. 28 (Feb. 1999).

¹³ CEDAW 32nd Session Summary Records, Afternoon Session, Algeria, CEDAW/C/SR.668 para. 30 (2005).

¹⁴ *Ibid.*, para.30.

¹⁵ CEDAW 20th Session, Concluding Observations, Algeria, Part of A/54/38, para. 91 (1999).

¹⁶ CEDAW 32nd Session, Concluding Observations, Algeria, CEDAW/C/DZA/CC/, para. 25 (2005).

¹⁷ CEDAW 51st Session, Initial Reports of State Parties, Algeria, CEDAW/C/DZA/3-4, p. 16-17 (2012).

¹⁸ CEDAW 51st Session, List of Issues and Questions, Algeria, CEDAW/C/DZA/Q/, para. 6 (2012).

- In both their 1999²⁰ and 2005²¹ Concluding Observations, the Committee noted with concern the discriminatory provisions between women and men in Algeria's Family Code related to, *inter alia*, the transmission of nationality.

d. RESERVATIONS

Current session

State party (State party report):

- In its State party report, the Government of Algeria restated its declaration made at the time of ratification re its reservation to Article 2 that 'it is prepared to apply the provisions of this article on condition that they do not conflict with the provisions of the Algerian Family Code.' It then went on to assert that Personal status, governed by their Family Code, 'is governed by the Shariah. These issues are subject to laws of divine origin which apply to all Muslims. Those laws are peremptory and unalterable.'²²

CEDAW Committee (List of Issues and Questions):

- The Committee asked the Government of Algeria to clarify what steps it has taken to withdraw its reservations to Articles 2 and 16.²³

Prior sessions

CEDAW Committee:

- During the 2005 constructive dialogue, CEDAW Committee members Ms. Patten²⁴, Ms. Gaspard²⁵, and Ms. Schöpp-Schilling²⁶ expressed serious concerns about Algeria's reservations to Articles 2 and 16 of the Convention. Ms. Gnacadja reaffirmed the Committee's view that articles 2 and 16 were core provisions of the Convention.²⁷
- The 2005 Concluding Observations noted as a point of concern Algeria's reservations to Articles 2, 9(2),15(4), and 16 of the Convention, and urged the Government to begin the process of withdrawing these reservations within a concrete time frame.

¹⁹ CEDAW 20th Session Summary Records, Additional Session, Algeria, CEDAW/C/SR.412, para. 53 (1999).

²⁰ CEDAW 20th Session, Concluding Observations, Algeria, Part of A/54/38, para. 83 (1999).

²¹ CEDAW 32nd Session, Concluding Observations, Algeria, CEDAW/C/DZA/CC/, para. 25 (2005).

²² *Ibid.*, p. 13.

²³ CEDAW 51st Session, Issues and Questions, Algeria, CEDAW/C/DZA/Q/4, para. 5 (2012).

²⁴ CEDAW 32nd Session, Summary Records, Morning Session, Algeria, CEDAW/C/SR.667, para. 32 (2005).

²⁵ *Ibid.*, para. 39.

²⁶ *Ibid.*, para. 23.

²⁷ *Ibid.*, para. 40 (2005).

B. JORDAN

a. MARRIAGE/DIVORCE

Current session

State party (State party report):

- Marriage laws allow for *wali* (male guardianship), but only with the woman's full consent.²⁸ He is empowered however to object to the selection of the husband, and/or to cancel the marriage contract under certain circumstances.²⁹
- There are different rules for marriage and divorce for Muslims and Christians.³⁰
- There are gender inequalities in grounds for divorce and the rights and duties in marriage.³¹
- Polygamy is permitted with certain restrictions.³² All authorities have always agreed that polygamy is lawful in Islam.³³
- There are drafts of legislation that would implement a national maintenance fund and that would reform divorce regulations (including *khul*).³⁴
- Both parties to a marriage contract must be at least 18, *unless* the marriage is deemed to be in the best interest of the girl by a judge.³⁵ The Government explains that "[t]he ultimate purpose of this exception is to ensure that the woman's rights are observed and protected. There are specific social circumstances and tacit reasons of which no one can pretend to be unaware, and the exception resolves a social problem."³⁶

CEDAW Committee (List of Issues and Questions):

- The CEDAW Committee asked the Government to clarify whether it was considering amending its Personal Status Act which allowed marriage before the age of 18 in certain circumstances?³⁷

Prior sessions

CEDAW Committee:

- In the 2007 constructive dialogue, CEDAW Committee member Ms. Shin raised concern that girls under the age of 18 could still marry if it was deemed by a judge to be in her best interest, and urged the Government of Jordan to repeal this provision due to "the potential impact of early marriage on a girl's education and health."³⁸ Concern over this exception was

²⁸ CEDAW 51st Session, Initial Reports of State Parties, Jordan, CEDAW/C/JOR/5, para. 301 (2012).

