

LIST OF ISSUES SUBMISSION ON FAMILY LAW AND
MUSLIM WOMEN'S RIGHTS IN

MALAYSIA

86th CEDAW Pre-Session Working Group (PSWG)

February 2023

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TABLE OF CONTENTS

A. INTRODUCTION	3
B. SUMMARY	3
C. KEY ISSUES OF CONCERN	3
1. Child Marriage.....	3
2. Discrimination under Islamic Family Law	5

A. INTRODUCTION

Musawah, the global movement for equality and justice in the Muslim family, **and Sisters in Islam**, a national NGO working towards equality and justice for women within the Malaysian Islamic legal framework, jointly submit this List of Issues report for consideration by the CEDAW, reporting before the 86th Pre-Session Working Group in February 2023.

This report highlights key legal inequalities that Muslim women face in Malaysia in the personal status sphere, along with suggested questions for the State Party. We hope that the CEDAW Committee will utilize this report as a key resource during its development of list of issues for Malaysia.

B. SUMMARY

Key Issues:

- **Child marriage remains legally permissible** under civil, Islamic and native customary laws despite Malaysia's removal of its reservation to Article 16(2) of CEDAW and its National Strategy Plan in Handling the Causes of Child Marriage (2020-2025).
- **Discriminatory provisions in civil law and Islamic family law reinforce**, and in some instances worsen, unequal rights in marriage between men and women.
- **Conflicting court jurisdictions and lack of political will on the part of the government** continue to be severe challenges in addressing the issue of unilateral conversions.

C. KEY ISSUES OF CONCERN

1. CHILD MARRIAGE

Child marriage remains legally permissible under civil, Islamic and native customary laws despite Malaysia's removal of its reservation to Article 16(2) of CEDAW and its National Strategy Plan in Handling the Causes of Child Marriage (2020-2025).

In 2020, the government embarked on a five-year National Strategy Plan to end child marriage¹. The plan outlines 7 objectives, 17 strategies, 58 programmes and actions to address the causes of child marriage in Malaysia and will involve 61 agencies in stages, including agencies from the federal government, state government, NGOs and international organisations for a phased series of short-, medium- and long-term programmes. The plan covers Muslim marriages conducted under Syariah laws, non-Muslim marriages under civil laws and *adat* marriages conducted under native laws. The plan addresses the root causes of child marriage, including cultural and religious aspects and are proposed to be addressed through policy changes, legislative reforms as well as awareness programmes and activities. The main purpose of these programmes is to achieve an end to child marriages in Malaysia by changing perceptions, stereotypes and stigmas associated with child marriage.

These programmes include raising the legal minimum age limit of marriage to 18 years for girls (and boys), strengthening existing socio-economic support, providing child-friendly reproductive health services for both children and adolescents, and strengthening the collection of marriage and divorce

¹ Executive Summary, National Strategy Plan In Handling The Causes Of Child Marriage (2020-2025)
<https://www.kpwkm.gov.my/kpwkm/uploads/files/Dokumen/Pelan%20Strategi%20Perkahwinan%20Bawah%20Umur/EXECUTIVE%20SUMMARY.pdf>

data. A committee is also required to be established to monitor the implementation and development of planned programmes and actions.

However, to date, no report has been provided to the Parliament on the progress of the National Strategy Plan in Handling Causes of Child Marriage by the government, nor has it been made available to the Human Rights Commission of Malaysia (SUHAKAM), civil society, the Malaysian Bar Council and the public to evaluate the progress on this Plan.

