



EQUALITY
& JUSTICE
ALLIANCE

COMPARATIVE LEGAL REVIEW OF
**THE IMPACT
OF MUSLIM
FAMILY LAWS
ON WOMEN**

ACROSS COMMONWEALTH
ASIA AND AFRICA



musawah
For Equality in the Family

The Equality & Justice Alliance

**is dedicated to
advancing equality
and promoting equal
protection of the law
for all Commonwealth
citizens regardless of
sex, gender, sexual
orientation, gender
identity or expression.**

1.

Muslim family laws
and discrimination
against women

2.

The case for reform
of Muslim family laws

3.

Country reports

This report

This report commissioned by Sisters For Change provides a comprehensive legal review of Muslim family laws across Commonwealth Asia and Africa, analysing the nature and extent to which they discriminate against Muslim women and girls. The right of women to equality, including within the family, is recognised in international law. Yet the constitutions of a large number of Commonwealth countries provide that personal status laws (relating to marriage, divorce, distribution of marital property, inheritance, adoption and related matters) are exempt from constitutional provisions prohibiting discrimination, or reserve matters of personal status to the ethnic and religious communities within the country. This report provides a detailed analysis of 12 focus areas relating to marriage and family matters in 10 Commonwealth countries where Muslim women and girls suffer discrimination under current Muslim family laws. The 10 countries selected for review from Commonwealth Asia are Bangladesh, Brunei, India, Malaysia, Pakistan, Singapore and Sri Lanka and from Commonwealth Africa are Kenya, Nigeria and South Africa.

The report discusses the work of the Committee on the Elimination of Discrimination against Women in urging legal reform of discriminatory religious and personal laws; highlights the critical legal advocacy work of domestic women's rights organisations across the 10 countries; and analyses steps taken by governments to reform and/or overcome resistance to legislative change. The report concludes by making a series of recommendations for reform of Muslim family laws that discriminate against Muslim women and girls for each of the 10 Commonwealth countries reviewed. The purpose of this report is to advance and support the reform of family and personal laws that discriminate against Muslim women and girls.



Authors and acknowledgements

This report was commissioned and edited by Sisters For Change and authored by Musawah.

Sisters For Change and Musawah would like to acknowledge and thank the national level advocates and activists working across the 10 focus Commonwealth Asia and Africa countries who contributed towards this report, many of whom are supporting Muslim women in obtaining justice and redress and diligently pushing for reform of discriminatory provisions in Muslim family laws within their own challenging domestic contexts.



About Musawah

Musawah is a global movement for equality and justice in the Muslim family. It was launched in Kuala Lumpur, Malaysia in February 2009 to address the compelling need for women's groups working in Muslim contexts to come together to share strategies, build scholarship and promote best practices to advance the rights of Muslim women to equality and justice. Musawah's key strategy is to challenge the ways Islam is being used to justify discrimination against women in law and practice and to build an international discourse and public voice to assert that equality is possible within Islam. It does this through four areas of work – knowledge building; capacity building; international advocacy; communications and outreach. One of Musawah's key initiatives is to map the status of Muslim family laws globally. The project is led by its Executive Director, Zainah Anwar, and coordinated by International Advocacy Programme Officer, Hysyama Hamin, with substantive support from the Musawah team.

For more information visit www.musawah.org
Follow us on  @musawah



About Sisters For Change

Sisters For Change (SFC) is an international NGO working to eliminate discrimination and violence against women and girls worldwide through legal reform, legal empowerment, legal accountability and legal advocacy strategies. SFC works to generate systemic change in how governments combat violence, structural change to give women voice and agency in justice systems and social change to end the social acceptance of violence against women and girls. SFC is active in the UK, India and Indonesia. As a member of the Equality & Justice Alliance, SFC is working to reform laws that discriminate against women and girls and LGBT people across the Commonwealth. SFC is currently working with the Governments of Namibia, Saint Lucia and Samoa on technical assistance programmes and is a member of the SADC Parliamentary Forum's Technical Working Group on the development of a Model Law on Gender-Based Violence.

For more information visit www.sistersforchange.org.uk
Follow us on  @sisters_4change
Registered Company No. 9136425
Registered Charity No. 1165647

Copyright © Sisters For Change 2019

This work can be copied, shared and distributed, in whole or in part, for research, educational and public policy purposes subject to the condition that the work is not altered or adapted and the Equality & Justice Alliance is acknowledged as author of the work.

This work has been commissioned by Sisters For Change, a member of the Equality & Justice Alliance, but it has not been approved by, nor does it represent the opinions of, any other member of the Alliance.

Printed in the United Kingdom. First printing 2019.

ISBN No. 978-1-913173-08-1

Design by Bright Design, elaine_craig@hotmail.com

Sisters For Change is grateful to the UK Government Foreign & Commonwealth Office for supporting the work of the Equality & Justice Alliance.

Contents

04	Focus of review
06	Executive summary
08	CEDAW and Muslim family laws
09	Structure of report

1. Muslim family laws and discrimination against women

12	Introduction
12	A. International legal standards on equality in marriage and family relations
15	B. Muslim family laws
16	C. Overview of Muslim family laws in Commonwealth Asia and Africa
17	D. Summary of findings assessed against 12 key areas of discrimination
26	E. Reforms required to Muslim family laws

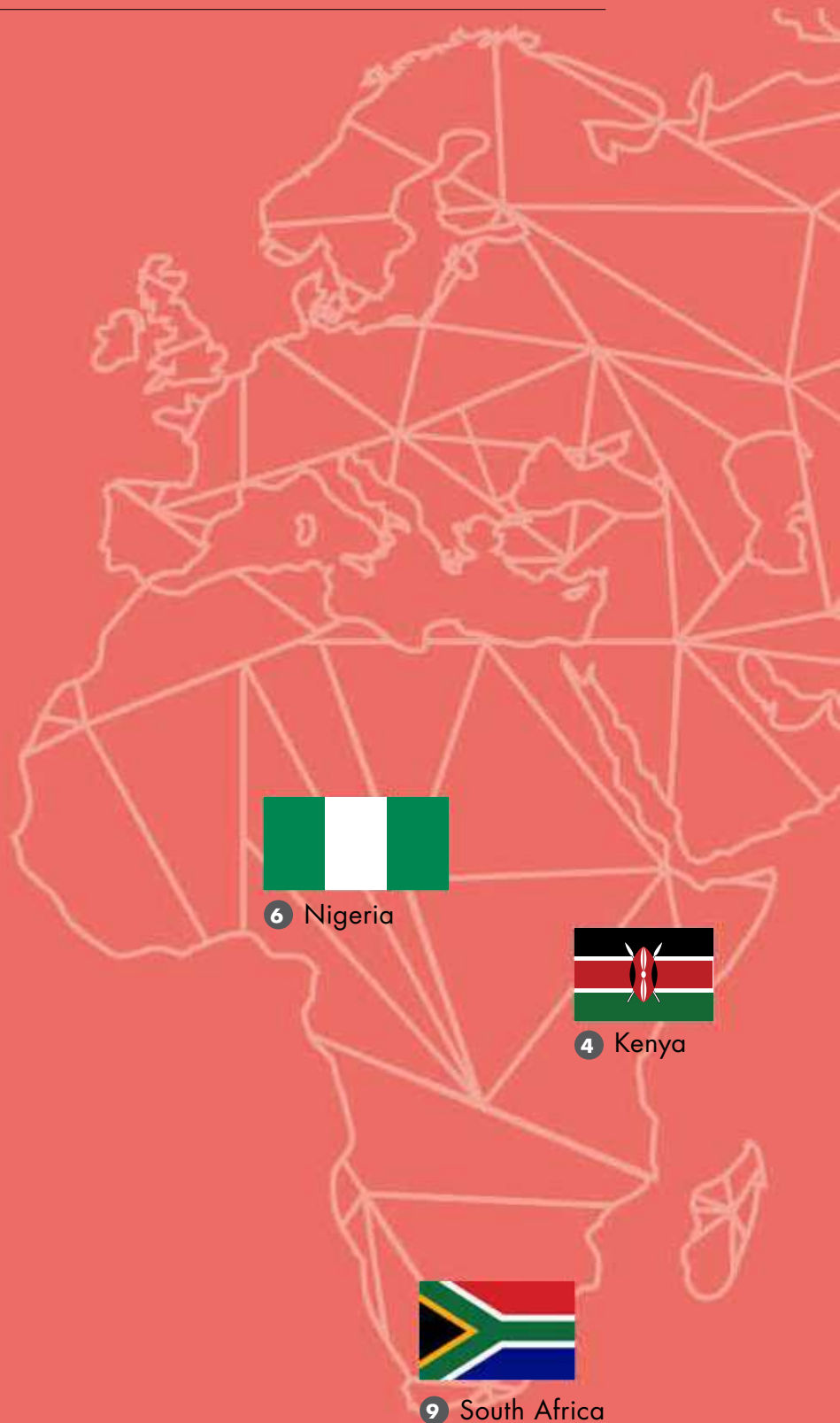
2. The case for reform of Muslim family laws

32	Introduction
33	A. CEDAW and Muslim family laws
37	B. SDGs and Muslim family laws
39	C. Key barriers and challenges to reform of discriminatory laws
41	D. Case studies of successful Muslim family law reform
43	E. Why reform of Muslim family law is necessary and possible
44	F. Recommendations for reform

3. Country reports

53	Bangladesh
60	Recommendations for reform
61	Brunei Darussalam
68	Recommendations for reform
69	India
76	Recommendations for reform
77	Malaysia
86	Recommendations for reform
87	Pakistan
94	Recommendations for reform
95	Singapore
102	Recommendations for reform
103	Sri Lanka
110	Recommendation for reform
111	Kenya
118	Recommendations for reform
119	Nigeria
128	Recommendations for reform
129	South Africa
136	Recommendations for reform

Focus of review



- 1 Bangladesh Population of **163,046,161**
- 2 Brunei Darussalam Population of **433,285**
- 3 India Population of **1,366,417,754**
- 4 Kenya Population of **52,573,973**
- 5 Malaysia Population of **31,949,777**
- 6 Nigeria Population of **200,963,599**
- 7 Pakistan Population of **216,565,318**
- 8 Singapore Population of **5,804,337**
- 9 South Africa Population of **58,558,270**
- 10 Sri Lanka Population of **21,323,733**



7 Pakistan



1 Bangladesh

3 India



5 Malaysia



2 Brunei Darussalam

10 Sri Lanka



8 Singapore



10

countries
reviewed

334m

Muslim women

8/10

countries requiring consent
of male guardian for
Muslim women to marry

10/10

countries with divorce
laws discriminating
against Muslim women

Executive summary

This report commissioned by Sisters For Change provides a comprehensive legal review of Muslim family laws across Commonwealth Asia and Africa, analysing the nature and extent to which they discriminate against Muslim women and girls. The right of women to equality within the family is recognised in international law. Yet the constitutions of a large number of Commonwealth countries provide that personal status laws (relating to marriage, divorce, distribution of marital property, inheritance, adoption and related matters) are exempt from constitutional provisions prohibiting discrimination, or reserve matters of personal status to ethnic and religious communities within the country.

In the majority of Muslim family laws, the husband is the single recognised head of the family. As head of the family, he bears the responsibility as the sole provider and protector of his family. In return for such maintenance (*nafaqah*) and protection, his wife is required to obey and submit to him completely (*tamkin*). This lack of equality between spouses is the structural root of inequality in current Muslim family laws. The issue centres around the view held by many Muslims that marriage is a relationship of “complementary” or “reciprocal” rights and responsibilities, rather than a relationship of *equal* rights and responsibilities. This view entrenches discrimination against women and sustains a “maintenance-for-obedience” legal framework that treats women as the inferior party in a marriage.

Areas of discrimination

This report analyses 12 focus areas relating to marriage and family matters in Commonwealth countries where Muslim women and girls suffer discrimination under current Muslim family laws – child marriage; consent to marry; capacity to marry; equality in marriage; polygamous marriage; violence against women in the family; nationality rights; right to divorce; women’s financial rights after divorce; custody of children; guardianship of children and women’s inheritance

rights. The 10 countries selected for review from Commonwealth Asia are Bangladesh, Brunei, India, Malaysia, Pakistan, Singapore and Sri Lanka; and from Commonwealth Africa are Kenya, Nigeria and South Africa.

The laws on minimum age of marriage vary in the 10 countries reviewed, ranging from no minimum age of marriage, to different minimum ages depending on sex (ie: lower age of marriage for girls than boys), to providing exceptions to a given minimum age which in practice legitimises child marriage. For example, Bangladesh, Malaysia, Pakistan and Singapore mandate a minimum age of marriage of 16 years for girls and 18 years for boys. However, exceptions are allowed with the permission of parents and/or a judge for which no absolute minimum age of marriage is established.

Muslim family laws of several countries have attempted to remove the practice of forced marriage by mandating that a woman must consent to marry before solemnising a marriage. In Bangladesh, Brunei, India, Malaysia and Pakistan, the laws explicitly require that regardless of her age, a woman (or girl) must consent to the marriage. This is not the case in all countries. For example, in Sri Lanka, consent of Sunni brides is not a prerequisite under Muslim family law and it is the guardian (*wali*) who has the right to give the bride in marriage. In Kenya, in practice a father is considered to have the right to conclude a marriage on behalf of a virgin daughter of any age, even if it is against her will.

The Muslim legal concept of a male having authority over a female means that most Muslim family laws still require a woman, regardless of age, to obtain a male guardian’s consent to enter into marriage. The majority of Commonwealth countries reviewed require the permission of a male guardian of the bride in order to solemnise a marriage. The guardian must be a Muslim and a male relative of the prospective bride, usually her father, brother, grandfather or closest uncle.

Polygamy is permitted and/or practiced in all 10 of the Commonwealth countries reviewed. Muslim men in Kenya, India, Nigeria, South Africa and Sri Lanka are not required to fulfil any specific pre-conditions nor obtain permission from a judge in order to practice polygamy. Codified laws in Bangladesh, Brunei, Malaysia, Pakistan and Singapore require that a man fulfil certain conditions and obtain permission of a court, Muslim judge or Arbitration Council to solemnise a second or subsequent marriage. Only in Bangladesh and Pakistan has the wife the right to seek dissolution of the marriage if her husband takes another wife and does not treat her equitably.

Laws relating to violence against women (VAW) do not usually fall within the realm of family law/personal status laws, except in the case of Brunei. However, due to the close link between entrenched gender roles within the family and domestic violence, VAW is included as an area of focus. Marital rape is not fully criminalised in 9 of the 10 Commonwealth countries reviewed. Some positive steps have been taken in relation to combating domestic violence – Bangladesh, Kenya, India, Malaysia, South Africa and Sri Lanka have adopted specific legislation on domestic violence. Domestic violence is explicitly criminalised in Bangladesh, Kenya, Malaysia and South Africa, but not in Brunei, India, Nigeria, Pakistan, Singapore or Sri Lanka.

Divorce rights are not equal between women and men under Muslim family laws in all 10 Commonwealth countries. There is a clear difference with regard to grounds for divorce and the conditions and procedures applicable to wives and husbands in initiating and pursuing divorce. Husbands have the legal right to unilaterally divorce (*talaq*) their wives in all 10 countries, although procedures for obtaining the *talaq* divorce differ. In all 10 countries, a Muslim wife can seek divorce from her husband, but only based on specific

grounds. Most Muslim family laws state that women have defined financial rights after divorce. The lived realities of women from the 10 countries reveal that in practice, women face many challenges in obtaining and accessing adequate financial support, as judges have the discretion to determine amounts of compensation and maintenance.

