



musawah

For Equality in the Family

**THEMATIC REPORT ON ARTICLE 16, MUSLIM FAMILY LAW
AND MUSLIM WOMEN'S RIGHTS IN**

Afghanistan

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A. INTRODUCTION

Musawah, the global movement for equality and justice in the Muslim family, submits this Thematic Report on Article 16 and related concerns for consideration by the CEDAW Committee in its review of the Government of Afghanistan, reporting before the 75th CEDAW Session in February 2020. In particular, this report examines Afghan laws and practices that enforce de jure and de facto discrimination against women in the following areas: discriminatory legal framework, child marriage, divorce rights, polygamy, inheritance and matrimonial assets and guardianship of children.

We hope that the CEDAW Committee will utilize this report as a key resource during its Constructive engagement with the State party, and in follow-up activities on the Concluding Observations. Musawah would like to acknowledge the vital input and feedback from Afghan women's rights activists and issue experts into this report.

B. MUSLIM FAMILY LAWS IN AFGHANISTAN

Article 54 of the Constitution of Afghanistan states that the family is the fundamental pillar of the society, and shall be protected by the state. It commits the State to adopt necessary measures to attain the physical and spiritual health of the family, especially of the child and mother, upbringing of children, as well as the elimination of related traditions contrary to the principles of the sacred religion of Islam.¹

Matters regarding marriage and family relations of the predominantly Muslim population in Afghanistan are mainly governed by the following codified laws:

- **For the Sunni majority:** The Civil Code is the main codified law that governs matters relating to marriage and family relations.² Based on Article 1(2) of the Civil Code, in the absence of codified laws that sufficiently address a particular matter of personal status of Sunnis, generally, the rules of Hanafi jurisprudence (*fiqh*) apply;³ and
- **For the Shia minority:** The Shiite Personal Status Law (SPSL) is the main codified law that governs matters relating to marriage and family relations.⁴ Based on Article 2(3) of the SPSL, in the absence of codified laws that sufficiently address a particular matter of personal status of Shias, generally, the rules of Jafari *fiqh* apply.⁵

¹ Article 54 of Afghanistan's Constitution (2004), https://www.constituteproject.org/constitution/Afghanistan_2004.pdf?lang=en

² Civil Code (1977), <http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/737834/doc/slspublic/Afghan%20Civil%20Code%20%20English%20translation%20ALEP%20Sept%202014.pdf>

³ Article 1(2) of the Civil Code (1977), <http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/737834/doc/slspublic/Afghan%20Civil%20Code%20%20English%20translation%20ALEP%20Sept%202014.pdf>; Article 130 of Afghanistan's Constitution (2004), https://www.constituteproject.org/constitution/Afghanistan_2004.pdf?lang=en

⁴ Shiite Personal Status Law (2009), <http://www.refworld.org/pdfid/4a24ed5b2.pdf>; Article 131 of Afghanistan's Constitution (2004), https://www.constituteproject.org/constitution/Afghanistan_2004.pdf?lang=en

⁵ Article 2(3) of the Shiite Personal Status Law (2009), <http://www.refworld.org/pdfid/4a24ed5b2.pdf>

C. KEY ISSUES AND LIVED REALITIES

1. DISCRIMINATORY LEGAL FRAMEWORK

Despite the equality guarantee under Article 22 of the Constitution, the Civil Code⁶ and the SPSTL⁷ provide for a marital framework based on 'reciprocal' or 'complementary' rights (as opposed to 'equal' rights) between the two spouses, whereby in return for maintenance and protection from her husband, a wife is expected to obey him. Provisions in the family laws therefore discriminate against women as it is based on male authority and male guardianship.

Delayed reform process:

According to the State Party report, in 2016 the Ministry of Women's Affairs (MoWA) together with relevant ministries and organisations undertook efforts to review and draft a Family Law to replace the Civil Code. According to women's rights groups who provided inputs into the draft, there is little information pertaining to the timeline and process of finalizing and enactment of the new/revised Family Law. The amendments and new provisions proposed have also been watered down and do not address all the most urgent areas of discrimination under the Muslim family laws in Afghanistan. The draft currently remains under review with the Ministry of Justice.

RECOMMENDATIONS

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

- Ensure that the draft Family Law is based on equality between spouses and the provisions within it addresses the areas of discrimination faced by women and girls.
- Ensure timely enactment of the Family Law, following consultations with women's rights groups to address any gaps in the current draft.