Malaysian Syariah laws are enacted at State level thus currently there exists 14 separate Syariah laws in operation across the country. Syariah laws are mandatorily applicable to Muslims. Laws on child marriage under Syariah laws are the same across all 14 enactments. Generally, under the Islamic Family Law (*State Jurisdiction*), the minimum age of marriage in Malaysia is 16 for females and 18 for males. However, the *Syariah* courts have discretion to give written permission for the marriages under these ages. As a result of sustained advocacy by NGOs on the issue of child marriages and a series of high-profile publicized cases of child marriages, the government called for states to review their Islamic Laws on child marriage. In 2019, the Woman, Family and Community Development Minister revealed the states that have agreed and disagreed to increase the minimum age of marriage to 18 years old, as follows:

States that Agree to Amend State Islamic Family Law	States that Disagree to Amend State Islamic Family Law
Federal Territories	Sarawak
Penang	Pahang
Sabah	Terengganu
Johor	Perlis
Melaka	Negeri Sembilan
Perak	Kedah
	Kelantan

Only the state of Selangor² has taken the necessary steps and amended the state Islamic Family Law increasing the minimum age of marriage to 18 (albeit with exceptions).³ In a recent development, in 2022, Kedah⁴ joined Selangor by amending the state Islamic Family Law increasing the minimum age of marriage to 18 with exceptions.

Thus, the situation remains much unchanged. Even in Selangor and Kedah, the exceptions stated in their respective Islamic Family Law allow the Syarie Judges to exercise their discretionary power to allow marriages below 18 years old. In 2020, the Director of the Department of Syariah Judiciary

² Statutory Amendments to Raise Minimum Age for Muslims to Marry in Selangor Passed, Sept 2018, *The Star*, <https://www.thestar.com.my/news/nation/2018/09/05/statutory-amendments-to-raise-minimum-age-for-muslims-to-marry-in-selangor-passed/>

³ Islamic Family Law (State of Selangor) (Amendment) Enactment 2018, <https://www.jakess.gov.my/pdf/ENAKMEN/Enakmen-enakmen%20negeri%20Selangor/Enakmen%20Keluarga/RUU%20UNDANG-UNDANG%20KELUARGA%20ISLAM%20%28NEGERI%20SELANGOR%29%20%28PINDAAN%29%202018.pdf>

⁴ Minimum age for women to marry increased to 18 in Kedah, July 2022, *The Star*, <https://www.thestar.com.my/news/nation/2022/07/18/minimum-age-for-women-to-marry-increased-to-18-in-kedah-one-year-jail-for-polygamy-without-permission>

Malaysia (JKSM) and holding the position of the Chief Syariah Judge of Malaysia issued a Practice Direction⁵ to all Syariah judges in Malaysia on the format and usage of the social/moral report form from the social welfare department (JKM) for cases of underage marriage applications. However, the legal effect of the practice direction is only persuasive. There are no legal consequences if a Syariah judge does not follow the practice direction issued. In addition to that, the law and practice direction are unclear as to the circumstances or situations to allow or reject an application for child marriage. The decision remains dependent on the discretion of the Syariah judges without strict and specified criteria for such evaluation.

In March 2020, it was reported in the state of Perak that underage marriages is one of the main reasons for students to drop out of school. In December 2021, it was reported that in 2020, out of 445 teenagers who dropped out of school to get married, 441 of them were girls⁶. These marriages and drop outs from school took place during the time of the pandemic when Malaysia had imposed severe lockdowns which affected students and their schooling experience to a great degree.

Additionally Islamic Family Laws are silent on the issue of consent of the child. In practice, consent is not necessarily requested in each case. There are circumstances where the child is not called in by the Court for an interview. Frequently, the parents' testimonies are accepted as sufficient. The laws are also silent on requiring the court to decide in the best interest of the child.

SUGGESTED LIST OF QUESTIONS FOR THE STATE PARTY

- Please provide a timeline and plan to report to the Parliament the progress of the National Strategy Plan in Handling Causes of Child Marriage by the government and made available to the Human Rights Commission of Malaysia (SUHAKAM), civil society, the Malaysian Bar Council and the public to evaluate how far Malaysia has come in ending child marriages.
- Please provide a detailed criteria of evaluation required to be used by Syariah Judges to allow marriages of children below the age of 18, or any action that Malaysia has taken to define such criteria and make it mandatory upon Syariah Judges.
- Please provide the steps that Malaysia is taking to prohibit marriage below the age of 18 all over the country without exception.
- Please provide to the public regular, timely disaggregated data on child marriages which include age of marriage, location, race and ethnicity, economic position, etc. to enable a proper assessment of motivations for child marriage, which can in turn contribute to policy formulation, law reforms and effective educational campaigns.

