



musawah

For Equality in the Muslim Family

Musawah Fact Sheet: Marriage and Family Relations

**Indonesian Government CEDAW Review
52nd CEDAW Session
July 2012**

Introduction

In this Fact Sheet submitted to the CEDAW Committee, Musawah, a global movement for equality and justice in the Muslim family, examines the status of marriage and family relations within the Indonesian context. It does this by reviewing key CEDAW-related documents on the issue, and offering responses to issues and points raised in response. Section I extracts relevant language from the Indonesian State Party CEDAW report, the CEDAW Committee List of Issues and Questions and the Indonesian State Party response thereto. It also reviews and extracts relevant language from select civil society and NHRI reports prepared for purposes of this review. Section II, presents the Musawah Framework for Action as a framework within which to engage with these issues and the possibilities for reform, and Section III offers recommendations for action.

1. Relevant language related to marriage and family relations

i. Indonesian Government

Stereotype Section (Article 5)

- a. Indonesia has the largest Muslim population in the world. The majority of the people has open, moderate views and practise gender relations of mutual respect and upholds the freedom of women.¹
- b. [I]ssues of concern in certain communities and cultures, especially in the villages, are problems of early marriage, arranged marriage, polygamy, illegal marriage, arbitrary divorce[.]²

¹ CEDAW 52nd Session, Initial Reports of State Parties, Indonesia, CEDAW/C/IDN/6-7, para. 31 (July 2012) [hereinafter 2012 Indonesia State Report].

² 2012 Indonesia State Report at para. 32.

- c. It must be acknowledged that the values and cultural practices, especially when framed in a justification stemming from narrow religious interpretations, are difficult to address.³
- d. Eliminating discrimination against women also involves civil society groups which take up an active role in the advocacy through the religious approach.....Advocacy for curriculum reform is conducted in *pesantren* deemed as gender-biased, replacing their material with a religious curriculum that promotes gender equality and equity. To that end, some of these *pesantren* have introduced *Fiqh an Nisa* (female-oriented teaching) as a new curriculum on Islamic law that has to do with a new way of seeing the position and role of women that is equal to men in religious rituals, marriage, family and society. *Fiqh an Nisa* is a product of a rereading of classic interpretations that have largely discriminated against women.⁴
- e. With respect to Law 1/1974 regarding Marriage and Islamic Law Compilation that has discriminatory provisions against women, a lot of work has actually been done, although the efforts are yet to bear fruit. The Law on Marriage still sets a very young minimum age for a woman to enter into marriage. It stipulates that the husband is the head of the family, and the wife, the homemaker, and enables the husband to practise polygamy. The Islamic Law Compilation applied in civil disputes in religious courts also contains provisions that are discriminatory for women.⁵
- f. Although not a majority, there are radical groups (both religious and secular) pushing for their own agenda. On the one side, women activists wish to change the marriage age for women and the clause “husband is the head of the family,” while on the other side, some pressure groups are fighting for unconditional freedom to practise polygamy, unregistered religious marriages, and other issues. Any effort to change the marriage law must be done very carefully. If the debate and the legislation process cannot be overseen and controlled properly, new laws produced may include provisions that go against women's interests, and could even be more discriminatory for women compared to existing laws.⁶

Equality Before the Law (Article 15)

- g. [I]n certain cultures and sub-groups, discriminatory interpretations of religious or traditional laws [are] still being applied, such as in matters of inheritance, the position of husband and wife, and so forth.⁷

Marriage and Family Relations Section (Article 16)

- h. The Marriage Law 1/1974 contains inequalities for women and men in minimum age for marriage, roles within the family, and permitting polygamy for men.⁸
- i. The Department of Religious Affairs is currently preparing the Material Draft Law on the Marriage Law to address the problems in the revision of the Marriage Law. This draft is aimed at resolving problems that often occur in the field, such as the young marriage

³ Id.
⁴ Id at para. 34.
⁵ Id at para. 35.
⁶ Id at para. 36.
⁷ Id at para. 188.
⁸ Id at para. 195.

age, polygamy, unregistered marriages....The possible difficulties in changing the Marriage Law were anticipated by creating underlying regulations to ensure that actions would be taken against discriminatory practices and those that harm women, as well as to provide protection for women. Sanctions could be stipulated for State officials and others involved in actions that harm women, for instance, State officials allowing the marriage of underage women, and families who should be responsible for protecting their children.⁹