2. CHILD MARRIAGE

According to UNICEF's State of the World's Children 2016 report, 33% of women aged 20- 24 in Afghanistan were first married by 18 and according to the Afghan government, women who marry below 15⁸ make up 3% of married women.⁹

For both Sunnis and Shias, the minimum legal age for marriage is 16 for females and 18 for males as per Article 70 of the Civil Code and Article 99(1) of the SPSTL, respectively.¹⁰ However, marriages below the minimum legal age for marriage are permissible for both sects:

⁶ Articles 60, 99, 115, 117, 155 of the Civil Code (1977), <http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/737834/doc/slspublic/Afghan%20Civil%20Code%20%20English%20translation%20ALEP%20Sept%202014.pdf>

⁷ Articles 74, 132, 133, 155 of the Shiite Personal Status Law (2009), <http://www.refworld.org/pdfid/4a24ed5b2.pdf>

⁸ According to Girls Not Bride, factors that contribute to the high prevalence of child marriage in Afghanistan include poverty, poor access to education and strong patriarchal values that have given rise to cultural practices that assign a low value to girls "such as bride price, child engagement (where children are engaged before birth), exchange marriages (between girls from two separate families) and giving girls in *baad* (to solve a community dispute) - Girls Not Brides, "Afghanistan", *Child marriages around the world*, <http://www.girlsnotbrides.org/child-marriage/afghanistan/>

⁹ UNICEF, "The State of the World's Children 2016", Table 9, pp. 150-153, https://www.unicef.org/publications/files/UNICEF_SOWC_2016.pdf; Afghanistan State party report, U.N. Doc. CEDAW/C/AFG/1-2 (2011), para. 359, <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>

¹⁰ Article 70 of the Civil Code (1977), <http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/737834/doc/slspublic/Afghan%20Civil%20Code%20%20English%20translation%20ALEP%20Sept%202014.pdf>; Article 91(1) of the Shiite Personal Status Law (2009), <http://www.refworld.org/pdfid/4a24ed5b2.pdf>

- **For Sunnis:** Article 71(1) of the Civil Code provides that either a competent father or competent court may permit girls below 16 to marry.¹¹ Article 71(2) of the Civil Code absolutely prohibits the marriage of girls below 15.¹²
- **For Shias:** Articles 99(2) and 99(3) of the SPSL provide that a guardian appearing before the court may permit girls and boys below 16 and 18, respectively, to marry if the marriage is considered necessary and in their best interest.¹³ The SPSL does not stipulate an absolute minimum age below which a marriage may not be authorised.

According to women's advocates, registration of marriages continues to be voluntary¹⁴ and as a result child and forced marriages are more likely to be unregistered. The lack of registration of marriages imposes difficulties on women with regard to their right to seek divorce in addition to their right to a dower (*mahr*), maintenance and child custody.

RECOMMENDATIONS

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

- Establish a standard minimum age of 18 years for all citizens of Afghanistan regardless of sex, sect, religion, tribe, geographic region and remove all legal loopholes that allow for exceptions.
- Ensure mandatory registration of all marriages and facilitate a standard process for registering of marriages.
- Improve awareness raising campaigns among tribal and rural communities about forced marriages and related penalties.

2. POLYGAMY

According to Article 86 of the Civil Code¹⁵ and Article 91 of the SPSL¹⁶, both Sunni and Shia men may marry up to four wives at one time. According to Afghanistan's 2015 Demographic and Health Survey, 6% of marriages in Afghanistan are polygamous¹⁷. The survey also found that:

- Older women were more likely than younger women to have co-wives. For instance, 11% of married women aged 45-49 reported having co-wives, as compared with 3% of women aged 20-24;
- Rural women were more likely to report having co-wives than urban women (7% versus 5%);
- Lower educated women were slightly more likely to report having co-wives than higher educated women.