With regard to guardianship and custody of children, there exists a marked difference between Muslim majority countries and countries with minority Muslim populations. Due to the underlying legal presumption regarding male guardianship which forms the basis of most Muslim family laws, fathers are accorded a priority right to the guardianship of children over mothers. This is the case without exception in laws relating to guardianship in Muslim majority countries. In countries with Muslim minority populations, guardianship and child custody fall under the jurisdiction of civil law. There is an important distinction between guardianship and custody of children under Muslim family laws – fathers rarely lose the right of guardianship; mothers often lose the right to custody of their children. For example, in Bangladesh, Brunei, Malaysia, Nigeria, a mother has a priority right to custody of children up to a prescribed age, based on the sex of the child. However, in countries where custody is governed by civil law – India, Kenya, Singapore, South Africa, Sri Lanka and Pakistan, custodial rights between women and men are generally equal and are determined by courts based on the best interests of the child.

CEDAW and Muslim family laws

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) specifically provides for the elimination of discrimination against women and girls in all matters relating to marriage and family relations (Article 16). Many Muslim majority countries and countries with significant Muslim minorities are party to CEDAW and the Convention on the Rights of the Child and have committed themselves to the Sustainable Development Goals. However, many of these countries continue to hold reservations with regard to family law matters, including CEDAW Article 16. The CEDAW Committee has consistently raised issues relating to Muslim family laws in its Constructive Dialogues with States Parties, as well as in the Committee's Concluding Observations and recommendations. All 10 Commonwealth countries analysed in this report have been reviewed by the CEDAW Committee within the past six years and the Committee has made a number of recommendations for reform of discriminatory family laws, including:

- ❧ Mandating 18 years as the legal minimum age of marriage for girls without exception.
- ❧ Reforming all personal laws to comply with CEDAW Articles 15 (equality before the law) and 16 (equal rights of women in marriage and family matters).
- ❧ Amend all personal status laws to address ownership, transfer and disposal of land and property, as well as provisions regulating legal capacity, marriage, divorce, and child custody.
- ❧ Take legislative measures to guarantee the equal rights of Muslim women in all matters of inheritance.

Trends in legal reform of Muslim family laws

A number of key trends can be identified across the Commonwealth Asia and Commonwealth Africa countries reviewed regarding national level discourses and developments (or lack thereof) on reform of discriminatory Muslim marriage and family laws, including:

1. Discriminatory family laws justified in the name of Islam.
2. Resistance to reform within Muslim communities.
3. Identity politics.
4. Lack of enabling national legislation and the challenge of plural legal systems.
5. Socio-economic and demographic factors

The second part of the report highlights the vital work by women's rights organisations to advocate for legal reform; steps taken by governments to reform discriminatory laws and overcome resistance to legislative change; and the critical role that rights-based scholarship in Islamic jurisprudence and activism plays in enabling and progressing meaningful legal reform of discriminatory Muslim family laws.

The final part of the report includes detailed individual country case reports, which conclude with a series of priority recommendations for Muslim family law reform in each of the 10 Commonwealth Asia and Africa countries included in this review.

Structure of report


This report commissioned by Sisters For Change provides a comprehensive legal review of Muslim family laws across Commonwealth Asia and Africa, analysing the nature and extent to which they discriminate against Muslim women and girls.

1. **Part 1** of the report discusses international legal standards on equality within the family before setting out a detailed comparative analysis of Muslim family laws in 10 Commonwealth countries under 12 areas relating to marriage and family where Muslim women and girls suffer significant discrimination, including child marriage; Muslim women's consent and capacity to marry; equality in marriage; polygamous marriage; violence against women in the family; nationality rights; right to divorce; women's financial rights following divorce; custody and guardianship of children; and women's inheritance rights. The table at the end of Part 1 provides an overview of the key areas of discrimination using a colour coded rating system to indicate the need for legal reform within each of the 10 Commonwealth countries.

2. **Part 2** of the report makes the case for reform of Muslim family laws, discussing the work of the Committee on the Elimination of Discrimination against Women in urging legal reform of discriminatory religious and personal laws; highlighting the vital advocacy work of domestic women's rights organisations across the 10 Commonwealth countries; and analysing steps taken by governments to reform Muslim family laws and overcome resistance to legislative change. Part 2 concludes with a summary of recommendations for reform of Muslim family laws that discriminate against Muslim women and girls for each of the 10 Commonwealth countries reviewed.

3. **Part 3** provides a detailed analysis of the extent to which Muslim family laws discriminate against Muslim women and girls in 10 countries across Commonwealth Asia and Africa as follows:

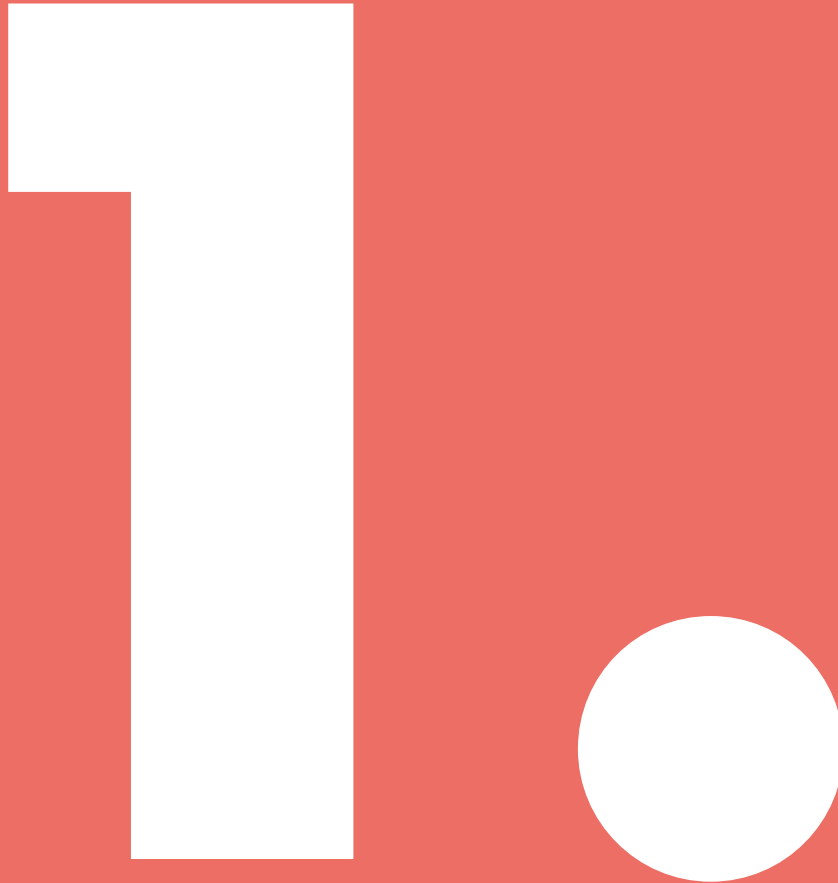
 **Commonwealth Asia:** Bangladesh, Brunei, India, Malaysia, Pakistan, Singapore and Sri Lanka.

 **Commonwealth Africa:** Kenya, Nigeria and South Africa.

METHODOLOGY

This report on Muslim family laws in Commonwealth Asia and Africa contributes to Musawah's ongoing project to map Muslim family laws in over 31 countries, including trajectories of reform and positive developments in legislation and practice. For this report, a mixed methodology was adopted:

- 1.** Primary information was sourced through surveys (*vis-à-vis* Musawah's family law table) and interviews with national advocates and activists with expertise in family laws and/or court systems.
- 2.** Secondary literature review and research on laws, legislative procedures and practices, impacts of the law on women and girls and efforts towards reform of laws relating to marriage and family.



Muslim family laws

and discrimination against women

Introduction

Governments and communities proclaim that families are a fundamental unit of society. Governments establish laws, policies, practices, procedures and judicial systems that purport to promote family wellbeing and harmony. In many contexts, however, this is often to the detriment of women and girls, as such laws and judicial practices discriminate against them and seek to preserve an outdated and patriarchal status quo.

Musawah has researched and documented de facto and de jure laws and practices in over 45 countries in the world that discriminate against Muslim women and perpetrate injustices in the name of religion, customs and tradition. These are primarily with regard to how women and men enter into marriage as well as provisions, procedures and practices during marriage and at the time of dissolution of marriage.

Part 1 of the report discusses international standards on equality in marriage and family relations and provides a comparative analyses of Muslim family laws across 10 Commonwealth Asia and Africa countries to highlight the ways in which these laws discriminate against Muslim women and girls.

A. International legal standards on equality in marriage and family relations

International law recognises that the concept of “family” takes many forms and must be understood in a wide sense.¹ The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has observed that the family is a social, legal, religious and economic construct.² Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides for the elimination of discrimination against women at the inception of marriage, during marriage and at its dissolution by divorce or death.

Yet, as the CEDAW Committee explicitly states, “inequality in the family underlies all other aspects of discrimination against women and is often justified in the name of ideology, tradition and culture”.³

The constitutions of a large number of Commonwealth countries provide that personal status laws (relating to marriage, divorce, distribution of marital property, inheritance, adoption and related matters) are exempt from constitutional provisions prohibiting discrimination or reserve matters of personal status to the ethnic and religious communities within the country. The CEDAW Committee has made clear that in such cases, constitutional equal protection provisions and anti-discrimination provisions do not protect women from the discriminatory effects of marriage under customary practices and religious laws.⁴ Likewise, countries that have adopted constitutions that include equal protection and non-discrimination provisions but have not revised or adopted legislation to eliminate the discriminatory aspects of their family law regimes, whether regulated by civil code, religious or customary law, fail to protect women from discrimination.⁵

¹ See for example, Human Rights Committee, CCPR General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses, 1990; Committee on the Elimination of Discrimination against Women (CEDAW Committee), General Recommendation No. 21: Equality in marriage and family relations, 1994.

² CEDAW Committee, General Recommendation No. 29, CEDAW/C/GC/29, 30 October 2013, (CEDAW GR 29), para.1. The CEDAW Committee recognises that families take many forms and underscores the obligation of equality within the family under all systems, “both at law and in private”. Statements by other UN treaty bodies confirm that the concept of “family” must be understood in a wide sense.

³ CEDAW GR 29, para.2.

⁴ CEDAW GR 29, para.10.

⁵ Ibid.

CEDAW Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
 - a. The same right to enter into marriage;
 - b. The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
 - c. The same rights and responsibilities during marriage and at its dissolution;
 - d. The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
 - e. The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
 - f. The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
 - g. The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
 - h. The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
 2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.
-

The right of women to equality within the family is recognised in international human rights law, as evidenced by multiple general comments of the human rights treaty bodies, including:

- ❧ CEDAW Committee General Recommendation No. 21 on equality in marriage and family relations and General Recommendation No. 29 on Article 16 on the economic consequences of marriage, family relations and their dissolution.
- ❧ Human Rights Committee General Comment No. 28, on equality of rights between men and women, and General Comment No. 19 on protection of the family, the right to marriage and equality of the spouses.
- ❧ Committee on Economic, Social and Cultural Rights General Comment No. 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights, and General Comment No. 20 on non-discrimination in economic, social and cultural rights.

In its most recent general recommendation on CEDAW Article 16 on marriage and family relations, the CEDAW Committee makes clear:

- “2. ... An examination of the reports of States parties reveals that in many States, the rights and responsibilities of married partners are governed by the principles of civil or common law, religious or customary laws and practices, or some combination of such laws and practices that discriminate against women and do not comply with the principles set out in the Convention...
10. ... All these constitutional and legal frameworks are discriminatory, in violation of article 2 in conjunction with articles 5, 15 and 16 of the Convention [on the Elimination of All Forms of Discrimination against Women].
11. States parties should guarantee equality between women and men in their constitutions and should eliminate any constitutional exemptions that would serve to protect or preserve discriminatory laws and practices with regard to family relations.
15. State parties should adopt written family codes or personal status laws that provide for equality between spouses or partners irrespective of their religious or ethnic identity or community, in accordance with the Convention... In the absence of a unified family law, the system of personal status laws should provide for individual choice as to the application of religious law, ethnic custom or civil law at any stage of the relationship. Personal laws should embody the fundamental principle of equality between women and men ... so as to eliminate all discrimination against women in all matters relating to marriage and family.”⁶

B. Muslim family laws

Musawah's research indicates that Muslim family laws discriminate against women and girls in more than 45 countries. In almost all instances, whether in majority Muslim countries or countries with Muslim minorities, those formulating or interpreting Muslim family laws claim that these laws are "divine" and therefore unchangeable. In reality, these laws are based on interpretations of religious texts made by primarily male Islamic scholars and based on a legal framework developed by Muslim jurists centuries ago. These jurists regarded men (husbands, fathers, uncles, brothers) as providers and protectors of women and children and considered men to have authority over women. This stereotypical view of male and female gender roles denies women their right to equality within marriage and the family.

As a result of being based on this outdated patriarchal legal framework, present-day Muslim family laws discriminate against women in both the private and public spheres. Many Muslim family laws, policies, and practices explicitly or implicitly consider men as heads of households and the "protectors and providers" of women and children. Women are defined to have a submissive role, where they should obey a man (whether husband, guardian or male relative) in exchange for provision and protection. In practice, however, many men do not, or are not able to, protect and provide, and many women choose to – or are forced to – contribute to their family's income and welfare. Yet male authority over females has remained intact, and a man who does not provide or protect the women in his family still maintains his authority in law and practice.

Many governments, especially Muslim governments, argue that this classical legal framework is acceptable because it provides what they see as "complementary rights" rather than "inequality". But this disconnect between law and reality means women continue to suffer discrimination, without full enjoyment of their right to equality in marriage and family relations.

The fact that Muslim family laws are based on religious interpretations poses a particular challenge to reform. In contrast to countries under communist rule, reform has been particularly difficult in countries in which former British colonial rule institutionalised religious and community control over family and customary laws that entrenched patriarchal authority in the name of religion and culture.

C. Overview of Muslim family laws across Commonwealth Asia and Africa

This report assesses Muslim family laws in 10 Commonwealth countries – four countries from South Asia (Bangladesh, India, Pakistan, and Sri Lanka); three from South-East Asia (Brunei, Indonesia and Malaysia); and three from Africa (Kenya, Nigeria and South Africa). We set out below a summary of the key findings of our analysis on the *de jure* and *de facto* Muslim family law and court systems in these 10 Commonwealth countries. Individual country reports and assessments are provided in Part 3 of the report.

Legislation

- Five of the 10 countries (Brunei, Malaysia, Pakistan, Singapore and Sri Lanka) have one or more codified laws which govern Muslim families. Unlike the other countries in this group, Bangladesh and Pakistan have multiple laws relating to marriage, divorce and related aspects, as opposed to one specific family law which governs family matters.
- Three countries (Kenya, Nigeria and South Africa) do not have codified Muslim family laws, however, Muslims have either a constitutional or legislative right to practice customary and/or religious marriages as per Muslim tradition. The application of Muslim family law is based on the judicial discretion of Muslim judges or clerics.
- In the case of Bangladesh and India only certain aspects of marriage or divorce matters are covered by codified legislation. For example, both countries have codified laws for dissolution of marriage, albeit not all aspects, but the onus lies upon the judicial discretion of judges to fill in gaps in law. In the case of India, a Muslim Personal Law Act grants Muslims the right to practice Muslim family law generally, without outlining the specific provisions or procedures for entry into marriage and matters arising during marriage. This again is left to the discretion of judges (*Quazis*) or clerics.