²⁹ *Ibid.*

³⁰ *Ibid.* "Under Jordanian legislation, in order to be official, a marriage must be registered before the Shari'a courts in the case of Muslims, and take place in a church in the case of Christian."

³¹ *Ibid.* at para. 302.

³² *Ibid.* at para. 303.

³³ *Ibid.*, p. 85-86.

³⁴ *Ibid.* at para. 304.

³⁵ *Ibid.* at para. 316.

³⁶ *Ibid.*

³⁷ CEDAW 51st Session, List of Issues and Questions, CEDAW/C/JOR/Q/5, para. 19 (2012).

³⁸ CEDAW 39th Session, Summary Records, Afternoon Session, Jordan, CEDAW/C/SR.806, para. 26 (2007).

also raised its 2007 Concluding Observations, noting that girls under 18 made up 15% of marriages in Jordan in 2007.³⁹

- Concern over the persistence of polygamy was raised by the Committee in its 2000⁴⁰ and 2007⁴¹ Concluding Observations, and in both instances urged the Government “to reconsider this law permitting the practice with a view to eliminating the practice.”⁴²
- In its 2007 Concluding Observations, the Committee also raised general concerns about the State party’s assertion that, for religious reasons, it could not grant women equal rights as men in matters of marriage and divorce.⁴³

b. CUSTODY AND GUARDIANSHIP OF CHILDREN

Current session:

State party (State party report):

- That State party explained that legal guardianship of a child goes first to the father, then the father’s designated agent, then the grandfather, than the grandfather’s designated agent, and then the court or a person designated by the court; however it also explained that the mother takes precedence over other persons in respect of appointment as guardian.⁴⁴

Prior sessions:

CEDAW Committee:

- In their 2007 Concluding Observations, the CEDAW Committee raised concerns over the State party’s assertion that, for religious reasons, it could not grant equality to women with men in matters of custody over their children.⁴⁵

c. NATIONALITY

Current session

CEDAW Committee (List of Issues and Questions):

- The CEDAW Committee asked Jordan what steps had been taken to amend the Nationality law to permit women to pass their nationality to their children and husbands, based on progressive interpretations of Islamic law?⁴⁶

Prior sessions

CEDAW Committee:

- In their 2000 and 2007 Concluding Observations respectively, the CEDAW Committee raised concerns about the inequality in a woman’s ability to confer nationality to her children⁴⁷ as well as to her foreign husband.⁴⁸

³⁹ CEDAW 39th Session, Concluding Observations, Jordan, CEDAW/C/JOR/CO/4, para. 35 (2007).

⁴⁰ CEDAW 22nd Session, Concluding Observations, Jordan, Part of A/55/38, para. 174 (2000).

⁴¹ CEDAW 39th Session, Concluding Observations, Jordan, CEDAW/C/JOR/CO/4, para. 9 (2007).

⁴² CEDAW 22nd Session, Concluding Observations, Jordan, Part A/55/38 (2000), para. 175; and CEDAW 39th Session, Concluding Observations, Jordan, CEDAW/C/JOR/CO/4 (2007), para. 9.

⁴³ CEDAW 39th Session, Concluding Observations, Jordan, CEDAW/C/JOR/CO/4, para. 11 (2007).

⁴⁴ CEDAW 51st Session, Initial Reports of State Parties, Jordan, CEDAW/C/JOR/5, para. 310 (2012).

⁴⁵ CEDAW 39th Session, Concluding Observations, Jordan, CEDAW/C/JOR/CO/4, para. 11 (2007).