2. DISCRIMINATION UNDER ISLAMIC FAMILY LAW

While the Law Reform Marriage and Divorce Act (1976) regulates marriage relations for persons who do not profess the Islamic faith, Muslims are governed under Islamic Family Laws (IFL), which are legislated at the state level, without option.

Equality among Spousal Rights in Muslim Marriages

⁵ Arahan Amalan No. 2 Tahun 2020, <https://jksp.pahang.gov.my/wp-content/uploads/2022/07/ARAHAN-AMALAN-TAHUN-2020.pdf>

⁶ 445 teens left school to get married in 2020, Dec 2021, *FMT*, <https://www.freemalaysiatoday.com/category/nation/2021/12/02/445-teens-left-school-to-get-married-in-2020/>

Paragraph 118 of the Malaysia's State Party Report states that "Malaysia guarantees that Muslim women have equal rights in all family and marriage matters, including equal capacity as men to enter into marriage and its dissolution, covering matters related to maintenance, custody and guardianship of their children and inheritance." However, a number of issues remain as some related laws continue to discriminate against Muslim women. These include the following:

- Muslim women still require a guardian (*wali*) to enter into a marriage, regardless whether she is single, divorced or widowed, even though various interpretations in Islamic jurisprudence do not stipulate such a requirement, particularly for divorced or widowed Muslim women.
- Muslim men can pronounce unilateral divorce (*talaq*). Women do not have this right, thus would have to apply for other forms of divorce (e.g.: *fasakh*) which is usually a protracted process involving complex legal documentation and can take up to two years in court, if not more. She would not be able to carry on her with life as immediately as the husband. Her personal/marital life is on hold until the divorce proceedings is over and the divorce is pronounced by the court. Conditions on which a woman may apply to the court for *fasakh* include if her husband: has failed to provide maintenance; has been insane or has a communicable sexually transmitted disease; treats her cruelly, including habitual assaults or making her life miserable by cruel conduct; does not treat her equally with other wives (if he has multiple wives); disposes of her property or hinders her legal rights over her property; attempts to force her to lead an immoral life; or associates with "women of ill repute." The Syariah Court requires the wife to provide strong grounds before pronouncing divorce through *fasakh*. *Fasakh* divorce takes a much longer time. The normal range is between six months to a year but there have been cases, which have stretched from five to ten years. These extensive delays are often the result of husbands using technical legal processes to delay the hearing of the case, husband not turning up for hearing, husband filing significant numbers of matters so as to disrupt the hearing of the matter at hand and so on.
- Muslim mothers have the right to custody but not guardianship. Legal guardianship remains with the Muslim fathers, even if the mother has custody of the children.
- Inheritance remains a highly challenging area when it comes to equal distribution between men and women, for instance between sons and daughters. While there are efforts to work around this by granting '*hibah*' or a 'gift' to the daughters while the estate holder is still alive, we assert that this is not a solution that is available for Where e.g., the beneficiaries are reliant on the savings of the deceased including the contributions made to the Employees Provident Fund (EPF), again equal distribution is not possible as *faraid* rules apply automatically, even if equal distribution is the wish of the deceased. In addition, the existing '*faraid*' rules affect how other people can inherit from Muslim women, regardless if she is married or not, with or without children. Baitulmal, the government body for inheritance management of Malaysia's Muslim citizens⁷ stands to have a significant portion, if not all, of her estate.

Polygamy

Since 1994, several rounds of law reform have chiseled away at rights of wives in polygamous marriages. For example, polygamy committed without the court's permission can be registered as legal, upon payment of a small fine - creating a legal loophole which led to a proliferation of men who divorce their wives at will and who take second, third and fourth wives without the permission of the court. The fifth condition for polygamy— 'no drop in standard of living of existing family' – was repealed, thus eliminating an important condition that a man has to fulfil before the court would consider giving him permission to marry again.