Court systems

- In six of the 10 countries (Brunei, India, Kenya, Malaysia, Nigeria, and South Africa), Muslim family matters fall under the jurisdiction of a special court with Muslim judges either via Sharia courts or *Quazi* courts (also spelt as *Kadhi*, *Kadi*, or *Qadi* in different countries). In South Africa, Muslims contract their marriage based on Muslim rites by having their marriage solemnised by a Muslim cleric (*imam*) who is a designated marriage officer under the (general) Marriage Act.
- Malaysia and Nigeria have Sharia courts which oversee Muslim family law matters, while Sri Lanka and Kenya have *Kadhi* courts which are a quasi-judicial court similar to family courts. In India, there is no court system, however, individual *Quazis*, who are usually self or community-appointed, oversee Muslim marriage and divorce matters.
- Pakistan and Singapore have family courts. These have jurisdiction over family matters for all citizens and through which Muslim family law is applied for Muslim cases.
- In Bangladesh, the regular court system has jurisdiction over Muslim family law matters and in Kenya, couples may choose for their matters to be adjudicated by other competent courts including Magistrates' Courts and High Courts, which apply civil law, regardless of whether or not they initially married under Muslim family law.

Application of civil law

- Despite the existence of a general civil law on marriage in countries with Muslim minorities, like Singapore and Sri Lanka, Muslim couples are by default allowed to marry only under Muslim family laws and cannot choose to be governed by the general laws on marriage which apply to non-Muslims.
- Muslims in other minority countries, such as India, Kenya, and South Africa, allow Muslim couples to choose to be governed by the general marriage law, however, this is rare in practice.

D. Summary of findings assessed against 12 key areas of discrimination

The report identifies 12 focus areas relating to marriage and family matters where Muslim women and girls suffer significant discrimination and their rights are seriously curtailed. The report groups these 12 areas according to the life cycle point where they are most likely to occur (see Table 1). The exception is inheritance rights. While most countries with Muslim family laws have a separate law relating to inheritance, it is included as a key area of concern in the evaluation given Muslim women are likely to be heavily discriminated against under religious inheritance laws.

Table 1: 12 focus areas to evaluate discrimination against Muslim women and girls

 I ENTRY INTO MARRIAGE
<ol style="list-style-type: none">1. Equality of spouses in marriage.2. Child marriage.3. Women's consent to marry.4. Women's capacity to enter into marriage.
 II DURING MARRIAGE
<ol style="list-style-type: none">5. Polygamous marriage.6. Violence against women in the family.7. Nationality rights.
 III AT THE TIME OF DISSOLUTION OF MARRIAGE
<ol style="list-style-type: none">8. Divorce rights.9. Women's financial rights after divorce.10. Custody of children.11. Guardianship of children.
 IV GENERAL
<ol style="list-style-type: none">12. Inheritance rights.

I ENTRY INTO MARRIAGE

The definition of “equality of spouses in marriage” is the structural root of inequality in many Muslim family laws that exist today. The issue centres around the view held by many Muslims that marriage is a relationship of “complementary” or “reciprocal” rights and responsibilities (as opposed to “same” or “equal” rights and responsibilities), a view that is based on the recognition of husbands as the single head of the family. This view entrenches discrimination and sustains a maintenance-for-obedience legal framework that treats women as the inferior party – a submissive subject – in a marriage.

Under such laws, men hold the primary responsibility as guardians for the women and children of the family including wives and adult daughters. This structural inequality *vis-à-vis* Muslim family laws institutionalises and perpetuates a broad range of inequalities and injustices with regard to numerous aspects of a woman's marriage and family life. They include a woman's choice of spouse and ability to consent to marry, a wife's rights and responsibilities during her marriage and at its dissolution, the custody and guardianship of children, as well as a woman's rights to her inheritance and her ability to bestow her nationality to a foreign-born husband or to her children.

1. Equality of spouses in marriage

This view of the Muslim family, within which the patriarchal concepts of male authority and guardianship over women and children (*qiwamah* and *wilayah*)⁷ are strongly rooted, was formed by classical Muslim jurists based on a contract of sale under vastly different historical, social and economic contexts. However, it remains very much the prevailing view that underpins many contemporary Muslim family laws.

In the majority of Muslim family laws, the husband is the single recognised head of the family. As head of the family, he bears the responsibility as the sole provider and protector of his family and is duty bound to meet the needs of his wife and children, including providing the necessary finance for their food, housing, clothing, healthcare and other living expenses. In return for

⁷ For an in-depth analysis of the concepts of *qiwamah* and *wilayah*, commonly understood as male authority and guardianship over women and children, please refer to Musawah's Oral Statement presented at the 9th Session of the UN Working Group on Discrimination against Women in Law and Practice available at: <http://www.musawah.org/musawah-oral-statement-discrimination-against-women-law-and-practice>.

D. Summary of findings assessed against 12 key areas of discrimination

cont

such maintenance (*nafaqah*) and protection, the wife is required to obey and submit to her husband completely (*tamkin*), including ceding primary parental authority over their children to him.

Muslim family laws that promote and sustain a maintenance-for-obedience type of marital relationship clearly discriminate against women and further, perpetuate reductive gender stereotypical roles for husbands and wives.

De facto and *de jure* Muslim family laws in all the 10 countries are based on this notion of marital relations to varying extents and hence contain discriminatory provisions, such as a lack of capacity of women to enter into marriage, the unilateral right of a husband to divorce or practice polygamy, amongst other provisions.

2. Age of marriage

The laws on minimum age of marriage vary in the 10 countries under study, ranging from no minimum age of marriage, to different minimum age depending on sex, to providing exceptions to a given minimum age which in practice legitimises child marriage.

The following are the key findings of our evaluation:

Exceptions allowed in spite of legal age of marriage

- ✧ Bangladesh, Malaysia, Pakistan and Singapore mandate a minimum age of marriage of 16 years for girls and 18 years for boys. However, exceptions are allowed with the permission of parents and/or a judge for which no absolute minimum age of marriage is established. In effect, this legitimises child marriage.
- ✧ India and Kenya have established the minimum age of marriage at 18 years without exceptions, applying to all citizens regardless of faith.

Differential minimum age of marriage for girls and boys

In Bangladesh, Malaysia, Pakistan (except Sindh province) and Singapore, the minimum age of marriage is lower for girls than boys.

Differential minimum age of marriage for Muslims in minority contexts

- ✧ In South Africa where Muslim marriages are not legally recognised, under-age Muslim marriages occur outside of the legal system and are not recorded. The minimum age of marriage is at the discretion of Muslim clerics who follow different schools of Islamic jurisprudence.

- ✧ In Sri Lanka, the minimum age of marriage is 18 years for all citizens except Muslims, as Muslims are governed by the Muslim Marriage and Divorce Act (MMDA). The MMDA does not stipulate a minimum age of marriage for Muslims. The Act only specifically states that for a Muslim child (male or female) under the age of 12 to marry, approval is required from the *Kadhi* (judge).



Positive developments:

Pakistan

The minimum legal age for marriage in the Sindh province is 18 years for both females and males as per Section 2 of the Sindh Child Marriages Act. The Act criminalises and penalises acts relating to child marriages.

3. Consent to enter into marriage

Muslim family laws of several countries have attempted to remove the practice of forced marriage by making the consent of Muslim women mandatory for solemnising a marriage. In Bangladesh, Brunei, India, Malaysia and Pakistan, the laws explicitly require that regardless of her age, a woman/girl must consent to the marriage.

Practices differ based on schools of jurisprudence

In Sri Lanka, consent of Sunni brides is not a prerequisite under Muslim family law and it is the guardian (*wali*) who has the right to give the bride in marriage. From the bride's side, the *nikah* (marriage) ceremony and registration process only require the declaration (and signature) of the *wali* of the bride and the groom.

Consent of women and girls based on age and previous marital status

- ✧ In Nigeria, a prospective bride who has attained puberty and has been married at least once must consent to her subsequent marriage. However, it is generally understood that a father has the right to conclude a marriage on behalf of a virgin daughter of any age, even if it is against her will. Consequently, forced marriage of a prospective bride who has not attained puberty or who has never been married is not prohibited in Nigeria.
- ✧ In Kenya, in practice a father is considered to have the right to conclude a marriage on behalf of a virgin daughter of any age, even if it is against her will. Consequently, forced marriage may occur. However, as in Nigeria, a prospective bride who is an adult and has been married at least once must consent to her subsequent marriage.

4. Capacity to enter into marriage

The Muslim legal concept of a male having authority over a female means that most countries that do not follow the Hanafi school of law still require a woman, regardless of age, to obtain a male guardian's consent to enter into marriage.

Permission of male guardian required to solemnise marriage

In 8 out of the 10 countries reviewed, the permission of a male guardian of the bride is needed in order to solemnise a marriage. The guardian must be a Muslim and a male relative of the prospective bride, usually her father, brother, grandfather or closest uncle. While practices may differ based on schools of jurisprudence, (eg: women who belong to the *Hanafi madhab* do not need permission of *wali*), the norm is still based on the fact that a woman requires a *wali* to contract a marriage.

Practices differ based on schools of jurisprudence

In Sri Lanka, women belonging to the Hanafi school of jurisprudence (*madhab*) can enter into marriage without permission of a male guardian and it is generally understood that women have the capacity to do so under the *Hanafi madhab*.



II DURING MARRIAGE

1. Polygamous marriages

Polygamy is permitted and practiced in all 10 selected countries, as per Muslim family laws or *de facto* practice.

No conditions legislated for the practise of polygamy

- ✎ Muslim men in Kenya, India, Nigeria, South Africa, and Sri Lanka are not required to fulfil any specific pre-conditions nor obtain permission from a judge in order to practice polygamy.
- ✎ In South Africa, a Muslim man may enter into an unofficial polygamous marriage without any legal requirements ie: there is no legal requirement for him to seek the permission of a court or his existing wife or wives before entering into a polygamous marriage.

Conditions legislated for the practice of polygamy

Codified laws in Bangladesh, Brunei, Malaysia, Pakistan and Singapore require that a man fulfills certain conditions and obtains permission of a court, Muslim judge or Arbitration Council to solemnise a second or subsequent marriage.

- ✎ In Brunei and Malaysia, husbands are specifically required to demonstrate financial capacity amongst other conditions before entering into a polygamous marriage.
- ✎ In Bangladesh, Malaysia and Singapore, there is an inquiry process for husbands and existing and intended wives to help the Arbitration Council or judge determine whether or not to give permission for a husband to contract a subsequent marriage.

Polygamy as a ground for divorce

In Bangladesh and Pakistan, a wife may seek dissolution of the marriage if her husband takes another wife and does not treat her equitably.

Polygamy out of court is an offence

In Brunei, Malaysia and Pakistan, it is an offence for a man to enter into a polygamous marriage without the written permission of a judge and Arbitration Council respectively. However, in Malaysia a man who marries without the court's permission may pay a fine for violating the law, and subsequently register and legalise a polygamous marriage.

Negative consequences of polygamy

Polygamy often results in inequality between wives; negative emotional consequences for both first and successive wives, as well as their respective children; economic difficulties; and greater levels of conflict and violence within families. Furthermore, the threat of polygamy can be used as a powerful means of control by the husband.



No positive legislation

Laws and practices relating to polygamy in all 10 Commonwealth countries reviewed are discriminatory. While the process of determining a husband's capacity to undertake a polygamous marriages may involve existing and intended wives to different degrees, no existing laws consider the consent of all parties involved as a prerequisite.

D. Summary of findings assessed against 12 key areas of discrimination cont

2. Violence against women in the family

Laws relating to violence against women do not usually fall within the realm of family law/personal status laws, except in the case of Brunei. However, due to the close link between domestic violence and marital rape, with marriage and family relations, we include them as an area of focus in our evaluation.

Domestic violence

Specific law relating to domestic violence

Bangladesh, Kenya, India, Malaysia, South Africa and Sri Lanka have adopted specific legislation in the form of a (Protection against) Domestic Violence Act. These Acts apply to all citizens of the country, regardless of their religion.

Domestic violence is criminalised

Domestic violence is explicitly criminalised in Bangladesh, Kenya, Malaysia and South Africa.

Domestic violence is not criminalised

In Brunei, India, Nigeria, Pakistan, Singapore and Sri Lanka, laws such as the Penal Code contain some general prohibitions that are applicable to domestic violence, however, domestic violence is not explicitly criminalised.

Penal Code provides for exceptions to domestic violence

In Nigeria, the Penal Code and the Sharia Penal Codes applicable in the Northern states contain exceptions to domestic violence by stating, **“Nothing is an offence which does not amount to the infliction of grievous hurt upon any person and which is done [...] by a husband for the purpose of correcting his wife.”**



Positive developments:

Bangladesh, Kenya and Malaysia

The 2010 Domestic Violence Act in Bangladesh criminalises violence against women and includes physical, psychological, sexual or economic abuse against women. The Women and Child Repression Prevention Act of 2000 severely criminalises offences related to, but not limited to, rape, acid-related offences, kidnapping, sexual abuse, and death resulting from rape and dowry demands.

The Protection Against Domestic Violence Act of Kenya criminalises a number of acts of domestic violence including harmful practices like child marriage, forced marriage, female genital mutilation, virginity testing, as well as emotional or psychological abuse, harassment and intimidation.

The Domestic Violence Act of Malaysia criminalises a number of acts of domestic violence and includes causing psychological abuse and emotional injury to the victim.

Marital rape

Marital rape is not criminalised

Marital rape is not fully criminalised in 9 of the 10 countries under review. In Bangladesh, Brunei, India, Kenya, Malaysia, Nigeria, Pakistan, and Singapore, marital rape is not criminalised by law.

Penal Code contains exceptions to marital rape

- ☞ The respective Penal Codes of Bangladesh, India, Kenya, Malaysia, Singapore and Sri Lanka include a specific provision which exempts marital rape, effectively providing immunity for sexual violence within marriage.
- ☞ Such Penal Code provisions exempt sexual intercourse by a man with his own wife from being a crime unless the wife is below a certain age.
- ☞ For Malaysia the exemption to marital rape is lifted under certain circumstances where the marriage has broken down eg: i. where the wife has obtained an injunction restraining her husband from having sexual intercourse with her; or ii. where the wife is living separately from her husband during the *iddah* period.



Positive developments:

South Africa

Under the Prevention of Family Violence Act, enacted in 1993, marital rape was criminalised in South Africa. With the enactment of the Act legislators removed an existing provision that exempted husbands from rape charges.

3. Nationality rights

Provisions relating to nationality do not fall under Muslim family laws in the 10 countries studied. Generally, women do not have the same rights as men to pass their nationality on to their children or foreign spouse.

A woman's ability to confer her nationality on her children

In Bangladesh, Kenya, Nigeria, Pakistan, Singapore, South Africa and Sri Lanka, women are able to pass their citizenship to their children regardless of whether the child was born in the country or abroad.

Conditions to a woman's ability to confer her nationality on her children

- ✧ In Brunei and Malaysia, the law does not specifically provide a mother the right to confer her nationality on her children.
- ✧ A Bruneian mother may make an application in a prescribed manner for a minor child to be a Bruneian citizenship. Such application may be approved if it meets "special circumstances".
- ✧ In Malaysia, the law does not specifically provide a Malaysian mother with the ability to confer her nationality on children born outside of Malaysia. In this instance, a Malaysian mother may make an application in a prescribed manner for a minor child to be a Malaysian citizen.

A woman's ability to confer her nationality on her foreign spouse

In Kenya, South Africa and Sri Lanka, a woman or man may pass their nationality to a foreign spouse.