⁴⁶ CEDAW 51st session, List of Issues and Questions, CEDAW/C/JOR/Q/5, para. 2 (2012).

d. INHERITANCE/PROPERTY

Current session:

State party (State party report):

- Jordan stated that women have equal inheritance/property rights as men, but admitted there are “cultural and family practices and obstacles that prevent most women from obtaining their lawful rights in matters of inheritance, and [as a result] it is increasingly likely that the women will fall into economically disadvantaged strata of society.”⁴⁹ It added that “[a]n estate is distributed in accordance with a broad social outlook, the distribution being governed by detailed rules given in the Koran” and that “[a]s a rule, female and male heirs do not inherit equally.”⁵⁰

e. RESERVATIONS

Current session

State party report (State party report):

- Jordan reaffirmed its reservations, “despite demands from many women’s organizations” to Article 15 (1)(c) and (d) because they are “incompatible with the provisions of Islamic law, [and] the Shari’a”⁵¹ It went on to share its ‘religious’ justifications for the reservations in these areas, including the differential roles and responsibilities of men and women in marriage (e.g. men are financially responsible for women in marriage).⁵² Jordan also reasserted its reservation to Article 16 (1) (g).⁵³

CEDAW Committee (List of Issues and Questions):

- The Committee asked the Government of Jordan what steps were being taken to withdraw reservations to Articles 9, paragraph 2, and 16, paragraph 1 (c), (d) and (g), of the Convention.⁵⁴

Prior sessions:

CEDAW Committee:

- In the 2007 constructive dialogue, the representative from Jordan, Mr. Touq, stated that “Jordan did not plan to withdraw its reservations to the Convention, as Islamic jurisprudence prevented it from doing so.”⁵⁵ Later, he added, “[w]ithdrawal..was a politically charged issue and could happen only in the right environment and with a favourable Parliament.”⁵⁶

⁴⁷ CEDAW 22nd Session, Concluding Observations, Jordan, Part of A/55/38, para. 172 (2000).

⁴⁸ CEDAW 39th Session, Concluding Observations, Jordan, CEDAW/C/JOR/CO/4, para. 11 (2007).

⁴⁹ CEDAW 51st Session, Initial Reports of State Parties, Jordan, CEDAW/C/JOR/5, para. 314 (2012).

⁵⁰ *Ibid.* at para. 315.

⁵¹ CEDAW 51st Session, Initial Reports of State Parties, Jordan, CEDAW/C/JOR/5, para. 302 (2012).

⁵² *Ibid.*

⁵³ *Ibid.* at para. 313.

⁵⁴ CEDAW 51st Session, List of Issues and Questions, CEDAW/C/JOR/Q/5, para. 2 (2012).

⁵⁵ CEDAW 39th Session, Summary Records, Morning Session, Jordan, CEDAW/C/SR.805, para. 25 (2007).

⁵⁶ CEDAW 39th Session, Summary Records, Afternoon Session, Jordan, CEDAW/C/SR.806, para. 29 (Aug. 2007).

- In both their 2000 and 2007 Concluding Observations, the Committee urged the Government of Jordan to withdraw its reservations to Articles 16(1)(c)(d) and (g).⁵⁷

⁵⁷ CEDAW 22nd Session, Concluding Observations, Jordan, Part of A/55/38, para. 175 (2000); CEDAW 39th Session, Concluding Observations, Jordan, CEDAW/C/JOR/CO/4, para. 11 (2007).

III. The Musawah Framework for Action

Musawah believes that Islamic teachings and universal human rights standards, including the CEDAW Convention, are fully compatible, and that both are dynamic and constantly evolving, based on changing times and circumstances.⁵⁸

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

Governments of countries with Muslim family law systems often argue that the laws cannot be amended to allow equality between men and women because the law is 'divine Islamic law' (or '*Shari'ah*'), and therefore unchangeable. This is used to justify why governments cannot lift their reservations to CEDAW articles, especially Article 16, and why they cannot reform their laws that discriminate against women. 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:⁵⁹

- 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.⁶⁰
- The categorisation of legal rulings into '*ibadat* (devotional/spiritual acts) and *mu'amalat* (transactional/contractual acts). The laws regulating marriage and family

⁵⁸ See Musawah Framework for Action, *supra* note 1.

⁵⁹ 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'.

⁶⁰ 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.