Ten years forward, more legal rights were given to men and the use of gender-neutral language extended to men rights that historically were seen as the rights of women. Amendments were first introduced in the state of Selangor in 2003, and thereafter the Islamic Family Law (Federal Territories) (Amendment) Act 2006 was passed in Parliament applicable for Federal Territories. For example, the

⁷ <https://www.malaysia.gov.my/portal/content/27712>

husband now has the right to claim a share of the matrimonial assets upon his polygamous marriage (section 23(9)); This provision created a gross injury upon the rights of an existing wife where a husband who is going to marry a new wife would be able to seek the sale of the matrimonial home and make claims on the matrimonial assets in order to support his new family.

Malaysia's State Party Report states that 'in making sure that the existing wife's concerns are heard and considered before the court decides the husband's application to contract a polygamous marriage, the Syariah Judiciary Department (JKSM) has issued Practice Direction No. 7 of 2021 which stipulates that the Syariah court is to summon the existing wife as a party in the application case.'⁸ However, it is important to note that the Practice Direction No.7 of 2021 issued by the Syariah Judiciary Department (JKSM) is only *persuasive* in nature. Thus, the husband's application for a polygamous marriage can continue regardless of whether the existing wife and/or family is consulted or not.

Inequality in Financial Rights of Women

The issues highlighted in the NGO CEDAW Shadow Report for the Malaysian government review in 2018 have not been addressed and still remain relevant. Owing to the lack of action from the government Muslim women's financial rights continues to regress. The provisions pertaining a Muslim wife's financial rights as stated in paragraph 121 of Malaysia's sixth periodic report, is the written law which is not disputed. It is the extent to which these rights are granted and fulfilled which is the cause for concern.

The prevalent practice on matrimonial assets is that a wife may claim one-third of the properties acquired by the husband during the marriage in recognition of her contributions in looking after the family. The gender-neutral language on matrimonial assets in the IFLA (section 122) enables either spouse to claim a share in the properties acquired by the other spouse during the marriage. Given the realities on the ground, it is unjust and discriminatory against women to regard one-third as the "normal" share to be given to the wife. Even one-half may be inadequate in circumstances where the woman has carried a double burden i.e., financially providing for the well-being of the family as well as her non-financial contribution in doing most of the housework and looking after the children and husband. Moreover, divorced or widowed mothers often have to provide for their children's needs without assistance (or adequate assistance) from the father or male relatives who were traditionally regarded as responsible for the children's maintenance.

Sisters in Islam operates a legal helpline since 2003 called Telenisa and reports on its statistics annually since 2016. The pandemic has affected women's financial rights in marriage even while the marriage is ongoing. In 2021, 76% of Telenisa clients claimed that their husbands didn't give sufficient maintenance and those with court orders for maintenance, their former husbands didn't fulfill them as ordered (11%).

Financial rights for the children remain an all-time high in terms of cases that come to the aforementioned helpline with the issue of non-payment of maintenance by fathers. According to the data, 63% of the fathers were not paying maintenance at all, 16% were unemployed, 14% were violating court orders to pay maintenance and 6% were paying insufficient maintenance. The main issue faced by women is the non-payment of maintenance as agreed in the divorce settlement agreement. In many cases, the ex-husband disappears or just refuses to pay. Even when there is a court order for the father to maintain the children, it is rarely enforced. The onus then falls onto the mother to apply for an enforcement of the court order. Yet, there is no strong enforcement action taken against the father if he does not pay. Where there is payment made by the father, the amount is often inadequate.

In November 2021, the Department of Syariah Judiciary announced that restrictions would be imposed to the husbands' or fathers' bank accounts if they do not fulfill maintenance payment. Nevertheless,

⁸ Paragraph 120, Malaysia's State Party Report 2022 to CEDAW

information to the public and legal fraternities as to how these can be exercised is still unknown so access to this provision is unrealised.