A woman's inability to confer her nationality on her foreign spouse

- ✧ In Malaysia and Singapore, while men can pass on citizenship to their foreign spouses, a foreign husband may only acquire citizenship through naturalisation.
- ✧ In Bangladesh, Brunei, Nigeria and Pakistan, a man's foreign wife can immediately obtain citizenship, but a woman cannot confer her citizenship on a foreign husband.



Positive developments:

Kenya and South Africa

A Kenyan woman or man may pass their nationality to their non-Kenyan spouse after seven years of marriage. A Kenyan mother or father may pass their citizenship to their children regardless of whether the child was born in Kenya or abroad.

In South Africa, both a South African man and woman may pass their nationality to their non-South African spouse. A South African mother or father may pass their citizenship to their children regardless of where they are born.



III DISSOLUTION OF MARRIAGE

1. Divorce rights

Divorce rights are not equal between women and men under Muslim family laws in all 10 countries under review. There is a clear difference with regard to grounds for divorce and the conditions and procedures applicable to wives and husbands in initiating and pursuing divorce.

Divorce options of a husband

A husband's right to unilaterally divorce his wife (*talaq*)

- ✧ Husbands have the legal right to unilaterally divorce (*talaq*) their wives in all 10 countries under review, without specific reasons or grounds. While Kenya, Nigeria and South Africa do not have codified laws that cover dissolution of Muslim marriages, *talaq* initiated by husbands is a prevalent form of divorce in Muslim communities.
- ✧ In India, Muslim husbands were able to perform "triple *talaq*" or instant divorce by the utterance of the word *talaq* three times in a row. However, this practice was criminalised in July 2019. Husbands must now follow the standard practice of having a waiting period to conclude a divorce, similar to other Muslim countries.

Divorce must be obtained via the court

- ✧ Procedures for obtaining *talaq* divorce differ from country to country. Muslim family laws of Bangladesh, Brunei, Malaysia, Singapore and Sri Lanka require that a husband can only obtain a *talaq* divorce via the respective courts. In Pakistan and Bangladesh, an Arbitration Council is set up to facilitate reconciliation and oversee the *talaq* divorce process.

D. Summary of findings assessed against 12 key areas of discrimination

cont

☞ In Brunei, Malaysia and Singapore, it is an offence for a man to divorce outside of court. However, in Malaysia the divorce can still be registered as valid upon payment of a fine.

Divorce options of a wife

A wife's right to *talaq* divorce (*talaq-e-tawfeez*)

In Bangladesh, Nigeria, Pakistan and South Africa, husbands can delegate their right to *talaq* divorce to their wives by stipulating it in the marriage contract. This option enables a wife to pronounce *talaq* on herself, with her financial rights preserved.

Right to obtain judicial divorce via the court (*fasakh*)

In all 10 countries under review, a Muslim wife can seek divorce from her husband, but only based on specific grounds and conditions. The burden of proof lies with the woman, and should the man object to the divorce, delays or refusal can be the result. Grounds for divorce primarily include variations of the following:

- i. a husband's prolonged absence;
- ii. detention or imprisonment;
- iii. failure to provide maintenance for wife and children;
- iv. failure to perform marital obligations;
- v. impotence of which the wife was not aware;
- vi. incurable or severe physical or mental illness provided certain conditions are met.

Special conditions for divorce

☞ **Harm by husbands:** In Brunei, Malaysia, Pakistan, Singapore, and South Africa, a wife may seek divorce on the basis of harm defined as physical and psychological abuse, mistreatment and cruelty.

☞ **Breach of contract:** In Brunei and Malaysia, a married woman may, if entitled to a divorce pursuant to the terms of her marriage contract, apply to the court to pronounce that such divorce has taken place.

Right to obtain redemptive divorce (*khul'*)

☞ In Bangladesh, Brunei, Kenya, Malaysia, Nigeria, Pakistan, Singapore and South Africa, a wife may seek redemptive divorce whereby she is granted a divorce in exchange for a mutually-agreed compensation payment made to the husband. If the parties are unable to reach mutual agreement on the amount of compensation to be paid, the court or cleric (depending on the jurisdiction) may assess the amount.

☞ In Brunei, Kenya, Malaysia and South Africa, a husband must consent to *khul'* divorce. However, in Brunei if the husband refuses to give his consent, the court can decide to approve the divorce once compensation has been paid.

☞ In Pakistan, a *khul'* divorce can be obtained without the consent of the husband if the wife chooses to forego any financial claim upon her husband.

Right to obtain mutual consent divorce

In Bangladesh, Kenya, Nigeria, Pakistan and Sri Lanka, husbands and wives have the right to obtain a divorce via mutual consent. No exchange of compensation is involved.



No positive developments in divorce practices

Divorce law and practice in all 10 countries under study are unequal for women and men. Men have the unilateral right to divorce their wives without cause or conditions, while women have the right to divorce only on specific and restricted grounds.

2. Women's financial rights after divorce

Most Muslim family laws state that women have defined financial rights after *talaq* and *fasakh* divorce. This includes varying forms of maintenance and compensation and/or share of matrimonial property. In the event of a *khul'* (redemptive) divorce which is initiated by a woman, the woman needs to provide compensation to her spouse, either by returning her dower or an amount specified by the court or mutually agreed between both parties.

The lived realities of women from the 10 countries under review reveal that in practice, women face many challenges in obtaining and accessing adequate financial support in the judicial process, as judges have the discretion to determine amounts of compensation and maintenance. And, in the event that a husband defaults on payments, women have few avenues to seek redress. Furthermore, in the case of *khul'* divorce, the majority of women who seek this form of divorce have an independent financial capacity to do so; economically dependent or disadvantaged women are effectively excluded as they are unable to pay the required financial compensation to their husbands.

Maintenance

Right to post-divorce maintenance

In the 10 countries reviewed, women divorced via *fasakh* or *talaq* are entitled to financial maintenance during a three-month period known as the *iddah*/waiting period (intended to cover three menstrual cycles). In the event that a woman is pregnant at the time of divorce, the *iddah* period and financial maintenance for her extends until the birth of the child. During the post-divorce *iddah* period, a woman is not permitted to marry another man.

A woman can lose her right to maintenance if she is considered “disobedient”

Under the Muslim family laws of Brunei and Malaysia, a woman loses her right to financial maintenance during the *iddah* period if she is found to be “disobedient” (*nusyuz*). The husband can also dispute a wife’s claim for backdated maintenance by claiming she was disobedient. The definition of *nusyuz* is generally undefined and therefore open to any interpretation made by a husband and the subsequent discretion of the judge.

Right of women to obtain compensation

- ~ *De jure* and *de facto* laws in Bangladesh, Nigeria, Pakistan, South Africa and Sri Lanka do not recognise a woman’s right to a consolatory gift or compensation even in cases where the fault of the husband is established eg: domestic violence.
- ~ In Brunei, Malaysia and Singapore, and in practice in Kenya, in addition to maintenance, a woman may apply to the court for a consolatory gift (*mut’ah*). In Kenyan practice, a wife can also claim compensation if her husband abuses his powers and divorces her arbitrarily and without valid reason; and the matter ends up in the *Khadi* court. In such instances, the court may grant relief to the wife.

Matrimonial property

Absence of matrimonial property regime

- ~ There is no matrimonial property regime in Bangladesh, India, Kenya, Nigeria, Pakistan, South Africa and Sri Lanka. As such, there is no recognition of women’s financial and non-financial contribution towards building up matrimonial assets.
- ~ In the case of Kenya, while the Matrimonial Property Act provides for a legal concept of matrimonial assets, there is an exemption that Muslims are to be governed by Islamic law in all matters relating to matrimonial property.

Matrimonial property regimes that value women’s financial and non-financial contributions

Brunei, Malaysia and Singapore have a strong matrimonial property regime which recognises women’s financial and non-financial contribution towards building and maintaining a matrimonial home and assets. The courts are mandated to order any assets acquired by the parties during the marriage (*harta sepencarian*), either through their joint efforts or by the sole efforts of one party to the marriage, to be divided between them or any such assets to be sold and the proceeds to be divided.

Where the assets were acquired by the joint efforts of the parties the court must have regard to:

- i. the extent of the contributions made by each party by way of money, property or labour towards acquiring the assets;
- ii. any debts owed by either party that were contracted for their joint benefit;
- iii. the needs of any minor children of the marriage.

Subject to these considerations, the Court should seek to order equal division of the assets.

Where the assets were acquired by the sole efforts of one party to the marriage, the court must have regard to:

- i. the extent of the contributions made by the party who did not acquire the assets, to the welfare of the family by looking after the home or caring for the family;
- ii. the needs of any minor children of the marriage.

Subject to these two considerations, the court may divide the assets or the proceeds of sale in such proportions that the Court deems reasonable.

D. Summary of findings assessed against 12 key areas of discrimination

cont



Positive developments:

Singapore

The Administration of Muslim Law Act (AMLA) mandates the Syariah court to order any matrimonial assets to be divided between the parties or any such asset to be sold and the proceeds of any such sale to be divided between the parties. When making such an order, the court is obliged to consider what is “just and equitable” and take into account all considerations including:

- i. the extent of the contributions made by each party in money, property or work towards acquiring, improving or maintaining the property;
- ii. any debt owing by either party for their joint benefit or for the benefit of any child of the marriage;
- iii. the needs of the children, if any, of the marriage;
- iv. the extent of the contributions made by each party to the welfare of the family, including looking after the home or caring for the family or any aged or infirm relative or dependent of either party;
- v. any agreement between the parties with respect to the ownership and division of the property made in contemplation of divorce;
- vi. any period of rent-free occupation or other benefit enjoyed by one party in the matrimonial home to the exclusion of the other party;
- vii. the giving of assistance or support by one party to the other party (whether or not of a material kind), including the giving of assistance or support which aids the other party in the carrying on of his or her occupation or business;
- viii. the income, earning capacity, property and other financial resources which each of the parties has or is likely to have in the foreseeable future;
- ix. the financial needs, obligations and responsibilities which each of the parties has or is likely to have in the foreseeable future;
- x. the standard of living enjoyed by the family before the breakdown of the marriage;
- xi. the age of each party and the duration of the marriage;
- xii. any physical or mental disability of either of the parties;
- xiii. the value to either of the parties of any benefit (such as a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

3. Rights over children

With regard to guardianship and custody of children, there exists a marked difference between Muslim majority countries (Bangladesh, Brunei, Malaysia, Nigeria and Pakistan) and countries with minority Muslim populations (India, Kenya, Singapore, South Africa and Sri Lanka).

In countries with Muslim minority populations, guardianship and child custody is outside the realm of Muslim family law and under the jurisdiction of civil law and the civil court system. An important point to note is the distinction between guardianship and custody of children – fathers rarely lose the right of guardianship regardless of circumstances; mothers can lose the right to custody of their children.

Guardianship

Priority right to legal guardianship of children rests with fathers

Due to the underlying legal presumption regarding male guardianship, which forms the basis of most Muslim family laws, namely that fathers are the natural guardian, fathers are accorded a priority right to the guardianship of children over mothers. This is the case without exception in laws relating to guardianship in the Muslim majority countries of Bangladesh, Brunei, Malaysia, Nigeria and Pakistan. No “best interests” standard has been adopted to establish grounds on which a father can lose guardianship.

Mothers gain guardianship of children only under exceptional circumstances

In the case of Brunei and Malaysia, a father has a priority right to the guardianship of his children followed by the paternal grandfather, the executors of the father or grandfather, the executors of their executors and finally a Syariah judge or a person entrusted by a Syariah judge. A mother may only be appointed as guardian of her children by the court in the absence of any other guardian as specifically stipulated in law. In such case, the court may also appoint a joint guardian.

In India, Kenya, Singapore and South Africa, a “guardian” is any person appointed to assume parental responsibility based on the best interest of the minor in question.



Positive developments:

Singapore

The right to legal guardianship of children is equal for men and women. Joint custody orders (the right to make major decisions having long-term effects on children such as matters relating to a child's education and health) are the norm and sole custody orders are the exception.

Custody

Mothers lose custody of a child upon the child reaching a prescribed age

- ✎ In Bangladesh, Brunei, Malaysia and Nigeria, a mother has a priority right to custody of children up to a prescribed age, based on the sex of the child. Mothers are more likely to get a preferential legal right to custody of daughters to a higher prescribed age than of sons.
- ✎ In Malaysia and Singapore, the age limit for custody may be extended based on the "best interests" of the child.

Mothers lose custody of a child under additional grounds

In the case of Brunei and Malaysia, while a father does not lose his right to guardianship of his children on any grounds, a mother will lose custody of her child if:

- i. she marries a man who is not related to the child. She will however, regain custody should she divorce;
- ii. she is of bad conduct in a gross and open manner;
- ii. she changes her place of residence (with the exception of moving to her birthplace) with the intention of preventing the father from exercising supervision over the child;
- iv. she becomes an apostate; or
- v. she neglects or abuses the child.

Custody governed by civil law

In the case of India, Kenya, Pakistan, Singapore, South Africa and Sri Lanka, custody is governed by civil law. Custodial rights between women and men are generally equal and are determined by the respective courts based on the best interests of the child.



Positive developments:

Kenya and South Africa

In Kenya, custodial rights between women and men are equal. As per s.24 of the Children's Act, a mother and father have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility.

In South Africa's Children Act, the child's best interest is of paramount importance and applies to all matters concerning the care, protection and wellbeing of the child. A Muslim mother who may or may not be in a legally recognised marriage can seek legal redress through the courts regarding her right to custody over her child.