- j. The marriage age for women has increased: in 1993 28.62% of women were married before they were 16, which fell to 13.68% in 2000 and to 11.23% in 2007.¹⁰

ii. CEDAW Committee

- a. In its list of issues and questions, CEDAW questioned what measures are envisaged or being taken to change discriminatory practices such as female circumcision, early marriage, arranged marriage, polygamy, illegal marriage and arbitrary divorce.¹¹
- b. Noting that Indonesia's Law on Marriage authorizes early marriage, polygamy and male dominance in the family and is silent about marital rape, the Committee asked the Government to provide detailed information on the concrete measures taken by the State party with a view to withdrawing these discriminatory provisions.¹²
- c. The Committee also asked for the state to provide more information about a law in the province of Aceh that criminalizes adultery, punishing women found guilty of adultery with stoning.¹³

iii. Civil Society and NHRIs

CEDAW Working Group of Indonesia (CWGI)

- a. Women have to bear the risk of losing their alimony after divorce as different legal consequence between cases of "cerai talak" (divorce for cause) and "cerai gugat" (contested divorce). This is the result of the reference of divorce cases that use classical interpretation over Islamic Law which tends to be discriminatory.¹⁴
- b. Many women in customary or 'siri marriage' (e.g. second wives) are not recorded. Cross-religious/interfaith marriages are similarly not legal and therefore not recorded.¹⁵ Unregistered marriage affects the unprotected women and children's rights in the marriage/family; for instance because there isn't any marriage act/certificate nor birth

⁹ Id para. 198.

¹⁰ Id at para. 199.

¹¹ CEDAW 52nd Session, List of Issues and Questions, Indonesia, CEDAW/C/IDN/Q/6-7, para. 5 (Jul. 2012) [hereinafter 2012 Issues and Questions].

¹² Id at para. 23.

¹³ Id.

¹⁴ CWGI Shadow Report at p. 14-15.

¹⁵ Id at p. 15.

certificate for the children, husbands are freed from the responsibility of taking care of and making a living for the family.¹⁶

- c. CWGI notes that so-called cultural practices such as child marriage, polygamy, un-registered marriage, are widespread in society, especially in rural areas. Cultural practices are increasingly powerful and difficult to handle especially those which are justified on the basis of a narrow interpretation of religious teachings.¹⁷
- d. Law No. 1 – 1974 states that men and women under the age of 21 need their parents permission to marry. This has led to parents marrying off girls and young women under the age of 18 years.¹⁸ Girls become object of their parents' permission to marry, or the object of child commercialization, or as payment of family's debt to other parties in certain customs.¹⁹
- e. CWGI notes that although the practice of polygamy did not begin with Islam, the practice of polygamy was reinforced by the coming of Islam and its spread in the early 13th century. According to CWGI, one of the supporting factors of the high case of polygamy is related to the interpretation of Islam that permits polygamy though with restrictions of four wives using the interpretation of the Qur'an, An-Nisa (4) verse (3).²⁰
- f. Cultures and public opinion put women in second place, especially in marriage. This becomes an obstacle to raise support and public opinion regarding discriminatory provisions in the marriage laws, for example, on a man as the head of family, child marriage, and decision-making on the timing and spacing of children in the marriage, etc.²¹

Komnas Perempuan (an NHRI)

- g. [T]here is hesitation in determining the minimum age for marriage so that it is in line with the Law on Child Protection [i.e. 18] because the practice of underage marriage is still considered normal in many communities. The Marriage Law provides the minimum age for marriage as 16 years (women) and 19 years (men).
- h. Currently, the revision to Law No. 1 of 1974 regarding Marriage (the Marriage Law) is still being debated. The proposed changes are aimed at preventing child marriages of young girls, the practice of polygamy and the reinforcement of stereotyped women's gender roles in the family.
- i. A Bill on the Law of Religious Affairs on Marriage (the HMPA Bill) is in development. This bill portends to be the reference point for the regulation of marriage for Muslims in Indonesia. Critical points of note in the HMPA Bill are the compulsory registration of marriage, the breaking down of the standard roles of husband and wife based on gender stereotypes, the minimum age of marriage in accordance with the protection of child rights and a guarantee to the same rights and responsibilities as at the dissolution of the marriage as during the marriage.
- j. Using a progressive interpretation of Islamic law gleaned from the results of studies and the comparison of existing international jurisprudence will contribute to the enforcement

¹⁶ Id.