Sisters in Islam believes that the issue of children's maintenance is critical to ensure that children's welfare continue to be taken care of even where the parents are separated or divorced. We suggest consideration be given to the establishment of a national level child support agency that can ensure payment of child support/ maintenance and enforce in situations of non-payment.

In a recent ongoing case (14600-017-0031-2022), the Syariah court allowed an application from the husband to claim for harta sepencarian (matrimonial property) from the wife instead of protecting the non-working mother who is the caretaker of all the children.

Rights of Mothers whose Children were Unilaterally Converted to Islam

While the Federal Court judgement on Indira Gandhi regarding this issue is welcomed,⁹ the implementation of this judgment and its applicability to Malaysian women still falls severely short. Despite the judgement, Indira Gandhi still hasn't had access to her youngest daughter who was taken away from her since 2009 and enforcement agencies have been evasive as to whether they know where she is or to take any positive action that would lead to reuniting Indira and her daughter, even for a moment, if not permanently.¹⁰

In addition, there is a new case of another mother initially being denied access to her children, also converted to Islam. Added to this denial of right, the Perlis state religious authorities, and the Perlis Mufti had intervened to prevent the mother from taking custody of her children¹¹. The Islamist political party, PAS, and Muslim individuals and groups had also publicly campaigned against the mother from acting to nullify the children's conversion to safeguard their status and creed as Muslims¹².

While the mother may have custody of her children now, she lives in fear of the converted Muslim father, who was released from prison, taking her children away at any time. In the meantime, the mother has been granted leave by the High Court in her judicial review application to challenge her three children's conversion to Islam¹³.

Women's Capacity to Enter into Marriage – Guardian's (Wali's) Consent

Islamic Family Laws do not grant women equal consent and capacity as men to enter into marriage. Regardless of her age, a prospective bride requires the consent of a male guardian (wali) to marry. The guardian must be a Muslim and a male relative of the prospective bride (father, followed by the paternal grandfather, and others).

According to paragraph 124 of Malaysia's State Party Report, both women and men are able to enter into marriage with the spouse of their choice without the consent of a third party (the wali) by

⁹ Malaysia's State Party Report to CEDAW, Para 117. *"The judgment...echoes that Malaysian women have equal access to justice irrespective of their religion...the latest amendments to the Act 164 ensures that the rights of spouses whose marriages were solemnised under the civil law are protected despite the conversion to Islam by one spouse."*

¹⁰ We'll find you, Indira Gandhi tells daughter on Deepavali, Oct 2022, *FMT*, <https://www.freemalaysiatoday.com/category/nation/2022/10/24/well-find-you-indira-gandhi-tells-daughter-on-deepavali/>; Indira Gandhi's suit against IGP, three others to go for full trial, July 2021, *Astroawani*, <https://www.astroawani.com/berita-malaysia/indira-gandhis-suit-against-igp-three-others-go-full-trial-308774>

¹¹ High Court rejects MAIPs' bid to vary Loh's child custody order, June 2022, *NST*, <https://www.nst.com.my/news/crime-courts/2022/06/805219/high-court-rejects-maips-bid-vary-lohs-child-custody-order>

¹² "Think of the consequences", PAS leader tells Loh on challenging children's unilateral conversion, March 2022, *Focus Malaysia*, <https://focusmalaysia.my/think-of-the-consequences-pas-leader-tells-loh-on-challenging-childrens-unilateral-conversion/>

¹³ High Court grants Hindu mum Loh Siew Hong leave to challenge kids' unilateral conversion to Islam, Aug 2022, *Malaymail*, <https://www.malaymail.com/news/malaysia/2022/08/01/high-court-grants-hindu-mum-loh-siew-hong-leave-to-challenge-kids-unilateral-conversion-to-islam/20351>

application and approval from the Syariah court. However, there are a number of issues that the woman can encounter in this process, making the process impractical, inconvenient, troublesome and discriminatory for women.