According to research compiled by the Ireland Refugee Documentation Centre¹⁸ reasons for

¹¹ Article 71(1) of the Civil Code (1977), <http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/737834/doc/slspublic/Afghan%20Civil%20Code%20%20English%20translation%20ALEP%20Sept%202014.pdf>

¹² Article 71(2) of the Civil Code (1977), <http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/737834/doc/slspublic/Afghan%20Civil%20Code%20%20English%20translation%20ALEP%20Sept%202014.pdf>

¹³ Articles 99(1)-99(3) of the Shiite Personal Status Law (2009), <http://www.refworld.org/pdfid/4a24ed5b2.pdf>

¹⁴ Afghanistan State party report, U.N. Doc. CEDAW/C/AFG/1-2 (2011), para. 355, <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>

¹⁵ Article 86 of the Civil Code (1977), <http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/737834/doc/slspublic/Afghan%20Civil%20Code%20%20English%20translation%20ALEP%20Sept%202014.pdf>

¹⁶ Articles 130, 132 of the Shiite Personal Status Law (2009), <http://www.refworld.org/pdfid/4a24ed5b2.pdf>

¹⁷ Refugee Documentation Centre (Ireland), "Information on Polygamous Marriages in Afghanistan", 2011, https://www.justice.gov/sites/default/files/eoir/legacy/2013/06/11/polygamous_marriages.pdf

¹⁸ Central Statistics Organisation, Afghan Ministry of Public Health and the DHS Program, "Afghanistan

polygamous marriages in Afghanistan include:

- The very poor social status of divorcees which pressurises wives to agree to become a second or third wife to avoid being single;
- The view among men that the ability to enter into a polygamous marriage is an indication of material and social prestige;
- The failure of the existing wife to produce a male child; and
- The wife as an incurable disease.

RECOMMENDATIONS

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

- Ensure that the Family Law must contain provisions to prohibit polygamy by Afghan Muslim men, following examples of other Muslim countries which have abolished the practice in the best interest of family well-being.

3. DIVORCE RIGHTS

Divorce rights between Muslim men and women are not equal. Both the Civil Code and the SPSL provide for three different mechanisms for divorce: (i) unilateral repudiation (*talāq*) by husbands; (ii) judicial divorce (*fasakh*) by wife on fault grounds; and (iii) redemptive divorce (*khul'*) by wife with consent of husband. The marriage may also be annulled.¹⁹

Under both the Civil Code and SPSL, the husband may unilaterally repudiate a marriage, which may be effectuated without much restrictions. While the Civil Code is silent on the requirement for witnesses to the repudiation, the SPSL specifically requires the presence of two male witnesses who must be Muslims.²⁰ A woman can initiate a judicial divorce only on specific grounds and must follow a different procedure than for *talaq*. She also has the responsibility to bring the burden of proof. According to reports by the Afghan government as well as civil society, several factors restrict a wife's right to divorce:²¹

- Many women are not aware of their right to seek judicial divorce. This is largely because divorce is culturally unfavourable;
- The lack of access to legal representation for women in family matters; and
- The fear of losing custody of her children.

Both Sunni and Shia husbands may delegate their unilateral right to divorce to their wives (*isma*) through a stipulation in the marriage contract,²² thus permitting her to pronounce *talāq* upon herself

Demographic and Health Survey 2015", Table 4.2.1, p. 67, <https://dhsprogram.com/pubs/pdf/FR323/FR323.pdf>

¹⁹ Article 131 of the Civil Code (1977), <http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/737834/doc/slspublic/Afghan%20Civil%20Code%20%20English%20translation%20ALEP%20Sept%202014.pdf>; Article 140 of the Shiite Personal Status Law (2009), <http://www.refworld.org/pdfid/4a24ed5b2.pdf>; Kabeh Rastin-Tehrani and Nadjma Yassari, "Max Planck Manual on Family Law in Afghanistan", (Hamburg, Germany: Max Planck Institute, Amended Second Edition, 2012), p. 71, http://www.mpipriv.de/files/pdf3/max_planck_manual_on_afghan_family_law_english.pdf

²⁰ Articles 135-145 of the Civil Code (1977), <http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/737834/doc/slspublic/Afghan%20Civil%20Code%20%20English%20translation%20ALEP%20Sept%202014.pdf>; Articles 158-161 of the Shiite Personal Status Law (2009), <http://www.refworld.org/pdfid/4a24ed5b2.pdf>; Kabeh Rastin-Tehrani and Nadjma Yassari, "Max Planck Manual on Family Law in Afghanistan", (Hamburg, Germany: Max Planck Institute, Amended Second Edition, 2012), pp. 73, 77, http://www.mpipriv.de/files/pdf3/max_planck_manual_on_afghan_family_law_english.pdf

²¹ Afghanistan State party report, U.N. Doc. CEDAW/C/AFG/1-2 (2011), paras. 356, 372, <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>; Human Rights Watch, "Afghanistan" Submission to the CEDAW Committee for the 55th Session, 2013, <https://www.hrw.org/news/2013/07/04/submission-combined-initial-and-second-periodic-report-afghanistan-united-nations>