- come under the *mu'amalat* category, which regulate relations between humans, and therefore remain open to rational consideration and change.⁶¹
- Diversity of opinion (*ikhtilaf*) in the *fiqh* tradition has led to multiple schools of law, resulting in the huge variety and diversity of provisions in Muslim family laws today. There is no one unified, monolithic, divine Islamic law governing human relations. Within the context of the modern state, we must recognise and engage with this diversity of opinions to determine how best to serve the public interest (*maslahah*) and meet the demands of equality and justice.
 - Justice is inherent to the philosophy of law in Islam; thus laws or legal amendments introduced in the name of *Shari'ah* and Islam should reflect the values of equality, justice, love, compassion and mutual respect among all human beings.

Contemporary Muslim family laws, whether codified or uncodified, are not divine, but are based on centuries-old, human-made *fiqh* interpretations that were enacted into law by colonial powers and national governments. Almost every Muslim country has a different family or personal 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 injustices of slavery became increasingly recognised and the conditions emerged for its abolishment, laws and practices related to slavery were reconsidered and the classical *fiqh* rulings that recognised slavery became obsolete. Likewise, Muslim family laws and practices can and must evolve to reflect the justice of our times.

⁶¹Musawah, *CEDAW and Muslim Family Laws: In Search of Common Ground* (2011), p. 23.

IV. Musawah Framework applied to Algeria and Jordan

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

a. Marriage

Recommendations

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

Musawah Framework

- **Child marriage.**⁶² The Qur'an does not provide any specification for age of marriage. *Surah an-Nisa'* 4:6 requires only that orphans be found to be of sound judgment before they marry, which would indicate that he/she must reach the age of majority before being allowed to marry. Furthermore universal human rights standards prohibit child marriage, defined as marriage under the age of eighteen.⁶³ All members of the OIC have ratified the Convention on the Rights of Children, including Algeria and Jordan. There is also overwhelming evidence demonstrating the negative physical, sexual, psychological, economic and other effects of child marriage on girls.
- **Capacity to enter into marriage.**⁶⁴ There are no verses in the Qur'an and no references in *hadith*⁶⁵ that stipulate guardianship as a condition for marriage. In the absence of such injunctions, a competent adult woman should be given unrestricted rights to choose if, when and whom to marry as is already the position in the Hanafi school of law.
- **Polygamy.**⁶⁶ Musawah maintains that Islam promotes monogamy, as can be seen in *Surah an-Nisa'* 4:3: 'If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two, three or four but if you fear that you shall not be able to deal justly [with your wives], then marry only one ... That will be more suitable, to prevent you from doing injustice'. Some Muslim countries have also prohibited polygamy. In others, women are entitled to add a stipulation in their marriage contracts that their husbands cannot take other wives without their permission and that this could be a ground for divorce. It is thus also possible for this clause to become a standard

⁶² For fuller arguments, see *Ibid.*, pp. 30-32.

⁶³ See e.g., Convention on the Rights of the Child, Article 1.

⁶⁴ Musawah, *CEDAW and Muslim Family Laws*, *supra* note 61, pp. 32-33. Musawah is currently undertaking a major research project on the *fiqh* concepts of *qiwamah* and *wilayah*, which are commonly understood as male authority and guardianship over women and children. These concepts play a central role in institutionalizing, justifying and sustaining a patriarchal model of families in Muslim contexts.

⁶⁵ *Hadith* are the sayings and/or deeds of Prophet Muhammad as recounted by his followers. A *hadith* has two parts: the first part cites the narrator(s), and the second part their recounting of the Prophet Mohammad's deeds/saying. The veracity of the *hadith* is dependent on the credibility of the narrator(s). See Musawah, *CEDAW and Muslim Family Laws*, p. 43.

⁶⁶ *Ibid.* p.33-36.

stipulation in marriage contracts. In this manner, States may discourage or prohibit polygamy as recommended by the CEDAW Committee under General Recommendation number 21.