For example, under the Selangor Islamic Religious Department (JAIS), women must prepare the following list of documents for the marriage consent application:

Requirements for First Time Women Applicants	Requirements for a Woman who has been Married Previously (or Widowed)
<ol style="list-style-type: none"> 1. One (1) copy of an Identification Card/ Passport 2. One (1) copy of an Identification Card/ Passport for 2 male witnesses on behalf of the applicant 3. One (1) copy of an Identification Card of the Wali 4. HIV test report from government's clinic or hospital 5. An original and one (1) copy of the pre-marriage course certificate 6. Form 1 (A domicile/residency verification) 7. A marriage permission letter for the husband-to-be 8. The parents' marriage certificate and copies 9. Marriage permission letter from the embassy/ Consulate and Immigration (for foreigner). 10. Letter or Conversion Card and the copies (for Convert/Muallaf) 11. Letter of Approval from KAGAT/PDRM (if applicants are a part of police force/army) 12. One (1) copy of Application form 2C, 2D and copy of support documents (if the applicants will be married outside of state/ countries) 	<ol style="list-style-type: none"> 13. One (1) copy of an Identification Card/ Passport 14. One (1) copy of an Identification Card/ Passport for 2 male witnesses on behalf of the applicant 15. One (1) copy of an Identification Card of the Wali 16. HIV test report from government's clinic or hospital 17. An original and one (1) copy of pre-marriage course certificate 18. Form 1 (A domicile/residency verification) 19. The parents' marriage certificate and copies 20. Original and a copy of the Wali Death Certificate 21. Original and a copy of the Divorce Certificate (if divorced) 22. Original and a copy of the spouse Death Certificate (if previous spouse passed away) 23. Marriage permission letter from the embassy/ Consulate and Immigration (for foreigner). 24. Letter or Conversion Card and the copies (for Convert/Muallaf) 25. Letter of Approval from KAGAT/PDRM (if applicants are a part of police force/army) 26. A marriage permission letter for the husband-to-be 27. One (1) copy of Application form 2C, 2D and copy of support documents (if the applicants are marrying outside of state/ countries)

As illustrated above, a woman has to go through numerous additional steps to register her marriage. She must prove that she is born in a lawful marriage whereby she has to provide a certificate of her parents' marriage to prove that she is not born out of wedlock. The requirement of proving lineage is imposed towards the woman only, and not the man. In addition, the presence of Wali is mandatory in the woman's marriage application. Regarding this, a woman may face any of the situations below that make it unable for her to get legally married. She may:

- a. Have no eligible Wali (Passed away/Missing)
- b. Be an adopted child
- c. Be a converted Muslim
- d. Be a child born out of wedlock
- e. Have an unwilling Wali, or one refusing to be at the wedding ceremony

Moreover, although a woman has a legal right to obtain permission from a Wali Raja or Wali Hakim through the application to the Syariah court in advance, in practice, the requirements for this application to be allowed in court are impractical, inconvenient and troublesome for women to meet. Many women's voices from the ground have shared their experiences of having to make an official search at the National Registration Department and advertise in the national newspapers in their effort to search for their long-lost wali. Some have been cases in which the wali has abandoned and/or abused them. The preliminary requirements mentioned above are also time and cost-consuming. In some cases, the experiences are also traumatising for women, as they need to find and approach their abuser to be present at their wedding day and give his consent to the marriage as the wali. Sometimes, these factors become a catalyst for couples to cross over the Malaysia-Thailand border and marry there instead, which expose the couples further to scam marriages and lack of legal protection.

SUGGESTED LIST OF QUESTIONS FOR THE STATE PARTY

- Please provide the steps Malaysia is taking to remove the requirement of the consent of guardian (wali) for women to enter into marriages.
- Please provide a timeline and plan to make the consent of an existing wife mandatory for her husband to contract a second marriage, and to make Practice Direction No. 7 of 2021 a legally binding requirement as opposed to a direction of persuasive value.
- Please provide information about the action Malaysia is taking to popularize and implement fully the Department of Syariah Judiciary's announcement that restrictions would be imposed to the husbands' or fathers' bank accounts if they do not fulfill maintenance payment of their children.