¹⁷ Id, para. 22.

¹⁸ Id. para. 318.

¹⁹ Id.

²⁰ Id. para. 326.

²¹ Id para. 340.

of human rights and gender equality within the prevailing system of legal pluralism in Indonesia today.

Amnesty International

- k. Although decreasing, marriage at a young age is still relatively widespread, especially in rural areas and slums. A 2010 study by the Indonesian Ministry of Health found that 41.9 per cent of all first marriages involving women and girls occurred between the ages of 15-19 while 4.8 per cent between the ages of 10-14.²²
- l. There are also concerns that the religious courts in Indonesia continue to provide a dispensation as provided for in the Marriage Law allowing girls, usually those who become pregnant below the age of 16, to marry at the request of the parents/legal guardian (Article 7.2).²³

Human Rights Watch

- m. Human Rights Watch reports on Indonesia's Sharia Laws Qanun 14/2003 and Qanun 11/2002 which prohibit 'seclusion' and impose public dress requirements on Muslims, respectively. The seclusion law makes association of unmarried individuals of the opposite sex a criminal offense, and woman suspects are often subjugated to 'virginity' tests and in some cases condition suspects' release on their agreement to marry.²⁴

Center for Reproductive Rights (CRR)

- n. On the issue of early marriage, CRR cited an Indonesian Demographic Health Survey (2007) which found that 10% percent of women ages 25-49 were married by 15 years of age while 34% were married by the age of 18. CRR went on to underscore that early marriage correlates with a risk of early pregnancy which itself increases the risk of maternal death and morbidity.²⁵

2. 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.²⁶

Most family laws and practices in today's Muslim countries and communities, including in Indonesia, 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

²² Amnesty International Shadow Report to the CEDAW Committee on Indonesia (2012), at p. 9.

²³ *Id.*

²⁴ Human Rights Watch Partial Review on Indonesia's Compliance with CEDAW – Discrimination against domestic workers and the effect of Sharia provisions in Aceh (2012), p. 4.

²⁵ Center for Reproductive Rights, Supplementary Information on Indonesia (2012), at p. 10.

²⁶ See Musawah Framework for Action in *CEDAW Muslim Family Laws* report (2011).

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 fact that Indonesia, the largest Muslim country in the world, has ratified CEDAW without reservations, makes it an important model for others to emulate. Unlike most other Muslim countries, the Indonesian government, the women's groups that prepared the Shadow report and Komnas Perempuan unanimously recognise that a major problem with discrimination against women in the country's Marriage Law is due to a narrow interpretation of Islam. Importantly, too, all sides recognise there are progressive interpretations and juristic opinions within the Islamic tradition that render the possibility of reform towards equality and justice for women.

This thinking is largely in line with the Musawah Framework for Action which outlines several basic concepts in Islamic legal theory which lay the foundation for this claim:²⁷

- i. 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.²⁸
- ii. 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.²⁹

²⁷ 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'.

²⁸ 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.

²⁹ See Musawah, *CEDAW and Muslim Family Laws* (2011)..

- iii. 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.
- iv. 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 uncoded, 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 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.

3. Application of the Musawah Framework, Recommendations, and Good Practices

The main issues identified above are addressed/responded to below from the perspective of the Musawah Framework which promotes equality and justice within Muslim families and family laws. Recommendations are then made and where available and applicable, good practices from other OIC countries, identified.³⁰

i. On the capacity to enter into marriage, there are no verses in the Qur'an and no references in *hadith*³¹ 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.

Recommendation: There be no requirement for a guardian's consent or approval.

³⁰ Arguments and text taken from Musawah's *CEDAW and Muslim Family Laws: In Search of Common Ground* (2011).

³¹ *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*, at p. 43.