Rights-Based Examples from Other OIC Countries

<p>Minimum age of marriage⁶⁷</p>	<p>Algeria: The minimum age of marriage is 19 for both males and females.</p> <p>Bangladesh: The minimum age is 18 for females and 21 for males; exceptions are not permitted.</p> <p>Morocco and Sierra Leone: The minimum age is 18 for both males and females.</p> <p>Turkey: The minimum age is 18 for females.</p>
<p>Women's capacity for marriage⁶⁸</p>	<p>Bangladesh, Pakistan, Sri Lanka: A <i>wali</i> (guardian) is not required for Hanafi women who have reached puberty.</p> <p>Kyrgyz Republic, Turkey, Uzbekistan: A <i>wali</i> is not required.</p> <p>Morocco: A woman gains the capacity to contract her own marriage at the age of majority.</p> <p>Tunisia: Both husband and wife have the right to contract their marriage themselves or appoint proxies. The consent of a <i>wali</i> is not required, provided that both are of the legal age of consent.</p>
<p>Monogamy / Polygamy⁶⁹</p>	<p>Tunisia, Turkey, Kyrgyz Republic, Tajikistan, Uzbekistan: Polygamy is prohibited.</p> <p>Saudi Arabia, Syria, Jordan, Egypt, Lebanon, Bahrain (for Sunnis only): A woman can stipulate in the marriage contract that her husband cannot take another wife. If the husband breaches this term of the marriage contract, the woman has the right to divorce.</p>

b. Dissolution of marriage

Recommendation

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

⁶⁷ See *CEDAW and Muslim Family Laws*, Annex 2: Table of Rights-Based Laws in the Muslim World, p. 45.

⁶⁸ *Ibid.*, p. 46.

⁶⁹ *Ibid.*, p. 46.

Musawah Framework

- Various *fiqh* schools have provided for more egalitarian access to divorce, such as delegated divorce (*talaq tafwid* or '*esma*', in which the marriage contract may stipulate that the wife has a right to unilaterally repudiate the marriage without cause), divorce for cause with no return of dower (*fasakh*) and divorce for breach of stipulations as contracted by the spouses (*taqliq*). It is thus possible for States to formulate divorce laws which provide equal rights at the dissolution of marriage as required under Article 16(c).

Rights-Based Examples from Other OIC Countries

Equal right to divorce ⁷⁰	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.
Delegated right to divorce (<i>talaq tafwid</i> or '<i>esma</i>) ⁷¹	Bangladesh, Pakistan, Iraq, Jordan, Morocco, Syria: A husband may delegate his unilateral right to divorce his wife, permitting her to pronounce <i>talaq</i> upon herself (<i>talaq tafwid</i> or ' <i>esma</i> '). The wife's right to financial entitlements remains preserved.

c. Custody and Guardianship of Children

Recommendation

- Mothers should have equal custody and guardianship rights as fathers over their children.

Musawah Framework

- Many Muslim countries, including Algeria and Jordan, have extended the mother's right to maintain custody of their children beyond certain age limits based on the universal principle of the "best interests of the child". This same principle should be used to extend to mothers the equal right to guardianship of their children.
- The Qur'an does not make a distinction 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. Nor father on account of his child.'

⁷⁰ *Ibid.*, p. 47.

⁷¹ See Women Living Under Muslim Laws, *Knowing our Rights: Women, family, laws and customs in the Muslim world* (2006), p. 267-271, available at http://www.wluml.org/sites/wluml.org/files/import/english/pubs/pdf/knowning%20our%20rights/kor_2006_en.pdf.

Rights-Based Examples from Other OIC Countries

Custody	Several countries, e.g. Bangladesh, Central Asian Republics, Gambia, India, Malaysia, Pakistan, Senegal, Sri Lanka, Turkey , decide 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 conservative interpretations of Muslim laws.
Guardianship	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.

d. Nationality

Recommendation

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

Musawah Framework

- The idea of nationality is a modern conceptualisation of statehood. There are no injunctions in the Qur'an or *hadith* on this issue. Musawah maintains there are no religious impediments to granting women equal political and legal rights to pass on nationality to their children and foreign spouses as equal citizens of a nation. Moreover, the Constitution of many Muslim-majority countries recognise the principles of equality before the law and prohibit discrimination on the basis of gender. Several OIC member countries have already reformed their laws in recent years to extend this right to women.

Rights-Based Examples from Other OIC Countries

Right of women to confer nationality	Algeria ⁷² : Women married to foreigners can extend citizenship rights to their husbands and children. Egypt, Morocco ⁷³ : Women married to foreigners have the right to
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⁷² Kelly Haggart, 'Research Leads to Rights Breakthrough for Arab Women', *IBID.RC Bulletin* (September 2009), available at http://www.lbid.rc.org/en/ev-145159-201-1-DO_TOPIC.html.

	<p>convey their citizenship to their children.</p> <p>Lebanon⁷⁴: By decree, foreign husbands and children of Lebanese women can apply for 'courtesy residency' permits to remain in Lebanon.</p>
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e. Inheritance Rights

Recommendation

- Women are able to inherit equally with men.