²² Article 142 of the Civil Code (1977), <http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/737834/doc/slspublic/Afghan%20Civil%20Code%20%20English%20translation%20ALEP%20Sept%202014.pdf>

(*talāq-i-tafwid*), however activists state that this practice is rare as most women have little opportunity to negotiate the contracts prior to marriage.²³

RECOMMENDATIONS

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

- Amend divorce provisions whereby Muslim men no longer have the right to unilaterally divorce their wives without reason or out of court.
- Ensure divorce procedures are just and fair for women, especially in instances of harm (eg. domestic violence).
- Ensure that all divorces must be administered via in the court after assessing the best interest of the parties and child/ren involved. Divorces must be registered via an official body and a divorce certificate/document issued to both parties.

4. INHERITANCE & MATRIMONIAL PROPERTY

There is no legal concept of matrimonial assets for both Sunnis and Shias, and inheritance rights between women and men are unequal for both Sunnis and Shia, although there are exceptions to the general rule. The Civil Code and the SPSL details the inheritance shares of beneficiaries. In many instances, women are entitled to half the share of the estate as compared to man.²⁴

According to the Afghan government, it is relatively difficult for a woman to exercise her inheritance rights because:²⁵

- Men often deprive women of their inheritance rights;
- Women in turn do not ask for their inheritance because such requests are deemed 'dishonourable' and not socially acceptable; and
- In instances where women are courageous enough to ask for their inheritance, their access to justice is limited because women's issues are not frequently considered by the competent authorities.

[nglish%20translation%20ALEP%20Sept%202014.pdf](http://www.refworld.org/pdfid/4a24ed5b2.pdf); Article 155(3) of the Shiite Personal Status Law (2009), <http://www.refworld.org/pdfid/4a24ed5b2.pdf>; Kabeh Rastin-Tehrani and Nadjma Yassari, "Max Planck Manual on Family Law in Afghanistan", (Hamburg, Germany: Max Planck Institute, Amended Second Edition, 2012), p. 73,

http://www.mpipriv.de/files/pdf3/max_planck_manual_on_afghan_family_law_english.pdf

23 Article 135(2) of the Civil Code (1977), <http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/737834/doc/slspublic/Afghan%20Civil%20Code%20%20English%20translation%20ALEP%20Sept%202014.pdf>; Article 155(1) of the Shiite Personal Status Law (2009), <http://www.refworld.org/pdfid/4a24ed5b2.pdf>; Kabeh Rastin-Tehrani and Nadjma Yassari, "Max Planck Manual on Family Law in Afghanistan", (Hamburg, Germany: Max Planck Institute, Amended Second Edition, 2012), p. 73,

http://www.mpipriv.de/files/pdf3/max_planck_manual_on_afghan_family_law_english.pdf

24 For instance:

- Under Article 2007 of the Civil Code as well as Article 219 of the SPSL, upon the death of his wife, a husband shall inherit 1/2 of her estate unless there are children, in which case he will receive 1/4. A wife, on the other hand, is entitled to 1/4 of his estate upon the death of her husband if there are no children and 1/8 if there are children;
- Where a parent leaves behind both sons and daughters, Article 2019 of the Civil Code and Article 222 of the SPSL, provides for the sons to inherit twice as much as the daughters.

Source: Articles 2007, 2019 of the Civil Code (1977), <http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/737834/doc/slspublic/Afghan%20Civil%20Code%20%20English%20translation%20ALEP%20Sept%202014.pdf>; Articles 219, 222 of the Shiite Personal Status Law (2009), <http://www.refworld.org/pdfid/4a24ed5b2.pdf>

25 Afghanistan State party report, U.N. Doc. CEDAW/C/AFG/1-2 (2011), para. 299, <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>

RECOMMENDATIONS

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

- Introduce a matrimonial property regime, drawing from progressive legislation in other Muslim contexts such as Malaysia (see Annexe 1), Brunei and Singapore. Law on matrimonial property must consider the financial and non-financial contributions of women during marriage.
- Reform provisions on inheritance to grant inheritance on equal grounds for women and men.

