

Joint Statement: KENYA
68th Session of the CEDAW Committee
Monday, 30TH October 2017

Madam Chair and esteemed members of the CEDAW Committee,

Article 45 of the 2010 Constitution of Kenya specifically states that Parliament shall enact legislation that recognizes any system of personal and family law to the extent that any such marriages or systems of law are consistent with the Constitution. However, Section 49(3) of the Marriage Act states that provisions of the Act, which are inconsistent with Islamic law and practices, shall not apply to persons who profess the Islamic faith.

This conflict of rights and how they apply to Muslims within a plural legal system is a phenomenon in many Muslim contexts that needs urgent resolution. In the name of Islam, the full scope of fundamental rights - especially of equality and non-discrimination - does not apply to Muslim women, particularly in the context of marriage and family. Such denial of rights in a country that constitutionally recognises equal rights and obligations at the time of marriage, during marriage and at dissolution of marriage constitutes gross discrimination that is untenable and unacceptable.

As outlined in the Musawah Thematic Report, the Kadhi Court system in Kenya, which administers Muslim marriages and divorces, is discriminatory towards Muslim women. Muslim women do not have equal capacity to enter marriages; men can enter into polygamous marriages without the consent or even the knowledge of the existing wife. Nor do husbands need to go to court to evaluate their ability to be fair and just in such a marriage. Muslim girls continue to be plagued by vulnerabilities pertaining to early marriage. Husbands also have the unilateral right to divorce their wives without any conditions and Muslim women face grave challenges in accessing justice and due redress within the current structure and procedures of the Kadhi Court system.

The 2010 Constitution recognized and strengthened Kadhi Courts in Kenya. This is, despite the fact that Kenya does not have a specific codified law governing Muslim marriages and family relations. Therefore, the processes and outcomes of cases depend on the interpretation, understanding of *Shari'ah* and Islamic law, and attitude of individual Kadhi judges. This leads to arbitrary and unpredictable standards of justice throughout the country.

It must be highlighted here that there is a distinction between what is perceived as *Shari'ah*, the revealed way, and *fiqh* or jurisprudence, which is the human understanding of the *Shari'ah*. Much of what is deemed to be 'Islamic law' by the State party and religious scholars, and what is practised in its Kadhi's Courts today are in fact, *fiqh or jurisprudence*. It is not divine law. It is human-made, fallible and changeable.

Musawah believes it is necessary and possible for the State party to codify a Muslim family law that complies with the equality provisions of its Constitution and Marriage Act. Most importantly, the changing realities of women's lives today in Kenya, necessitate the urgent need for a codified law based on equality between spouses.

There are various juristic tools and concepts within Islamic legal theory, which has led to positive developments and practices in other Muslim contexts, which can be used as the basis for codification. As Musawah has shown, there is great diversity of opinions and schools of law and thought, which has always been accepted and celebrated in the Muslim legal tradition. Principles such as *maslahah* (public interest), and *istihsan* (choosing the best opinion among many) must be used to meet the demands of equality and justice today.

Thus, Musawah recommends the CEDAW Committee to urge the Kenyan government to:

- Undertake within a definite timeline, a process to codify a Muslim family law that recognizes marriage as a partnership of equals, in line with guarantees of equality and non-discrimination in the Constitution and the Marriage Act;
- Ensure engagement especially of Muslim women rights groups in this process;
- Strengthen support services and establish legal clinics to ensure that girls who are vulnerable to early marriage are able to obtain swift and effective support and women are provided with legal advisory services in going through the Kadhi Court processes.