Musawah Framework

- Men's superior right to inheritance is frequently justified by scholars on the grounds that men have a 'degree of advantage' over women (Qur'an, *Surah al-Baqarah* 2:228) and that they are the protectors and providers (*qawwamun*) of the family (Qur'an, *Surah an-Nisa'* 4:34). Yet in reality, women are also providers and protectors. Traditionally, women's roles as homemaker, primary caregiver of children and elderly parents, and other forms of unpaid work in the home and on the land are crucial to family well-being and survival. But this unpaid contribution is not given recognition. The rise of women-headed households, dual-income families and women migrant workers who are compelled to leave their families to earn better wages mean that today women are also providing financially for their families. Musawah maintains that laws must take into account the socio-economic realities of women's lives. Under these circumstances, a right that is given on the assumption that only men provide for the family must be re-evaluated, especially when socio-economic realities render the presupposition false.
- While many States parties argue that the inheritance laws are stipulated in the Qur'an, and thus cannot be changed or reformed, in reality, the *traditional Muslim* rules of inheritance were elaborated and systematised by the various schools of law through jurisprudential methods and interpretations. Many modern Muslim nation-states have adapted these rules from one of the major Sunni or Shiite schools of law, have combined rules from two or more different schools, or have created modern inheritance laws based loosely on traditional jurisprudence but suited for modern realities.
- An example of how the major schools of Islamic law differ can be seen in the case of the maximum amount of an estate female heirs can inherit. In the Shafi'i and Maliki schools, daughters and sisters can inherit a maximum of 2/3 of the estate; the residue would go to agnatic males, and, if there are none, to the public treasury. For the Hanbali and Hanafi schools, if there are no agnatic males, the female heirs can inherit the residue – it would not go to the public treasury. In the Jafari school, one or more daughters can inherit the entire estate outright if there is no son. Agnatic males are excluded.⁷⁵ In some countries, bequests can be made to heirs, thus enabling parents to expand the right of daughters to inherit more, a step forward in redressing the discriminatory inheritance rules.

⁷³ *Ibid.*

⁷⁴ Women's Learning Partnership, 'Lebanon's Decree 4186 on Courtesy Residency Goes Into Force' (8 September 2010), available at <http://www.learningpartnership.org/blog/2010/09/lebanon-decree4186-residency/>.

⁷⁵ See the section on Inheritance Reform on the Sisters in Islam website, http://www.sistersinislam.org.my/files/downloads/inheritance_reform_on_rights.pdf.

Rights-Based Examples from Other OIC Countries

Daughters exclude collateral male agnates	Tunisia⁷⁶ and Iraq⁷⁷ : Sunni schools of law adopt the Shiite practice where daughters can inherit an entire property in the absence of sons, thus excluding male agnates. ⁷⁸
Right of orphaned grandchildren to inherit	Egypt, Morocco, Tunisia⁷⁹ : The children of a predeceased son or daughter can inherit through an obligatory bequest. ⁸⁰
Bequests can be made to heirs	Tunisia⁸¹ : Bequests can be made in favour of an heir and beyond the one-third limit if other heirs agree to it. ⁸² Egypt, Sudan, Iraq⁸³ : Bequests can be made in favour of heirs up to one-third of the estate without the consent of the other heirs.

f. Reservations

Recommendation

- The use of Islam and Shariah to justify why reservations cannot be lifted and why law reform cannot take place must be reconsidered. Statements such as Islamic law is divine law that cannot be changed, and they are “peremptory and unalterable”⁸⁴ and that governments cannot lift reservations on articles because they are “incompatible with the provisions of Islamic law”⁸⁵ must be challenged.

⁷⁶ See Collectif 95 Magheb-Egalité, *Gulbld.e to Equality in the Family*, Women’s Learning Partnership Translation Series, Syracuse University Press (2006), p. 140; John L. Esposito with Natana J. DeLong-Bas, *Women in Muslim Family Law*, Syracuse, N.Y.: Syracuse University Press, 2d ed. (2001), p. 109.

⁷⁷ See Esposito, *Women in Muslim Family Law*, *supra* note 72, p. 109.