5. GUARDIANSHIP OF CHILDREN

Both Sunni and Shia fathers have priority right over the guardianship of their children. For Sunnis, the Civil Code is silent on the person with the priority right over the guardianship of the children in a marriage. Nevertheless, it is implied in the Civil Code that the priority right over the guardianship of the children belongs to father through various provisions as follows: (i) Under Article 71(1) of the Civil Code, the father may conclude the marriage of girls between 15 and 16 years of age; (ii) Under Article 252, as long as the mother is married, she cannot take the child on a journey without the permission of the father; (iii)

Under Article 256, the father shall provide maintenance to his son until the son has the power to work and his daughter until she gets married; and (iv) Under Article 268, a father has priority guardianship over the property of his children.²⁶ In addition, according to all Sunni schools of law, the father is obliged to provide for education, upbringing, development, health and security of the minor child.²⁷

For Shias, Article 45 of the SPSL specifies that a father and paternal grandfathers have priority right over the guardianship of his children. The exercise of the guardianship rights of the father and grandfather does not require the authorisation of the court.²⁸

A minor's father or paternal grandfather may appoint an alternative guardian to manage the affairs of minors.²⁹

RECOMMENDATIONS

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

- Amend and/or enact family law provisions to ensure that mothers and fathers have equal right to guardianship over children and that courts determine guardianship based on the best interest of the child/children.

²⁶ Articles 71(1), 252, 256, 268 of the Civil Code (1977), <http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/737834/doc/slspublic/Afghan%20Civil%20Code%20%20English%20translation%20ALEP%20Sept%202014.pdf>

²⁷ Kabeh Rastin-Tehrani and Nadjma Yassari, "Max Planck Manual on Family Law in Afghanistan", (Hamburg, Germany: Max Planck Institute, Amended Second Edition, 2012), pp. 106-107, http://www.mpipriv.de/files/pdf3/max_planck_manual_on_afghan_family_law_english.pdf

²⁸ Article 45 of the Shiite Personal Status Law (2009), <http://www.refworld.org/pdfid/4a24ed5b2.pdf>

²⁹ Article 47(2) of the Shiite Personal Status Law (2009), <http://www.refworld.org/pdfid/4a24ed5b2.pdf>

ANNEXE 1: JUSTIFICATION FOR REFORM




1. Equality in marriage

CHALLENGING THE MAINTENANCE-FOR-OBEDIENCE FRAMEWORK	
<p>This idea of 'complementarity of rights' is a manifestation of male authority (<i>qiwamah</i>) and guardianship (<i>wilayah</i>) over women. It does not in practice lead to equality in rights and responsibilities between the husband and wife. Men who fail to provide do not lose their authority over women, and women who financially provide for the family do not enjoy corollary rights and privileges.</p>	
<p>QUR'ANIC PRINCIPLES PROMOTE EQUALITY BETWEEN SEXES</p>	<ul style="list-style-type: none"> • The concept of male authority (<i>qiwamah</i>) and male guardianship (<i>wilayah</i>) over women play a central role in institutionalizing, justifying, and sustaining a patriarchal model of families in Muslim contexts, and must be challenged. • The very notion of male authority and guardianship over women is not in line with Qur'anic principles. The hierarchical understandings of <i>qiwamah</i> and <i>wilayah</i> are juristic (fiqh) constructs that belong to the time and context where patriarchy was part of the social and economic fabric of life, and where men's superiority and authority over women was theoretically a given. • We can and must reconsider these concepts in line with the Qur'anic principles of justice and fairness, to build egalitarian family laws and practices that are based on social justice and enable families and their individual members to reach their full potential.
<p>CONTEMPORARY LIVED REALITIES</p>	<ul style="list-style-type: none"> • Women's lives and stories reveal that laws based on male authority and guardianship over women are untenable, unjust and discriminatory. Far from creating harmony in marriage, these laws are the main causes of marital breakdown and violence against women and thus there is urgent need for reforms.

POSITIVE DEVELOPMENTS IN MUSLIM FAMILY LAW GLOBALLY	
<p>EQUALITY OF SPOUSES IN MARRIAGE</p>	
<p>ALGERIA</p> <p>Under the Constitution and the Civil Code, the family is based on equality between spouses</p>	<p>TURKEY</p> <p>The Family Code requires each spouse to cohabit in harmony, mutual respect and kindness, contribute jointly to the preservation of the family's interests, the protection of their children and the provision of a sound education for them and mutually agree in the management of the family's affairs, including the spacing of births.</p>
	<p>MOROCCO</p> <p>The Family Code (Moudawana) recognises marriage as a partnership of equals and specifies the 'mutual rights and duties' between spouses which includes: (i) cohabitation, mutual respect, affection and the preservation of the family interest; (ii) both spouses assuming the responsibility of managing and protecting household affairs and the children's education; and (iii) consultation on decisions concerning the management of family affairs.</p>