Good practices:

- a. Bangladesh, Pakistan, Sri Lanka: A *wali* (guardian) is not required for Hanafi women who have reached puberty.
- b. Kyrgyz Republic, Turkey, Uzbekistan: A *wali* is not required.
- c. Morocco: A woman gains the capacity to contract her own marriage at the age of majority.
- d. Tunisia: Both husband and wife have the right to contract their marriage themselves or appoint proxies. The consent of a *wali* is not required, provided that both are of the legal age of consent.

ii. **On child/early marriage**, 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.³² All members of the OIC, including Indonesia, have ratified the Convention on the Rights of Children. There is also overwhelming evidence demonstrating the negative physical, sexual, psychological, economic and other effects of child marriage on girls.

Recommendation: Equal marriage age set at 18 years for both men and women.

Good practices:

- a. Algeria: The minimum age of marriage is 19 for both males and females.
- b. Morocco and Sierra Leone: The minimum age is 18 for both males and females.
- c. Bangladesh: The minimum age is 18 for females and 21 for males; exceptions are not permitted.
- d. Turkey: The minimum age is 18 for females.

iii. **On 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. 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.

Recommendation: Abolition of polygamy in law and in practice.

Good practices:

- a. Tunisia, Turkey, Kyrgyz Republic, Tajikistan, Uzbekistan: Polygamy is prohibited.

³² See e.g., Convention on the Rights of the Child, Article 1.

- b. 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.

iv. On marriage as a partnership of equals, 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. The Indonesian Marriage Law which stipulates that the husband is the head of the family, and the wife is the homemaker, in most cases, contradicts the realities on the ground.

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

Good Practice:

- a. Morocco: The 2004 Family Code (Moudawana) places the family under the joint responsibility of both spouses. 'Marriage is a legal contract by which a man and a woman mutually consent to unite in a common and enduring conjugal life. Its purpose is fidelity, virtue and the creation of a stable family, under the supervision of **both** spouses according to the provisions of this Moudawana.'

v. On maintenance of children born from unregistered marriages, Musawah believes that proof of paternity or the admission by the man that he is the biological father of the child should be enough to establish his responsibility to maintain the children. The Qur'an in Surah al-Baqarah 2:233 states that: 'He (the father) shall bear the cost of their food and clothing on equitable terms ... No mother shall be treated unfairly on account of her child. Nor father on account of his child.' A valid marriage should not be the basis to determine whether a child should be maintained or not by the father. Since proof of paternity may now be scientifically established, a man should not be allowed to disavow or disclaim a child by way of *li'an* or imprecation unless he brings scientific proof that he is not the father of the child.

Recommendation: Proof of paternity can be determined through scientific means or through acknowledgement or court ruling to compel fathers to take responsibility to maintain their children.

Good practices

- a. Turkey: Paternal descent is established through marriage with the mother, acknowledgement or a court ruling. The term "illegitimate" was repealed under the new Civil Code.
- b. Cameroon: Paternity of children born outside marriage can be established by the parents' declaration or through a court decision.

4. Conclusion

The Indonesian government should be commended for its continued efforts to reform discriminatory provisions of the Marriage Law No. 1 – 1974 and to adopt the Law of Religious Affairs on Marriage. Both of these efforts could result in the setting of a minimum marriage age to 18 for both women and men, and the eliminating of some stereotyped roles within marriage. Nonetheless, the failure of past efforts at law reform, even when initiated by the government, must be critically examined.

Given the many voices in Indonesia - in government, within the religious establishment and civil society - which recognize the possibility of reform of discriminatory laws made in the name of Islam, it is imperative that the Indonesian government exercises the political will and leadership needed to bring about the necessary law reform to comply with its obligations to CEDAW.

The Indonesian government has been candid in acknowledging the difficulties it faces in dealing with “narrow religious interpretations”, which has resulted in the failure of several efforts at law reform of the discriminatory Marriage Law. But given Indonesia’s tradition of progressive scholarship among its religious leaders and mass based Islamic groups such as the Nahdlatul Ulama and the Muhammadiyah and the demands for law reform from women’s groups, including those led by women with Islamic background, what seems to be needed is the will and courage to face off the challenge posed by radical Islamists who use Islam as a political ideology. A skillful formation of a broad-based alliance among the government, civil society, religious scholars and national human rights and women’s mechanisms can put Indonesia at the forefront of law reform in the Muslim world to end discrimination against women.

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/>.

Acknowledgements

Acknowledgements to Janine Moussa, independent consultant, member Musawah International Advocacy Working Group and Zainah Anwar, Director of Musawah, for the preparation of this report.