⁷⁸ According to traditional Sunni inheritance rules, in the absence of a son, one daughter can inherit up to one-half of the estate and two or more daughters can share in two-thirds of the estates, but the remainder must revert to a male agnate reslbd.uary, regardless of how close or distant a relative he is. Sisters in Islam, ‘Inheritance Reform’, *supra* note 71.

⁷⁹ See Esposito, *Women in Muslim Family Law*, *supra* note 80, p. 110.

⁸⁰ In the Sunni schools of law, orphaned grandchildren, or the children of the deceased’s son or daughter who predeceased the deceased, are not allowed to inherit when there is a surviving son. This means that a son could inherit everything from his parents while his orphaned nieces and nephews (and their predeceased parent) inherit nothing. Sisters in Islam, ‘Inheritance Reform’, *supra* note 71.

⁸¹ See Esposito, *Women in Muslim Family Law*, *supra* note 72, p. 109.

⁸² Under the traditional Sunni rules of inheritance, bequests of up to one-third of the estate can be made, but not to an heir unless (for some schools) the other heirs agree. The Shiite (Jafari) rules of inheritance allow heirs to receive a bequest of up to one-third of the estate without the consent of the other heirs. Sisters in Islam, ‘Inheritance Reform’, *supra* note 71.

⁸³ See Esposito, *Women in Muslim Family Law*, *supra* note 72, p. 109.

⁸⁴ 51st CEDAW Session, State party report, Algeria, CEDAW/C/DZA/3-4, p.13 (2010).

⁸⁵ CEDAW 51st Session, Initial Reports of State Parties, Jordan, CEDAW/C/JOR/5, para. 302 (2012).

Musawah Framework

- As stated in Section III above, contemporary Muslim family laws are based on centuries-old, human-made *fiqh* interpretations that were enacted into law by colonial powers and national governments. It is not possible for these positive laws to be considered divine, “unalterable” or “immutable” when there is much diversity, and centuries of tradition of reform and amendments already made to the Personal Status laws of most Muslim countries.
- The trajectory for reform and the possibilities for equality and justice exist within Islamic legal thought. Modern scholars of Islamic jurisprudence are reviving the traditional tools and methodologies in order to read and understand Islamic sources and use classical juristic principles such as *ikhtilaf* (diversity within Islamic law and *fiqh*), *istihsan* (adopting the idea or principle that is better, more useful), *maslahah* (choosing that which benefits the public interest or common good), *ijtihad* (exerting effort to form an independent judgment on a legal question), and *maqasid al-Shari’ah* (the objectives of the *Shari’ah*) to develop solutions for the ‘newly created issues’. Working with progressive scholars to better understand these tools and the possibilities they entail is one way to open the dialogue about equality in Muslim laws and practices, instead of simply stating that change is impossible because Islamic law is divine.⁸⁶
- The idea that “complementarity” or “reciprocity” of rights and obligations do not constitute discrimination in Muslim Personal Status laws must be challenged. The argument commonly used is that husbands have a duty to give a dower to the wife upon marriage and to provide maintenance for the wife and children during their marriage, while women have no legal obligation to support their husbands or families even if they are wealthy. Therefore, the laws are constructed to give men additional rights – double shares of inheritance, unilateral right to divorce – in relation to their additional responsibilities, while women have additional responsibilities – full obedience to their husbands – in return for the financial benefits they receive.
- This argument about reciprocal arrangements is simply a legal fiction grounded in medieval *fiqh* thinking that remains rigid in spite of the changed realities. Men do not lose their privileges/rights and are not punished when they do not carry out their responsibilities as the provider and protector of the family. The serious disconnect between law and reality must be rectified. Women who act, sometimes as co- and other times as sole providers and protectors of their family do not receive greater inheritance shares to reflect their greater responsibilities, nor are they granted equal right to divorce or to guardianship of their children.

Rights-Based Examples from Other OIC Countries

CEDAW ratification without reservations	29 out of the 54 OIC countries that have ratified CEDAW did so without reservations – most of them from Sub-Sahara Africa and Central Asia. ⁸⁷ Indonesia and Yemen also ratified without reservations, while Turkey and Morocco removed their reservations later.
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⁸⁶ Musawah, *CEDAW and Muslim Family Laws: In Search of Common Ground* (2011), p. 26, available at <http://musawah.org/docs/pubs/CEDAW%20&%20Muslim%20Family%20Laws.pdf>,

⁸⁷ *Ibid.*, p1, paras. 49-63.

About Musawah

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

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