2. Minimum age of marriage as 18 years

MUSAWAH JUSTIFICATION FOR REFORM	
Attempts to set and strictly enforce the minimum age of marriage at 18 for both men and women are often met with resistance from conservative religious authorities, who claim that this is 'un-Islamic.'	
NEW HISTORICAL EVIDENCE NOW AVAILABLE	<ul style="list-style-type: none"> • Commonly, the example of the Prophet Muhammad's marriage to Aishah is used to justify child marriage. The marriage was supposedly consummated when Aishah was nine years old. • However, there are new studies asserting that Aishah was likely to have been 19 at the time of her marriage (source: http://www.sistersinislam.org.my/news.php?item.997.41). • The question arises as to why the Prophet's marriage to Aishah is used as a model, while his marriage to Khadijah, a widow 15 years older than him, or his marriage to other widows and divorcees, are ignored as exemplary practices.
QUR'AN STATES CONDITION OF PERSON FIT FOR MARRIAGE	<ul style="list-style-type: none"> • While the <i>Qur'an</i> 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 (<i>baligh</i>), as is traditionally done, forces adulthood on children under 18, even onto those who start menstruating at the age of nine. • The onset of puberty is no indication of sufficient maturity for marriage.

CHILD MARRIAGE	POSITIVE DEVELOPMENTS IN MUSLIM FAMILY LAWS
EGYPT 	<p>The minimum age for marriage is 18 for both females and males.</p> <p>The registration of the marriage of a person below 18 is prohibited and penalised.</p>
PAKISTAN: SIND PROVINCE 	<p>The minimum age for marriage is 18 for both females and males.</p> <p>The law criminalises and penalises the following:</p> <ul style="list-style-type: none"> (i) males over 18 who contracts a child marriage; (ii) whoever performs, conducts or directs a child marriage; and (iii) parents or guardians who promote a child marriage, permit it to be solemnised or negligently fail to prevent it from being solemnised.
KENYA 	<p>The minimum age for marriage is 18 for both females and males, regardless of religion.</p> <p>Any person who marries or knowingly celebrates or witnesses the marriage of a person below 18 commits an offence and will be liable to a penalty (imprisonment, fine or both).</p>

3. Abolishment of polygamy

MUSAWAH JUSTIFICATION FOR REFORM	
Musawah believes Islam promotes monogamy and only permits polygamy as an alternative in exceptional circumstances. <i>Surah an-Nisa' 4:3</i> in the Qur'an states: 'If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if you fear that you shall not be able to deal justly [with your wives] then marry only one.... That will be more suitable, to prevent you from doing injustice'.	
QUR'AN PROMOTES MONOGAMY	<ul style="list-style-type: none"> When the Qur'an was revealed, it imposed limitations upon the pre-Islamic practice of polygamy. The verse in Surah an-Nisa' that allows polygamy if a man can treat all his wives justly was revealed after a battle which had resulted in many men being killed, leaving behind war widows and orphans. As men were breadwinners in that society, the widows found it difficult to provide for their children. It was in this context that polygamy was tolerated in Islam: to provide for the welfare of widows and the orphaned children.
CHALLENGING POLYGAMY	<ul style="list-style-type: none"> Polygamy is not an intrinsically 'Islamic' practice, as some Muslims believe. Polygamy was a practice that existed in various civilizations, religions, and cultures in many parts of the world until it was abolished by law as governments acknowledged the injustices it inflicted on women and children. Tunisia has forbidden polygamy on the ground that it is impossible for a man to deal justly with more than one wife. Thus, the continuum of reform suggests that polygamy should be even more restricted than it was in the situation discussed in the Qur'an.




Polygamy

POSITIVE DEVELOPMENTS IN MUSLIM FAMILY LAWS

POLYGAMY IS PROHIBITED FOR MUSLIMS:


Tunisia, Turkey

Requirement of court authorisation and consent of existing wives



ALGERIA

- Polygamous marriages must be authorised by the court and may only be concluded with the agreement of existing wives.
- Court permission is only granted if the husband is able to provide justification for entering into multiple marriages as well as proof of his ability to be fair to all wives and meet the necessary conditions of married life with regard to all his marriages.