E. Reforms required to Muslim family laws

Table 2: Key areas where Muslim family laws discriminate against women and girls

	Commonwealth Asia			
	 Bangladesh	 Brunei	 India	 Malaysia
The Constitution contains comprehensive equality provisions prohibiting discrimination on all grounds including race, gender, sex, pregnancy, marital status, ethnic/social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.	No (limited to religion, race, caste, sex, place of birth).	No equality provisions.	No (limited to religion, race, caste, sex, place of birth).	No (limited to religion, race, descent, place of birth, gender).
Child marriage is unlawful (girls or boys under 18 years prohibited from marriage without exception)	Yes, but exceptions for Muslim girls under 18 with permission of Court + consent of parents	No	Yes	No, minimum legal age for marriage 16 for Muslim girls and 18 for Muslim boys. Syariah judge may give permission for marriage below this age in certain circumstances.
A Muslim woman is legally required to consent to marry	Yes	Yes	Yes	Yes
A Muslim woman has the legal capacity to marry without a guardian (wali)	Yes	No, requires consent of a male guardian (<i>wali</i>).	No, father appointed as guardian (<i>wali</i>).	No, requires consent of a male guardian (<i>wali</i>).
Polygamy is prohibited	No, allowed with written permission.	No, allowed to marry up to 4 wives with written permission.	No codified provisions; in practice can marry up to 4 wives without condition.	No, allowed to marry up to 4 wives with written permission.
There is specific legislation on domestic violence	Yes	No, but the Family Law contains some provisions applicable to domestic violence.	Yes	Yes
Marital rape is fully criminalised in all circumstances	No	No	No	No





Key for rating existing Muslim family law provision

- Law requires complete reform
- Law requires significant reform
- Law requires partial reform
- Law complies with international human rights standards





 Commonwealth Asia			 Commonwealth Africa		
 Pakistan	 Singapore	 Sri Lanka	 Kenya	 Nigeria	 South Africa
No	No	No (limited to race, religion, language, caste, sex, political opinion, place of birth).	Yes (includes race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth).	No	Yes (includes all grounds)
No, minimum legal age for marriage is 16 for Muslim girls and 18 for Muslim boys (except for Sindh province where it is 18 for both).	Yes, but exceptions can be granted for girls under 18 who have attained the age of puberty.	No. Approval of <i>Quazi</i> judge required for marriage of a child under 12.	Yes	Child Rights Act specifies minimum age of marriage is 18. Only 23 of 36 states have domesticated the Act.	Yes, but South African Muslim clerics may permit child marriages: <i>Shafi'i</i> School sets marriage age of 15, <i>Hanafi</i> School 17 for girls and 18 for boys.
Yes	Yes	No, a male guardian (<i>wali</i>) can consent on her behalf	Yes, if an adult previously married. No otherwise	Yes, if attained puberty and previously married. No otherwise.	Yes
Yes	No, requires consent of a male guardian (<i>wali</i>).	No, requires consent of a male guardian (<i>wali</i>) (except for <i>Hanafi</i> adherents).	No, requires consent of a male guardian (<i>wali</i>).	No, requires consent of a male guardian (<i>wali</i>).	No, requires consent of a male guardian (<i>wali</i>).
No, allowed to marry up to 4 wives with written permission.	No, allowed to marry up to 4 wives with permission of a Judge (<i>Kadi</i>).	No, allowed to marry up to 4 wives without condition.	No, allowed to marry up to 4 wives without condition.	No, allowed to marry up to 4 wives without condition.	No, allowed to marry up to 4 wives with permission of Muslim cleric on condition the husband treats all wives equally.
No, except The Punjab.	No, but Women's Charter contains specific provisions applicable to domestic violence.	Yes	Yes	Only in Abuja. 36 states governed by general provisions in Penal Code (Northern states) and Criminal Code (Southern states).	Yes
No	No	No	No	No	Yes







E. Reforms required to Muslim family laws cont

Table 2: Key areas where Muslim family laws discriminate against women and girls cont

	Commonwealth Asia			
	 Bangladesh	 Brunei	 India	 Malaysia
A Muslim husband can unilaterally divorce his wife (<i>talaq</i>)	Yes	Yes	No	Yes
A Muslim woman can unilaterally divorce her husband	No	No	No	No
A woman is entitled to maintenance after divorce (without additional conditions)	Only for 3 month "waiting period" after divorce.	Only for 3 month "waiting period" after divorce + can apply to court for consolatory gift.	Yes and courts can be requested to grant relief if not provided.	Only for 3 month "waiting period" after divorce (unless deemed "disobedient") + can apply to court for consolatory gift.
There is a formal legal regime which divides matrimonial property equally between husband and wife upon divorce	No	Yes	No, only for assets given to her before or during marriage.	Yes
The Muslim father has preferential legal rights of guardianship of his children	Yes	Yes	No	Yes
Child custody rights between Muslim women and men are equal	No, mother has priority rights until daughter reaches puberty and son is 7 years.	No, mother has priority rights until child is capable of <i>mumaiyiz</i> .	Yes	No, mother has priority rights until daughter is 9 years and son 7 years.
A Muslim woman is able to confer citizenship on a foreign spouse or on her children	Yes to children. No to spouse.	No	Yes	Yes to children. No to spouse.
Inheritance rights are equal in law for Muslim women and men	No	No	No	No

Key for rating existing Muslim family law provision

-  Law requires complete reform
-  Law requires significant reform
-  Law requires partial reform
-  Law complies with international human rights standards

	Commonwealth Asia			Commonwealth Africa		
	 Pakistan	 Singapore	 Sri Lanka	 Kenya	 Nigeria	 South Africa
	Yes	Yes	Yes	Yes	Yes	Yes
	No	No	No	No	No	No
	Only for 3 month "waiting period" after divorce.	Only for 3 month "waiting period" after divorce + can apply to court for consolatory gift.	Wife can file an application to the <i>Quazi</i> court to obtain maintenance if husband defaults.	Only for 3 month "waiting period" after divorce provided she observes the rules + can apply to court for consolatory gift.	Only for 3 month "waiting period" after divorce.	Only for 3 month "waiting period" after divorce + can apply to court for consolatory gift or compensation.
	No	Yes	No	No	No	No, unless couple agree matrimonial property division before marriage.
	Yes	No	Yes	No	Yes	No
	Yes	Yes	No, father has priority rights.	Yes	No, mother has priority rights until daughter marries and son reaches puberty.	Yes
	Yes to children. No to spouse.	Yes to children. No to spouse.	Yes	Yes to children; yes to spouse after 7 years of marriage.	Yes to children. No to spouse.	Yes
	No	No	No	No	No	Yes



The case for reform of
**Muslim
family laws**

Introduction

Inequality between women and men has overarching impacts on not just the physical, psycho-social and economic wellbeing of women, children and the family as a unit, but also impacts social and national development.

Muslims make up a significant portion of the world's population. Based on an estimate by the Pew Research Centre, as of 2010 there were approximately 1.6 billion Muslims across the world – 23% of the world's population. The Muslim population is projected to grow at the fastest rate among major religious groups over the next four decades to reach about 2.8 billion (30% of the world's population) by 2050.¹ This is due primarily to demographics: a comparatively youthful Muslim population with the youngest median age – 23 years – among major religious groups (2010 figures) plus the highest fertility rate of an average of 3.1 children per woman.

Several recent global gender equality surveys have reported that many countries among the bottom 25 are Muslim-majority countries. Some of these are high- or upper-middle-income countries, including Bahrain, Oman, Saudi Arabia, Iran and Jordan, but they languish at the bottom of gender equality tables (together with lower-income Muslim countries) with women and girls suffering multiple levels of discrimination in law and practice. 21 out of the 25 countries at the bottom of the World Economic Forum's 2018 Global Gender Gap Index are countries with majority Muslim populations or significant Muslim minority communities.² This has led to significant gender gaps in indicators including in education, economic participation and opportunity, health and political empowerment.

¹ Pew Research Centre, *The Future of World Religions: Population Growth Projections, 2010-2050: Why Muslims Are Rising Fastest and the Unaffiliated Are Shrinking as a Share of the World's Population*, (pp.7, 10), 2015, available at: <http://www.pewforum.org/2015/04/02/religious-projections-2010-2050/>.

² World Economic Forum, *The Global Gender Gap Report 2018*, Table 3, pp. 10-11, available at: http://www3.weforum.org/docs/WEF_GGGR_2018.pdf.

A. CEDAW and Muslim family laws



Many Muslim-majority countries and countries with significant Muslim minorities are party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC), and have committed themselves to the Sustainable Development Goals (SDGs). However, many of these countries continue to hold reservations with regard to family law matters, including Article 16 of CEDAW on marriage and family relations.

More than 30 States Parties with Muslim-majority or

significant Muslim-minority populations have placed reservations to CEDAW or made assertions that they are unable to fully meet their CEDAW obligations because certain CEDAW provisions are inconsistent with Islamic law (*Sharia*); and/or Muslim family law provisions on specific matters (eg: age for marriage, polygamy, inheritance) cannot be changed because these provisions are based on the Qur'an or specific *hadith*. As a result, these countries state that they are unable to reform their family laws even though they conflict with the definition of discrimination against women as set forth in the Convention.³

TABLE 3: Reservations to CEDAW made by 10 Commonwealth countries under review⁴



Commonwealth Asia



Bangladesh

"The Government of the People's Republic of Bangladesh does not consider as binding upon itself the provisions of article 2, [... and ...] 16 (1) (c) as they conflict with Sharia law based on Holy Quran and Sunna."



Brunei

"The Government of Brunei Darussalam expresses its reservations regarding those provisions of the said Convention that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the official religion of Brunei Darussalam and, without prejudice to the generality of the said reservations, expresses its reservations regarding paragraph 2 of Article 9 and paragraph 1 of Article 29 of the Convention."



India

Declarations "(i) With regard to articles 5 (a) and 16 (1) of the Convention on the Elimination of All Forms of Discrimination against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent; (ii) With regard to article 16 (2) of the Convention on the Elimination of All Forms of Discrimination against Women, the Government of the Republic of India declares that though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy."

Reservation "With regard to article 29 of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it does not consider itself bound by paragraph 1 of this article."

³ For a greater examination of the use of Islam and Sharia by States Parties to justify their reservations to CEDAW and resist demands for reform, see Musawah, *CEDAW and Muslim Family Laws: In Search of Common Ground*, 2012, available at: <https://www.musawah.org/resources/cedaw-and-muslim-family-laws-in-search-of-common-ground/>.

⁴ UN Treaty Collection, Status of CEDAW (as at 30 October 2019) available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mdsg_no=IV-8&chapter=4&clang=en#32.

A. CEDAW and Muslim family laws cont

TABLE 3: Reservations to CEDAW made by 10 Commonwealth countries under review⁴ cont

Commonwealth Asia cont

Malaysia

“The Government of Malaysia declares that Malaysia’s accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic *Shari’a* law and the Federal Constitution of Malaysia. With regard thereto, further, the Government of Malaysia does not consider itself bound by the provisions of articles 9 (2), 16 (1) (a), 16 (1) (c), 16 (1) (f) and 16 (1) (g) of the aforesaid Convention. In relation to article 11 of the Convention, Malaysia interprets the provisions of this article as a reference to the prohibition of discrimination on the basis of equality between men and women only.”

Pakistan

Declaration “The accession by [the] Government of the Islamic Republic of Pakistan to the [said Convention] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan.”

Reservation “The Government of the Islamic Republic of Pakistan declares that it does not consider itself bound by paragraph 1 of article 29 of the Convention.”

Singapore

“(1) In the context of Singapore’s multiracial and multi-religious society and the need to respect the freedom of minorities to practice their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of articles 2, paragraphs (a) to (f), and article 16, paragraphs 1(a), 1(c), 1(h), and article 16, paragraph 2, where compliance with these provisions would be contrary to their religious or personal laws. (2) [...] (3) [...] Singapore considers that legislation in respect of article 11 is unnecessary for the minority of women who do not fall within the ambit of Singapore’s employment legislation. (4) The Republic of Singapore declares, in pursuance of article 29, paragraph 2 of the Convention that it will not be bound by the provisions of article 29, paragraph 1.”

Sri Lanka

No declarations or reservations.

Commonwealth Africa

Kenya

No declarations or reservations.

Nigeria

No declarations or reservations.

South Africa

No declarations or reservations.

CEDAW Committee’s Concluding Observations on Muslim family laws

Since 2011, Musawah has engaged closely with the CEDAW reporting process, submitting Thematic Reports and Oral Statements and making specific interventions relating to CEDAW Article 16 (marriage and family) and Muslim women’s rights in countries with Muslim family laws. Musawah has submitted over 32 reports on 30 States Parties to CEDAW.

The CEDAW Committee has consistently raised issues relating to Muslim family laws in its Constructive Dialogues with States Parties, as well as in the Committee's Concluding Observations and recommendations. Indeed, matters relating to Muslim family laws have been increasingly noted as one of the priority *Follow-up issues* on which particular State Parties are requested to show progress in two years following their CEDAW review.

TABLE 4: CEDAW Committee Concluding Observations on reform of Muslim family laws

All the 10 Commonwealth countries included in this report have been reviewed by the CEDAW Committee within the past six years. An indication of some of the most relevant recommendations given by the CEDAW Committee are set below:

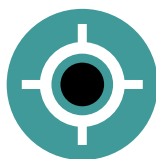
Country	Year of last review	CEDAW Committee's Concluding Observations on matters of family law
 Commonwealth Asia		
 Bangladesh	2016	<ol style="list-style-type: none"> 1. End the harmful practice of child marriage and retain 18 years of age as the legal minimum age of marriage for girls without exception. 2. Review personal laws and adopt a uniform civil code applicable to all citizens.
 Brunei	2014	<ol style="list-style-type: none"> 1. Reform Islamic Family Law Act. 2. Repeal the law that penalises unmarried women who leave their parents/guardians. 3. Raise the minimum age of marriage to 18 years. 4. Address the issue of polygamy.
 India	2014	<ol style="list-style-type: none"> 1. Enact legislation for compulsory registration of marriage. 2. Implement Prohibition of Child Marriage Act without exceptions. 3. Void child marriages. 4. Raise awareness about prohibition of child marriage. 5. Ensure all personal laws comply with Articles 15 and 16 of the Convention.
 Malaysia	2018	<ol style="list-style-type: none"> 1. Ensure Sharia laws are in full compliance with the Convention. 2. Provide safeguards against violations against women's human rights in all marriage and family matters (<i>also a follow-up issue</i>). 3. Ensure that Muslim women have equal rights in all marriage and family matters (divorce, maintenance, custody and guardianship of children, inheritance). 4. Prohibit unilateral conversion of children to Islam. 5. Discourage and prohibit polygamy. 6. Raise the minimum age of marriage to 18 years.
 Pakistan	2013	<ol style="list-style-type: none"> 1. Revise Dissolution of Muslim Marriages Act. 2. Ensure that marriage and family cases are efficiently handled and heard by civil courts. 3. Conduct research on the extent of the phenomenon of abduction of girls for the purposes of forced conversion and forced marriages. 4. Take necessary legislative measures to prohibit polygamy. 5. Enact legal provisions to ensure that women have equal rights to property acquired during marriage.

A. CEDAW and muslim family laws cont

TABLE 4: CEDAW Committee Concluding Observations on reform of Muslim family laws cont

Country	Year of last review	CEDAW Committee's Concluding Observations on matters of family law
 Commonwealth Asia cont		
 Singapore	2017	<ol style="list-style-type: none"> 1. Abolish exceptions to minimum age of marriage and ensure full consent of women in all marriages. 2. Intensify efforts to discourage and prohibit polygamy 3. Ensure that women and men have equal rights to divorce. 4. Guarantee the equal rights of women in all matters of inheritance. 5. Amend Muslim family law to include women in key positions and professions within the Registry of Muslim Marriages.
 Sri Lanka	2017	<ol style="list-style-type: none"> 1. Amend all personal status laws to address ownership, inheritance, transfer and disposal of land and property, as well as provisions regulating legal capacity, marriage, divorce, and child custody (<i>also a follow-up issue</i>). 2. Amend the General Marriage Ordinance to enable Muslims to marry and opt out of Muslim family law. 3. Increase minimum age of marriage for Muslims to 18 years. 4. Allow women to be judges, marriage registrars, members of Board of <i>Quazi</i> and adjudicators in <i>Quazi</i> courts. 5. Amend Penal Code to ensure that the crime of statutory rape applies to all girls under the age of 16, without exception.
 Commonwealth Africa		
 Kenya	2017	<ol style="list-style-type: none"> 1. Repeal or amend discriminatory provisions under religious and customary law. 2. Codify Muslim family law in compliance with CEDAW and the Kenyan Constitution. 3. Appoint Muslim women as judges and alternative dispute resolution mediators in the <i>Kadi</i> courts. 4. Abolish <i>talaq</i> and grant Muslim women and men equal rights to divorce. Compulsorily register divorces.
 Nigeria	2017	<ol style="list-style-type: none"> 1. Undertake comprehensive law reform to harmonise conflicting provisions under statutory, customary and Islamic personal laws and ensure their full compliance with CEDAW. 2. Expedite the repeal or amendment of all discriminatory laws identified by the Nigerian Law Reform Commission. 3. Eradicate child marriages and uniformly apply Child Rights Act. Amend section of Criminal Code to establish 18 years as minimum age of marriage. 4. Repeal section of Criminal Code that legitimises child marriage and rape. 5. Eradicate polygamy.
 South Africa	2011	Prepare a unified family code in conformity with the Convention, in which unequal inheritance rights, property and land rights and polygamy are addressed, with the aim of abolishing them, including the option of civil provisions available for all women.