IRAQ (KURDISTAN)

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

- (i) the first wife has to agree before the court to her husband marrying a second wife;
- (ii) if the wife is diagnosed with an incurable disease that prevents sexual intercourse or if the wife is infertile;
- (iii) the man has the financial capacity to support more than one wife;
- (iv) the husband signs a contract promising to deal with both wives fairly and equally in terms of sexual intercourse and other marriage relations;
- (v) the first wife does not have a condition in the marriage contract that the husband will not take a second wife.
- A man who concludes a polygamous marriage without the authorisation of a judge will be subject to a penalty of imprisonment and fine and judges are prohibited from suspending the penalties.

3. Equal rights to divorce

MUSAWAH JUSTIFICATION FOR REFORM

It is cruel and unjust to continue to allow men the right to divorce their wives at will. Given today's realities and contemporary conceptions of justice, the urgent necessity to provide equal and just grounds for divorce to both men and women must be undertaken.

QU'RAN PROMOTES JUST & FAIR DIVORCE

- The man's unilateral right to divorce his wife at will contradicts Qur'anic teachings, and specifically the message of kindness, justice, fairness and to do what is right and good.
- The Qur'an calls on parties to the marriage to 'either hold together on equitable terms (*ma'ruf*), or separate with kindness (*ihsan*)' (Surah al-Baqarah 2:229).
- The proceedings for arbitration and mediation in Surah an-Nisa' 4:35 place both spouses on an 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.'

EQUAL RIGHT TO DIVORCE

POSITIVE DEVELOPMENTS IN MUSLIM FAMILY LAWS

EQUAL RIGHT TO DIVORCE

TUNISIA



TURKEY



All divorces must go through the court. The grounds for divorce are equally available to both spouses.

Divorce through unilateral repudiation (*talaq*) by the husband is not recognised.

Talaq, with court authorisation and conditions:

MOROCCO




Divorce by way of repudiation which can only be effectuated under judicial supervision. The wife and children must have received all their vested rights before it is authorised.


INDONESIA



A divorce by way of repudiation by the husband (*cerai talak*) must be effectuated through the court. The husband must make a request to the court where his wife resides to hold a court proceeding to witness his pronouncement. His application must contain the reasons for his request.

4. Financial rights after divorce

Inheritance Rights		POSITIVE DEVELOPMENTS IN MUSLIM FAMILY LAWS
Equal right to inheritance		
	Turkey	Inheritance law does not discriminate on the basis of gender. Equal division of property and assets acquired during the marriage is the default property regime.
Divisions of property through bequests, agreement etc.		
Jordan, Tunisia:	Bequests can be made in favour of an heir and beyond the one-third limit if other heirs agree to it.	
Malaysia:	Division of the deceased's property can be changed in whatever manner if all heirs agree to such division.	

Financial Rights		POSITIVE DEVELOPMENTS IN MUSLIM FAMILY LAWS
Division of matrimonial assets after divorce:		
	Malaysia	<p>The court may order the division of matrimonial assets (<i>harta sepencarian</i>) acquired through the parties' joint efforts, having regard to the extent of contributions made by each party towards acquiring the assets, debts owed by the parties and the needs of minor children to the marriage.</p> <p>For assets acquired by the sole efforts of a party, the court may order division of the assets having regard to the other party's contributions towards looking after the home or caring for the family, though the party by whose efforts they were acquired shall receive a greater proportion.</p> <p>Even though a woman may not have contributed financially to the acquisition of the marital assets, her role as wife and mother are considered as indirect contributions and she is usually granted at least a third of the share of assets.</p>

5. Guardianship of children

MUSAWAH JUSTIFICATION FOR REFORMS	
QU'RAN DOES NOT DISCRIMINATE	<ul style="list-style-type: none"> 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."
EQUAL RIGHTS REGARDLESS OF MARITAL STATUS	<ul style="list-style-type: none"> 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.

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

ANNEXE 2:

MUSAWAH VISION FOR THE FAMILY

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

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

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

- Recognize the diversity of opinions, laws and practices in the Muslim world and the growing scholarship in Islam that recognizes equality and justice and the possibility and necessity for reform of Muslim family laws today.
- Promote human rights standards as intrinsic to the teachings of Islam, national guarantees of equality and non-discrimination, and the lived realities of men and women today.
- Encourage open and inclusive public debate regarding diversity of opinion and interpretations in Muslim laws and principles relating to family laws and practices.