B. SDGs and Muslim family laws



All 10 Commonwealth countries have committed towards attaining the Sustainable Development Goals (SDGs). Goal 5 of the SDGs is primarily aimed at achieving gender equality and empowering all women and girls. It recognises that ending all forms of discrimination against women and girls, in addition to being a basic human right, also has a multiplier effect in other areas of human and national development. There is a global acknowledgement that gross inequalities in access to education and employment have created significant gaps between women and men in the economic, social and political areas. This is exacerbated by gender-based violence against women and girls and by discriminatory laws and harmful traditional practices like child and forced marriage.

TABLE 5: SDG 5 targets and indicators relevant to reform of Muslim family laws

	Target 5.1	End all forms of discrimination against women and girls everywhere.
	Indicator 5.1.1	Whether or not legal frameworks are in place to promote, enforce and monitor equality and non-discrimination on the basis of sex.
	Target 5.2	Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation.
	Indicator 5.2.1	Proportion of ever-partnered women and girls aged 15 years and older subjected to physical, sexual or psychological violence by a current or former intimate partner in the previous 12 months, by form of violence and by age.
	Indicator 5.2.2	Proportion of women and girls aged 15 years and older subjected to sexual violence by persons other than an intimate partner in the previous 12 months, by age and place of occurrence.
	Target 5.3	Eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation (FGM).
	Indicator 5.3.1	Proportion of women aged 20-24 years who were married or in a union before age 15 and before age 18.
	Indicator 5.3.2	Proportion of girls and women aged 15-49 years who have undergone female genital mutilation/cutting, by age.
	Target 5.A	Undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws.
	Indicator 5.A.1	(a) Proportion of total agricultural population with ownership or secure rights over agricultural land, by sex; and (b) share of women among owners or rights-bearers of agricultural land, by type of tenure.
	Indicator 5.A.2	Proportion of countries where the legal framework (including customary law) guarantees women's equal rights to land ownership and/or control.

Indicator 5.1.1 specifically identifies review and reform of legal frameworks, such as family laws, to ensure they promote, enforce and monitor gender equality and non-discrimination. Target 5.3. and associated indicators highlight two key issues – the elimination of child and forced marriages and the elimination of FGM as issues that must be eliminated in order to achieve gender equality.

B. SDGs and Muslim family laws cont

Legal and economic empowerment of Muslim women

SDG 5 explicitly makes the link between improving women's economic capacity and making progress on gender equality. While there is widespread acknowledgement that women's access to employment, resources and opportunities improves gender equality and human development indicators in a given context, the link between discriminatory family laws and women's economic capacity has only recently gained the attention of policymakers.

The World Bank Report, *Women, Business and Law 2019*, which globally assesses how women's employment and entrepreneurship are affected by legal discrimination, recorded that equal opportunities in getting a job or starting a business do not exist where legal gender differences are prevalent and that legal restrictions constrain women's ability to make economic decisions and can have far-reaching consequences. The data analysis showed that for reforming economies, female labour force participation increased by higher percentage points than for non-reforming economies, which indicates that more women join the workforce overall in economies that are taking steps to improve gender equality.

The report noted that in the Middle East and North Africa, the pace of reform is occurring so slowly that the legal gender gap is increasing as other regions reform discriminatory laws against women and girls.

Another significant study published recently, *Gender-Discriminatory Laws and Women's Economic Agency*,⁵ suggests the following important factors linking discriminatory laws with economic and human development:

- ✔ Greater legal capacity is the most consistent correlate of women's economic agency.
- ✔ National governments often focus on labour codes and maternity and parental leave policies as determinants of women's economic agency, as they directly relate to rights in the workplace.
- ✔ However, more fundamental rights and freedoms codified in family laws, civil codes and personal status laws may be more important indicators, particularly in less developed countries.

The analysis suggests egalitarian reform of family laws may be one of the most crucial preconditions for empowering women economically.

Impact of discriminatory Muslim family laws on other SDGs

Discriminatory family laws and practices also impact the attainment of other SDGs, including:

- SDG 1.** End poverty in all its forms everywhere
- SDG 2.** End hunger, achieve food security and improve nutrition
- SDG 3.** Ensure healthy lives and promote wellbeing for all at all ages.

Without full autonomy in marriage, equal rights to divorce, inheritance and nationality, it is much more difficult for women to make key decisions relating to education, employment and livelihood. Practices like polygamy, unequal divorce, lack of access to maintenance and property rights, as well as domestic violence and sexual abuse in marriage leaves women and children in socio-economically vulnerable and unsafe situations. For example, without the necessary legal safeguards in place to economically protect women and children, husbands who wish to practice polygamy are more likely to leave one or more of their wives and children in destitution and poverty. Unfair and discriminatory court practices and barriers on access to justice (such as lengthy court processes and biased attitudes of judges) further marginalise women, denying them equal protection of the law and limiting their ability to attain just and fair redress.

- SDG 4.** Ensure inclusive and equitable quality education for all
- SDG 8.** Promote economic growth, full employment and decent work for all

Muslim family laws treat women as minors under perpetual male guardianship. This means that key decisions relating to, amongst others, education, employment, travel, marriage, birth control and spacing of children are determined by male guardians rather than women themselves. Such laws deny women their full agency and autonomy on matters that impact their lives and violate their human rights and fundamental freedoms. Child and forced marriage deny or undermine the rights of girls to education, employment and improved livelihood opportunities. Child marriage leads to increased numbers of teenage pregnancies which pose serious sexual and reproductive health risks for girls.

⁵ The report was authored by Mala Htun, Francesca R. Jensenius, Jami Nelson Nuñez.

C. Key barriers and challenges to reform of discriminatory laws



The biggest challenge in the reform of discriminatory Muslim family laws is the fact that these laws are based on Islam. Traditionally, religious scholars – mostly male and conservative – are recognised by governments and society as having the sole authority to decide on matters related to religion. The dominant understanding of Islam and the legal framework that governs family life remain rooted in the belief that men are superior to women; men provide for and protect women and children; men have authority over women and children; men enjoy rights and privileges that cannot be extended to women.

The nature and extent of organising and mobilising of women's groups and civil society actors around law reform is different from country to country given the differing legal frameworks and socio-political contexts of each country. However, a number of key patterns and trends can be identified across the 10 Commonwealth Asia and Africa countries reviewed regarding national level discourses and developments (or lack thereof) on reform of discriminatory Muslim marriage and family laws. These are outlined below.

1. Family laws justified in the name of Islam

- ✔ Muslim family laws are considered sacred and divine and thus unchangeable. Any attempts to reform such laws are considered to be against Islam and the "will of God", effectively silencing dissent and activism.
- ✔ The fact that Muslim family laws are based on religion places authority to interpret and make decisions on religious leaders (*ulama*) and scholars who are male, conservative and patriarchal. Religion is therefore used as a patriarchal tool to justify discrimination against women and to resist legislative reform. In all contexts with Muslim family laws, women face major challenges in asserting legitimacy, voicing their demands and confronting conservative interpretations and authority.
- ✔ This is exacerbated by various demographic and socio-political factors, including the politicisation of religion and minority-majority politics depending on individual country contexts.

2. Resistance from within the community

- ✔ In all countries, the maintenance of discriminatory Muslim family laws and resistance to reform is primarily from within Muslim communities and in particular, conservative religious groups and institutions, political parties, Muslim leaders and Islamic scholars.
- ✔ For Muslim majority countries, reform of Muslim family laws is explicitly interlinked with religion, in that it is seen as directly challenging religious belief and Islamic scholarship and leadership. Governments justify discriminatory Muslim family laws and arguments against reform by upholding Islam and what is perceived as Sharia and sacred.
- ✔ Muslim and non-Muslim governments consider reform of Muslim family laws as a "religious" issue which requires expertise of religious scholars. This perspective effectively excludes the voices of Muslim women. Muslim women's groups campaigning for equality and justice are labelled "anti-Muslim" and their demands for reform regarded as anti-Islam and anti-Sharia. For this reason, very few men in authority, not least political leaders, are willing to support Muslim women's rights activists in their campaigns to reform discriminatory laws.
- ✔ As a consequence, there is a high risk-factor for Muslim women activists and groups who are often faced with direct threats, attacks and various forms of intimidation in the process of advocating for change.

C. Key barriers and challenges to reform of discriminatory laws cont

3. Identity politics at play

- For countries with Muslim minorities, identity politics is more saliently at play, whereby demands for reform of discriminatory laws are also seen as a challenge to minority rights and Muslim identities. Governments often condone discriminatory Muslim family law and practices (many of which are British colonial legacy laws) on the grounds that they do not want to interfere in minority religious personal laws.
- In these contexts, the individual rights of members of Muslim communities, and especially Muslim women, is accorded less value and priority than the communal rights of having a distinct Muslim family law with a Sharia-based court system. The governments of such countries defend discriminatory Muslim family laws and arguments against reform by holding up family law as a religious and minority right.

4. Lack of enabling national legislation and plural legal systems

- In some countries, domestic legislation also provides an enabling environment for Muslim family laws to continue to discriminate against women and girls. For example, Article 16(1) of Sri Lanka's Constitution allows any provision of pre-existing laws (including Muslim family law) to be valid and operative despite contradicting fundamental constitutional rights.

- In Nigeria and Malaysia, the federal and state structure of governance and legislation poses a major challenge to uniform application of laws. In Nigeria, each of the 36 states, as well as the Federal Capital Territory (FCT) Abuja, has its own laws. Federal laws only apply in the FCT and to federal agencies and do not apply within the territory of individual states until the state explicitly adopts it. In Malaysia, Muslim family laws fall under the jurisdiction of state laws, therefore Islamic laws (except for Islamic finance) are enacted by state legislative bodies. This means that each of the 14 state jurisdictions is able to enact its own set of laws through its state legislature.

5. Socio-economic and demographic factors

The high levels of illiteracy and poverty within Muslim communities across all 10 Commonwealth countries reviewed results in limited and non-uniform access to information about domestic laws and human rights. This makes it easier for conservative and religious groups to exert their influence through mosques and other mainstream institutions, including the media.

D. Case studies of successful Muslim family law reform



Despite these major challenges, women's rights and civil society groups in all 10 Commonwealth Asia and Africa countries have to varying degrees been actively advocating for reform of discriminatory Muslim family laws. This has resulted in legal reform in a number of cases. We discuss below two positive examples of reform of Muslim family laws.



INDIA: MUSLIM WOMEN'S MOVEMENT CAMPAIGN TO BAN TRIPLE TALAQ

Bharatiya Muslim Mahila Andolan (BMMA)/Indian Muslim Women's Movement is a national movement of Muslim women in India actively campaigning for an end to discriminatory family practices within Muslim communities, such as triple *talaq* (instant divorce) and polygamy. BMMA has a membership of over 100,000 women across India and has been instrumental in initiating and maintaining the debate on Muslim women's rights and reform of Muslim family laws in the media and to the fore of the government's agenda.

BMMA has conducted extensive studies into the lived realities of Muslim women and the legal framework relating to Muslim family laws and practices in India. They also completed a survey, *No More Talaq Talaq Talaq*, which sought the perspectives of Muslim women in 10 states across India on matters such as a codified Muslim family law, polygamy, triple *talaq* and *nikah-halala*. BMMA identified that there was no law in the Indian legal system that reflected their belief that gender justice is included in the *Qur'an*. BMMA held consultations in 2008 to formulate a draft bill on Muslim family law and in 2014 submitted their draft bill to parliamentarians and political parties. However, there was little action in response.

In 2016, BMMA conducted a signature campaign seeking to ban the triple *talaq* as '*un-Quranic*,' collecting approximately 50,000 signatures. The same year, BMMA decided to initiate strategic litigation and file petitions at the Supreme Court against triple *talaq*, *halala* and polygamy as violations of the fundamental rights of Muslim women. The petition against triple *talaq* was filed in May 2016 and the Supreme Court declared the practice unconstitutional in August 2017. BMMA states there is still a lot of work to be done to eradicate the practice of triple *talaq*, given the Bharatiya Janata Party (BJP) ordinance criminalising triple *talaq* does not offer an alternative method of divorce for Muslim men. In July 2019, India's Parliament passed the Muslim Women Protection of Rights on Marriage Bill, officially outlawing triple *talaq*.

In March 2018, the Supreme Court examined the constitutional validity of the practice of polygamy (among other practices like *nikah-halala*) based on petitions by Muslim women and directed the Government of India to indicate in writing its official stance on polygamy. The Government has yet to respond.

BMMA reports that it has faced an immense backlash both from conservative groups as well as secular groups who claim that BMMA is aligning with the right-wing Hindu government to achieve its intended outcomes.

D. Case studies of successful Muslim family law reform cont



SRI LANKA: MUSLIM WOMEN'S MOVEMENT FOR REFORM OF MUSLIM FAMILY LAWS

Muslim women in Sri Lanka have been at the forefront of demanding substantial reform to the Muslim Marriage and Divorce Act (MMDA). Muslim Women's Research and Action Forum (MWRAF), an organisation working on Muslim women's rights since the 1980s, has advocated for reform of the MMDA for over 30 years, and their work has included setting up an Independent Committee for Muslim Personal Law Reform in 2005. MWRAF has also provided testimonies to government-appointed law reform committees.

Other community women's groups in different parts of the country have also been actively engaging in MMDA reform, especially in the last few years. Muslim Women's Development Trust in Puttalam, and Islamic Women's Association for Research and Empowerment in Ampara district are among the community-based women's groups that have been raising awareness about the MMDA among their communities, providing legal and counselling support to affected women, documenting cases and advocating for reform.

In 2016, Muslim Personal Law Reform Action Group (MPLRAG) emerged as a young lobby group of individual lawyers, activists and researchers with the specific intention to push for MMDA reform. MPLRAG published *Muslim Women's Demands* which outlined key amendments to the MMDA, including raising the minimum age of marriage to 18 years without exception; allowing women to become *Quazis*, jurors, marriage registrars and members of Boards of *Quazi*; mandating written consent of women to marry; giving women equal autonomy to enter into marriage; and mandating consent of all parties to a polygamous marriage including existing and new wives, among other demands. MPLRAG periodically releases Position Papers on the main issues currently being debated.

In July 2019, Muslim MPs decided on a set of amendments to the MMDA, which included raising the minimum age of marriage to 18 years; women to be appointed as *Quazi* court judges; mandatory consent of women to marry; mandatory registration of marriages; and the requirement that *Quazi* court judges be qualified attorneys. The revised proposed set of amendments to the MMDA was submitted to the Cabinet of Ministers on 21 August 2019 and passed as a supplementary paper by the Cabinet. MMDA reform remains on the government's agenda.

E. Why reform of Muslim family law is necessary and possible



Through its scholarship and advocacy, Musawah has persistently refuted arguments of governments and conservatives groups that resist reform of Muslim family laws based on the premise that these laws are divine and unchangeable. By drawing primarily on the following established theories and concepts from within Islamic jurisprudence, Musawah maintains that Islamic teachings and international human rights standards, including CEDAW, are fully compatible, and that both are dynamic and constantly evolving based on changing times and circumstances:

- ✔ First, there is a distinction between the revealed way Sharia, which is immutable and infallible, and human understanding and interpretation of Sharia (known as *fiqh*), which is fallible and changeable. Much of what is freely labelled as “Islamic law” today is *fiqh* and not Sharia.
- ✔ Second, there are two main categories of legal rules – devotional/spiritual acts (*‘ibadat*) and transactional/contractual acts (*mu‘amalat*). Muslim jurists have always considered legal rulings relating to marriage and family relations as social and contractual matters (*mu‘amalat*), which are open to rational consideration and change depending on circumstances and social conditions, rather than spiritual or devotional matters (*‘ibadat*), where there is little room for disputation.
- ✔ Third, diversity of opinion (*ikhtilaf*) has always been accepted and celebrated within the tradition of *fiqh*. This is the reason for the existence of multiple Islamic schools of laws (*mazhab*). The fact that different Muslim family laws exist today demonstrates that there is no unified, monolithic “Islamic law”. It must be recognised that contemporary codified Muslim family laws are not God-given but have been developed by individuals serving in legislatures or committees. People can therefore change the laws to be more equal and just to reflect changing norms and contexts. A collection of guiding principles of understanding that includes “public interest” (*maslahah*) and “choosing the best opinion in the interest of the common good” (*istihsan* or *istislah*) supports this process.
- ✔ Fourth, family laws that are developed or amended in the name of Islam should reflect the Qur’anic values of justice (*‘adl*), equality (*musawah*), equity (*insaf*), human dignity (*karamah*), love and compassion (*mwaddah wa rahmah*), and mutual respect among all human beings. All these values are fully compatible with international human rights standards, including CEDAW, and national constitutional guarantees of equality and non-discrimination.

F. Recommendations for reform



All Muslim family law reforms must be rooted in the lived realities of Muslim women, address discrimination against Muslim women, and ensure that Muslim women have equal protection of the law and access to justice and redress. Muslim women activists and women's groups have made significant effort towards documenting the lived experiences of Muslim women and girls and it is critical that they be included and engaged as experts in every step of the legal reform process. In countries like Bangladesh, India, Malaysia and Sri Lanka, their advocacy efforts span decades.

Legislative reform to Muslim family laws has been taking place around the world, proving that laws can and must evolve and change to meet modern day realities. Because the source of Muslim family laws primarily remains Islamic jurisprudence, there are many lessons to be learnt across similar contexts. Governments should consider examples of positive legislative reform in other Muslim countries to inform and support domestic legal reforms in their own countries and to identify reforms that may cause unintended harms.

The following are priority recommendations for Muslim family law reform in each of the 10 Commonwealth Asia and Africa countries included in this comparative legal review.



Commonwealth Asia

BANGLADESH

Recommendation 1

The Government should conduct national and community consultations on the problems and challenges relating to family laws and practices. Muslim women's groups should be directly engaged in this process.

Recommendation 2

The Government should set up an inclusive inquiry to determine the merits of a uniform family code in consultation with representatives from civil society, media and the legal community and including all ethnic, indigenous and minority groups.

Recommendation 3

The Child Marriage Restraint Act should be amended to repeal exceptions permitting child marriage below the age of 18 years.

Recommendation 4

Registration of all marriages, whether civil or religious, should be mandatory with explicit sanctions for non-registration of marriage. Procedures for Muslim men and women to obtain a divorce should be equalised.

Recommendation 5

The Government should enact legislation to combat domestic violence in consultation with women's rights and civil society groups.

Recommendation 6

The Government should take concrete steps to enable it to withdraw reservations to CEDAW Articles 2 and 16(1)(c).



BRUNEI

Recommendation 1

The Government should urgently repeal provisions in the Syariah Penal Code which violate human rights and fundamental freedoms of citizens.

Recommendation 2

The Government should implement its international treaty obligations with urgency by reviewing laws which contradict commitments made under these treaties.

Recommendation 3

The Government should recognise the harm caused to its citizens by repressive State adherence to a State of Emergency and other conservative laws that restrict the ability of all citizens, especially women and girls, to realise the full enjoyment of their human rights and for civil society to thrive.



INDIA

Recommendation 1

The Prohibition of Child Marriage Act 2006 should be implemented fully and uniformly across all religious groups in India without exceptions.

Recommendation 2

Marriages should be registered mandatorily, including those under the jurisdiction of Sharia law.

Recommendation 3

The Government of India should promptly issue its opinion on matters of Muslim family law that have been referred to it by the Supreme Court, taking into consideration the body of evidence of the impact of discriminatory practices on Muslim women and their calls for reform.

Recommendation 4

Matters relating to polygamy and the customary practice of *nikah-halala* should be addressed by the Supreme Court without delay. Petitioners who have faced threats of violence should be given protection to ensure their security.

Recommendation 5

The Government should introduce a codified Muslim family law with a legal framework that recognises the equal rights and responsibilities of a husband and wife in marriage, and marriage as a partnership of equals, with Muslim women's groups consulted during the drafting process.

F. Recommendations for reform cont



MALAYSIA

Recommendation 1

The Government should conduct a comprehensive review of Islamic family laws to provide Muslim women equal rights in marriage and family matters. The review should be based on a progressive interpretation of the Syariah and be grounded in a legal framework that ensures equal rights and accords equal protection of the law to both partners.

Recommendation 2

The Government should amend the Domestic Violence Act to extend protection to unmarried intimate partners.

Recommendation 3

The Government should repeal the marital rape exception included in s.375 of the Penal Code.



PAKISTAN

Recommendation 1

The Government of Pakistan should apply 18 years as the minimum age of marriage (without any legal exceptions) uniformly across all religious groups and regions in Pakistan.

Recommendation 2

The Government should take concrete steps to address harmful customary and traditional practices, including forced marriage, which perpetuate violence against women and girls. The Government should implement widespread awareness-raising campaigns to educate women and girls about their legal rights and that violence against women is a crime and radically improve support services for women and girls victims of violence, especially in areas where women and girls are vulnerable to harmful practices.

Recommendation 3

The Government of Pakistan should embark on a consultative process with full involvement of women's groups to assess the critical areas of discrimination faced by women in marriage, family matters and access to justice in Family Courts.

Recommendation 4

The Government should urgently reform laws relating to polygamy and ensure equality in the conditions and procedures of divorce for Muslim women and men.



SINGAPORE

Recommendation 1

The Government should repeal or reform the Administration of Muslim Law Act 1968 with a new family law that grants husbands and wives equal rights and responsibilities in marriage, within a legal framework that recognises marriage as a partnership of equals. This includes the following:

- Remove the prohibition of qualified women from all positions within the Syariah Court system.
- Ensure that Muslim women have an equal right to enter into marriage on their own accord without permission of a male guardian or *Kadi*.
- Prohibit polygamy for Singaporean Muslim men.
- Ensure that men and women have equal rights to divorce, including the grounds considered for divorce and the standards of proof.

Recommendation 2

The Government should define 18 years as the minimum age of marriage for Muslim girls and remove all legal exceptions.

Recommendation 3

The Government should revert to the legal position before the introduction of the Administration of Muslim Law Act 1968 to provide Muslims the option to choose whether to distribute their estate and assets upon death under Muslim law or civil law.



SRI LANKA

Recommendation 1

The Government of Sri Lanka should seek to demonstrate progress by 2020 on recommendations made by the CEDAW Committee in its Concluding Observations 2017, including, in particular, recommendation 13(b) on the amendment of personal laws, which is a priority women's rights issue.

Recommendation 2

The Government should consider the recommendations of the 2009 Reform Committee as suggestions that can be individually considered in light of the lived realities and experiences of Muslim women and girls.

Recommendation 3

The Government should treat statistical data, research and cases gathered by Muslim women's groups as core evidence in making the case for comprehensive reform of the Muslim Marriage and Divorce Act.

Recommendation 4

The Government of Sri Lanka should consider the emerging feminist and rights-based scholarship on Islamic jurisprudence, as well as the diversity of Islamic legal tools and traditions, both of which support egalitarian family law reform.

Recommendation 5

The Government should define the minimum age of marriage as 18 without exceptions in light of statistical data showing that child marriages of 16 and 17-year-olds constitute the majority of registered underage marriages.

Recommendation 6

The Government should remove the barrier preventing women from being appointed to all *Quazi* court positions including *Quazi*, marriage registrars, jurors and members of the Board of *Quazi*.

Recommendation 7

The Government should make it mandatory to obtain i. the consent of all wives and ii. proof of financial capacity of husbands as a pre-requisite for entering into polygamous marriages. Couples should also be allowed to draw up marriage contracts stipulating a desire for a monogamous marriage only.

Recommendation 8

The Government should reform the law to give Muslim women full autonomy to enter into marriage and equality of rights and legal procedures in relation to divorce.

F. Recommendations for reform cont



Commonwealth Africa

KENYA

Recommendation 1

The Government should address the barriers and challenges to justice that Muslim women face and facilitate a process whereby Muslim women can contribute and engage in the *Kadhi* Court system.

Recommendation 2

The Government should ensure that Muslim women are part of the process for legal reform of Muslim family laws from the outset, and that any and all reform responds to the lived realities of Muslim women and complies with the equality provisions of the Constitution and the Marriage Act.



NIGERIA

Recommendation 1

The Federal Government of Nigeria should take steps to ensure that Muslim women living under the jurisdiction of Islamic laws benefit equally from Constitutional equality and non-discrimination provisions under Articles 15(2) and 42.

Recommendation 2

Federal and State Governments should reform family-related laws as follows:

- ↪ The Child Rights Act and the Violence Against Persons Prohibition Act should be adopted in the Northern states of Nigeria. The Government must encourage implementation of the Child Rights Act by all states or amend the Constitution to enforce it federally.
- ↪ A legal framework that recognises the equal rights and responsibilities of a husband and wife in marriage, and marriage as a partnership of equals, should be established across states that apply Muslim family laws.
- ↪ The minimum age of marriage should be made 18 years for all citizens regardless of ethnicity, religion or region of residence. No exception to the minimum age of marriage should be permitted. The Government should ensure mandatory secondary schooling for boys and girls up to the age of 18 years to discourage early marriage.
- ↪ The law should require mandatory registration of all marriages, including those under the jurisdiction of Islamic law.
- ↪ The Federal Government should ensure that Islamic law on marriage and divorce prohibits polygamy. Alternatively, the Government should put in place legal conditions to restrict the practice of polygamy and minimise harm and injustice to the existing wife and children, such as mandatory consent of wives and procedures to verify documents and evidence that proves financial capacity and just cause.

Recommendation 3

Federal and State Governments should strengthen support services, including special police units and access to legal, psycho-social and emergency support to ensure that early marriages are prevented and girls who are vulnerable to early marriage are able to obtain prompt and effective assistance.



SOUTH AFRICA

Recommendation 1

The Government should ensure the Muslim Marriages Bill, or any legislation that takes its place, should address the *de jure* Muslim marriage practices that have resulted in multi-layered discrimination against Muslim women.

Recommendation 2

The Government should ensure the legal recognition of Muslim marriages within a framework that recognises the equal rights and responsibilities of a husband and wife in marriage and marriage as a partnership of equals. Muslim women's groups should be consulted during this process and provide evidence of the lived realities of Muslim women.

Recommendation 3

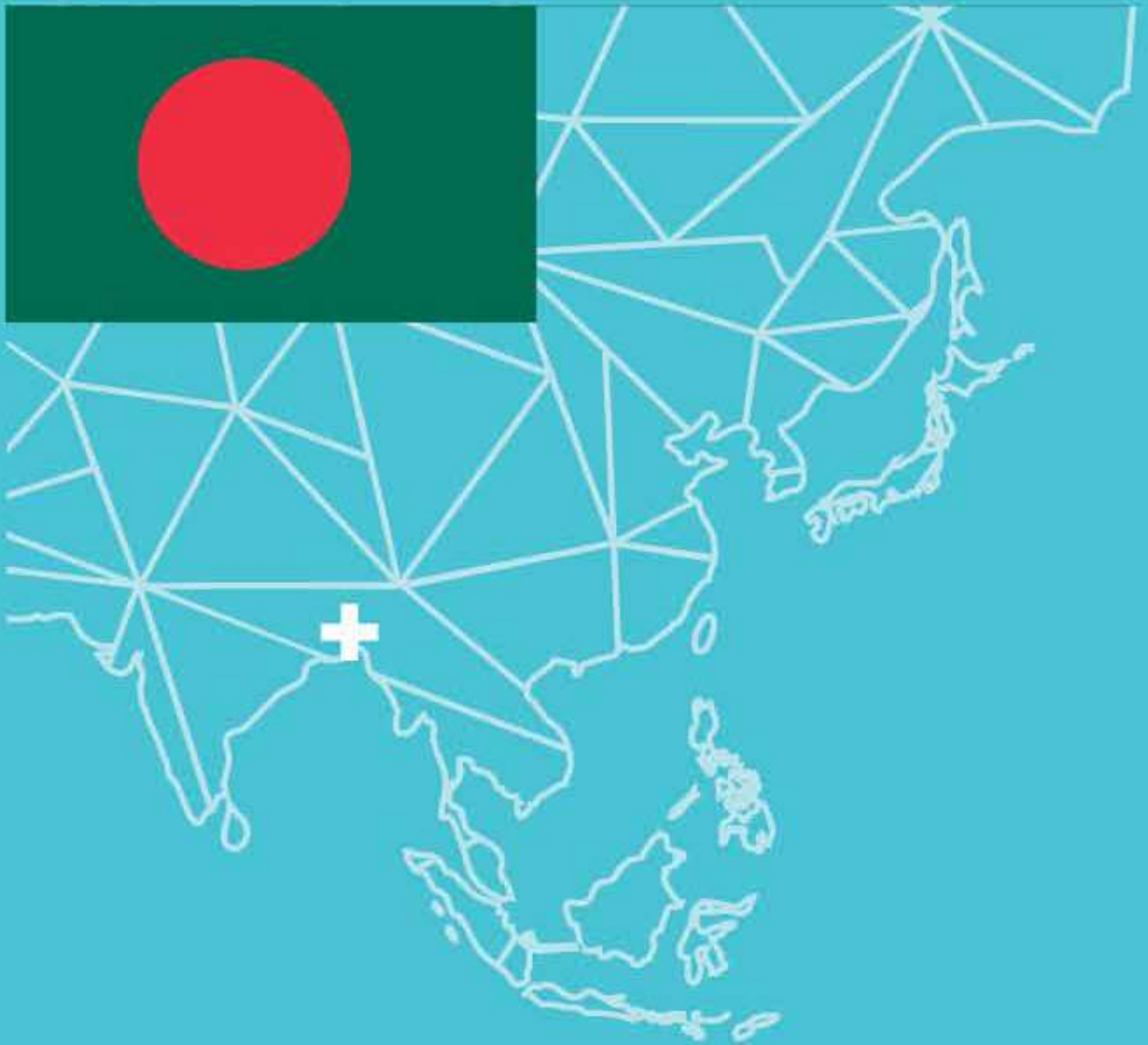
The Government should introduce mandatory registration of marriages, including religious marriages.

Recommendation 4

The Government should move away from piecemeal responses to addressing discrimination and violence against minority South African women and adopt a holistic approach.



Country reports



Bangladesh

Bangladesh



CONTEXT

The People's Republic of Bangladesh has an estimated population of over 163.05 million people. The Population and Housing Census 2011 reported that Sunni Muslims constitute 90% of the total population and Hindus 9.5%.¹ Other minority communities include Christian (mostly Roman Catholic), Theravada-Hinayana Buddhist, Shia Muslims, Bahais and Ahmadiyya Muslims. Ethnically, the majority population is Bengali. The country also includes ethnic tribal and aboriginal groups.

According to the United Nations Development Programme (UNDP) 2018 Human Development Report,² Bangladesh ranks 136 out of 189 countries, placing it in the "medium human development" category. In the 2018 World Economic Forum Global Gender Gap Index (GGI), Bangladesh was ranked 48 out of 149 countries, performing ahead of the other South Asian countries. Bangladesh ranks highly on political empowerment and is in the top five countries globally with a gender parity of more than 50%.³

LEGAL FRAMEWORK

Constitution of the People's Republic of Bangladesh

The Fifth Amendment to the Constitution of Bangladesh in 1977 removed the principle of secularism and the Eighth Amendment in 1988 inserted Article 2A declaring Islam the official state religion. The 15th Amendment of the Constitution in 2011 reinserted the principle of secularism into the Constitution. Article 2A, however, remains, providing: "The state religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religions."

Article 27 of the Constitution (Equality before the law) provides: "All citizens are equal before law and are entitled to equal protection of law", and Article 28 (Discrimination on grounds of religion etc.) of the Constitution provides:

1. The State shall not discriminate against any citizen on ground only of religion, race, caste, sex or place of birth.
2. Women shall have equal rights with men in all spheres of the State and of public life.
3. No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.
4. Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens."

Article 28(4) of the Constitution explicitly provides for affirmative action or positive discrimination and permits the State to make special provisions in favour of women. Article 102(1) of the Constitution states that the High Court may give such directions or orders to any person or authority required to enforce any of the fundamental rights of the Constitution, including equality before the law and the prohibition against discrimination..

¹ Bangladesh Bureau of Statistics (BBS) Statistics and Informatics Division (SID) Ministry of Planning, *Bangladesh Population and Housing Census 2011. National Report Volume 4, Socio-economic and Demographic Report*, December 2012: http://203.112.218.66/WebTestApplication/userfiles/Image/BBS/Socio_Economic.pdf

² UNDP *Human Development Indices and Indicators: 2018 Statistical Update. Bangladesh*: http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/LKA.pdf.

³ World Economic Forum, *The Global Gender Gap Report 2018*: http://www3.weforum.org/docs/WEF_GGGR_2018.pdf.

DOMESTIC LAWS

A. Family laws

There are no uniform codified family laws which apply to all citizens of Bangladesh irrespective of religion. The majority of the population are Muslims who follow the Sunni *Hanafi* school of Islamic jurisprudence. Marriage, divorce, maintenance and inheritance are regulated by Islamic law. The Muslim Personal Law (Shariat) Application Act 1937 applies to Muslims in matters relating to family affairs⁴ and provides that “notwithstanding any custom or usage to the contrary”, in matters related to intestate succession, marriage, dissolution of marriage, dower and guardianship, the final decision in cases where the parties are Muslims “shall be the Muslim Personal Law (Shariat)”.⁵

Whilst marriage-related laws for Muslims are largely uncodified, a small number of laws have been passed to address specific aspects of family-related matters including:

- ~ The Dissolution of Muslim Marriages Act 1939.
- ~ The Muslim Family Laws Ordinance 1985.
- ~ The Muslim Marriages and Divorces Registration Act 1974.

There are also certain laws on family matters which apply to all religions, including:

- ~ The Guardians and Wards Act 1890.
- ~ The Dowry Prohibition Act of 1980.
- ~ The Child Marriage Restraint Act 2017.

B. Administration of family law

There are no Sharia courts, therefore Muslim family law matters are dealt with by State Family Courts, with judges who may be non-Muslim. The Family Courts were established under the Family Courts Ordinance 1985 and are the courts of first instance for personal status cases of all religious communities (although different religious communities are governed by their own personal status laws).

Family Courts have jurisdiction over five matters:

- a. Dissolution of marriage.
- b. Restitution of conjugal rights.
- c. Dower (payment made by the groom to the bride at the time of marriage).
- d. Maintenance.
- e. Guardianship and custody of children.

Family Courts apply the particular personal law to which applicants before it are subject, so the decision handed down by the Court will reflect the religious personal law of the parties in each case, including for Muslims the *madhab* (schools of jurisprudence) which apply in relation to Muslim personal status laws.

Key issues regarding Muslim family law

1. Child and forced marriage

The Bangladesh Majority Act 1875 s.3 defines a person under the age of 18 years to be a child, but this law does not apply in relation to marriage or divorce.

The minimum age of marriage is not equal between males and females. There are inconsistencies in the laws, where a general law defines one age and a personal status law referring to Muslims states otherwise.⁶ In the Muslim Family Laws Ordinance 1961, the minimum age of marriage for females is 16 years and for males, 21 years.⁷

The Child Marriage Restraint Act 2017 replaced the Child Marriage Restraint Act 1929, under which the minimum age for marriage continues to be 18 years for females and 21 years for males. However, exceptions are permitted in relation to the marriage of girls by order of the Court and with the consent of her parents.⁸ Under the Child Marriage Restraint Act 2017 only certain documents will be accepted as proof of age, including birth certificates, national identity cards and secondary school certificates.⁹

4 O. Sial, *A Research Guide to the Legal System of the Peoples' Republic of Bangladesh*, 2008: <http://www.nyulawglobal.org/globalex/Bangladesh.html>.

5 Muslim Personal Law (Shariat) Application Act 1937, s.2: <http://bdlaws.minlaw.gov.bd/act-173/section-21540.html>.

6 Center for Reproductive Rights, *Child Marriage in South Asia Briefing Paper*, 2013:

https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/ChildMarriage_BriefingPaper_Web.singlepage.pdf.

7 Muslim Family Law Ordinance 1961: <http://bdlaws.minlaw.gov.bd/act-305.html?hl=1>.

8 Child Marriage Restraint Act 2017, s.19.

9 *Ibid.*, s.12.

The Child Marriage Restraint Act 2017 prescribes sanctions for persons facilitating or marrying underage girls, including those responsible for the solemnisation of the marriage, marriage registrars and parents. The sanctions range from imprisonment of six months to two years and fines up to 100,000 taka (approximately \$1000).

Under the Dissolution of Muslim Marriages Act 1939, if a girl is married before she is 18 years of age she has the right to repudiate the marriage before she is 19 – but only if the marriage is not consummated.¹⁰ The Muslim Marriages and Divorces Rules 1975 was intended to strengthen the responsibilities of marriage registrars, but registrars continue to fail to identify and prevent forced marriages.¹¹ Moreover, while the Bangladeshi Government has made promises to eliminate forced marriage, little has been accomplished.¹²

According to women's rights advocates, forced marriages of girl children are the most easily identified as child marriages, whereas forced marriages of women can be more difficult to distinguish because of the prevalence of cultural norms around traditional arranged marriage.¹³

Due to damaging gender norms, families in poorer, rural areas often see girl children as an economic and social burden and agree child marriages to remove the financial strain from the family.¹⁴ Early marriages are often connected to the avoidance of higher dowry demands. A further justification given by parents for child marriage is to ensure the security of their daughters.¹⁵

2. Women's consent and capacity to enter into marriage

Under *Hanafi fiqh* (school of jurisprudence), family law does not require a guardian *wali* for a Muslim woman to marry. When a Muslim adult couple wish to marry without the involvement of parents/family or despite their opposition, they can be married in the presence of two witnesses or by the marriage registrar without the need for approval from the court. A Muslim woman may negotiate her rights and entitlements by the insertion of stipulations in the marriage contract, which is considered

valid under religious law. Whilst legally there is no rule preventing renegotiation of her rights and entitlements after the marriage, this is rare.¹⁶

3. Polygamy

The Muslim Family Laws Ordinance 1961 obliges a Chairperson of a union council/union *parishad* (the smallest rural administrative and local government units) of Bangladesh to convene an Arbitration Council to resolve certain family law matters. The Arbitration Council oversees applications to marry additional wives and reviews the conditions under which such applications are made.¹⁷

The Muslim Family Law Ordinance s.6 permits polygamy only with the written permission of the Arbitration Council and this may involve obtaining the permission of the existing wife/wives. Absence of such permission may result in sanctions for the husband but does not affect the validity of the later marriage. Under Article 6(2) of the Muslim Family Laws Ordinance 1961, a man must state the reasons for a further proposed marriage and whether his current wife or wives has/have consented.¹⁸

Section 6(5) of the Muslim Family Law Ordinance sanctions a man to imprisonment for one year and/or a fine of up to 10,000 taka for contracting another marriage without the permission of the Arbitration Council. The husband will also have to pay his existing wife/wives their respective dowers immediately.¹⁹ Under the Dissolution of Marriages Act s.2(f), a wife may seek dissolution of the marriage if her husband takes another wife and does not treat her equitably.²⁰ It is reported by women's rights advocates that the composition of the Arbitration Council is all male and the Council are quick to give permission to marry an additional wife without adequate consideration of the consent of existing wife/wives.²¹

4. Unequal provisions for divorce

Bangladesh has made a reservation to Article 16(1) (marriage and family relations) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and does not provide for equal rights of divorce for men and women.

10 Dissolution of Muslim Marriages Act 1939, s.2: <http://bdlaws.minlaw.gov.bd/act-180/section-4813.html>.

11 Women Living Under Muslim Laws, *Knowing our rights: Women, family, laws and customs in the Muslim world*, (p.85), 2006: http://www.wluml.org/sites/wluml.org/files/import/english/pubs/pdf/knownour%20rights/kor_2006_en.pdf.

12 Human Rights Watch, *Bangladesh: Girls Damaged by Child Marriages*, 2015: <https://www.hrw.org/news/2015/06/09/bangladesh-girls-damaged-child-marriage>

13 US Embassy in Bangladesh, *Forced Marriage*: <https://bd.usembassy.gov/us-citizen-services/forced-marriage/>.

14 Ibid.

15 S. Huda, *Presentation on Analysis of Laws on Child Marriage in South Asian Countries*, CARE Bangladesh, 20 August 2017, BRAC Centre, Dhaka.

16 S. Huda, *Protection of Women in the Marriage Contract: An Exploration in Bangladesh Journal of Laws*, Vol. 5, No.1 & 2, June & December 2001; Bangladesh Institute of Law and International Affairs (pp.138-181).

17 K. Hossain, *In Search of Equality: Marriage Related Laws for Women in Bangladesh*, *Journal of International Women's Studies*, Vol. 5(1), 2003, p.100: <http://vc.bridgew.edu/cgi/viewcontent.cgi?article=1524&context=ijws>.

18 Muslim Family Laws Ordinance 1961: <http://bdlaws.minlaw.gov.bd/act-305/section-13538.html>.

19 Ibid.

20 The Dissolution of Marriages Act 1939: http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=180.

21 Op. cit. at fn 18, p.100.

i. Unilateral divorce by a husband (*talaq*)

Under uncodified Islamic family law, the Muslim husband has the unilateral right to *talaq* divorce.²² However, s.7 of the Muslim Family Laws Ordinance provides certain restrictions on the husband's right of divorce and states that a husband must, after his pronouncement of *talaq* (in any form) notify in writing the Chairperson of the Arbitration Council²³ and provide a copy of the notice to his existing wife.²⁴ The Chairperson will then convene the Arbitration Council for the purpose of attempting to reconcile the parties. If reconciliation is unsuccessful, *talaq* (divorce) ensues after the expiration of 90 days from the day on which notice was delivered to the Chairperson.

ii. Divorce by wife (*fasakh* or *khul'*)

A Muslim wife has the right of divorce without the approval of the court by way of a. *Talak-e-tawfeez* (right of *talaq* delegated by the husband); b. *mubarat* (mutual consent divorce); or c. *khula* (redemptive divorce – where the husband agrees to the wife's proposal of divorce in exchange for compensation, which usually (but not always) involves the wife giving up her right to dower. Case law has established that a Muslim wife may be entitled to a divorce by way of repudiation (*khula*) without the husband's consent on an application to the court.²⁵

In situations where out-of-court procedures for divorce are not available to Muslim women, they may submit an application for judicial dissolution (*fasakh*) of marriage with proof of cause. Under the Dissolution of Muslim Marriages Act 1939, there are grounds for a woman to obtain a decree for the dissolution of her marriage including, but not limited to, the following:

- ~ her husband treats her cruelly including, but not limited to, cruelty of conduct;
- ~ her husband forces her to lead an "immoral life";
- ~ her husband obstructs her observing her religion;
- ~ her husband has been missing for four years;
- ~ her husband has not provided maintenance for two years;
- ~ her husband has taken another wife;
- ~ her husband has been sentenced to imprisonment;
- ~ her husband is impotent.²⁶

C. Violence against women in the family

The Domestic Violence (Prevention and Protection) Act 2010 defines domestic violence as "physical abuse, psychological abuse, sexual abuse or economic abuse against a woman or a child of a family by any other person of that family with whom the victim is, or has been, in a family relationship". The Act criminalises violence against women and includes physical, psychological, sexual or economic abuse against a woman.²⁷

The Penal Code criminalises offences committed against women including rape, abduction, kidnapping, criminal force and assault. The Women and Children Repression Prevention Act 2000 addresses serious violent offences against women including acid attacks, rape and rape-related deaths, murder for dowry, kidnapping of women and children, sexual abuse and maiming of children for purposes of begging.²⁸ The Human Trafficking Deterrence and Suppression Act 2012 addresses criminal acts of trafficking in persons and the Acid Crimes Prevention Act 2002 addresses acid-related offences.

The Domestic Violence (Prevention and Protection) Act 2010 sets out the rights and remedies of victims of domestic violence and defines the duties and responsibilities of police officers, enforcement officers and service providers. A police officer who receives a domestic violence complaint has the duty to inform the victim of her rights to apply for protection, access medical services and request free legal services. Amongst remedies, the court can issue protection orders (including restraining the respondent from certain acts); residence orders restraining the respondent from remaining in the family home or the same local area of the victim; and can direct an Enforcement Officer to provide safe shelter for the victim and her children. Under s.16 of the Act, the court is required to review and dispose of an application within six months of receipt of the application.

22. S. Huda, *Untying the knot – Muslim Woman's Right of Divorce and other incidental rights in Bangladesh*; Dhaka University Studies Part-F, Journal of the Faculty of Law Vol. V(1), (pp.133-157), June 1994.

23. Of the relevant administrative area.

24. Muslim Family Law Ordinance 1961: <http://bdlaws.minlaw.gov.bd/act-305/section-13539.html>.

25. *Khurshid Bibi v Baboo Mohammad Amin* (PLD 1967 SC 97).

26. The Dissolution of Muslim Marriages Act 1939: <http://bdlaws.minlaw.gov.bd/act-180/section-4813.html>.

27. Domestic Violence (Prevention and Protection) Act 2010, available at: http://mowca.portal.gov.bd/sites/default/files/files/mowca.portal.gov.bd/page/203db6dc_7c82_4aa0_98a6_8672334b235c/Domestic%20Violence%20Act%20English.pdf.

28. Q. Maruf, *Law Analysis Women & Children Repression Prevention Act 2000. Preventing abuse of law*, 23 March 2013: <https://www.thedailystar.net/news/preventing-abuse-of-law>.

NATIONAL LEVEL REFORM EFFORTS

A. Civil society

Women's groups like the *Mahila Parisad* (Women's Union) have advocated for a uniform family code that applies to all citizens of the country regardless of religion or ethnicity since the late 1980s.²⁹ Women activists have stressed that a uniform family code will liberate women's personal rights from segregation on the basis of religious faith and would provide equality for all women in Bangladesh in relation to their rights to marriage, divorce and maintenance.

B. Government

According to women's rights groups, Muslim family laws were reformed radically in 1937, 1939, 1961 and 1985 as a result of reformists who brought in progressive interpretations of Islam within the Islamic legal tradition. Since then, progress has been stifled as subsequent governments have been reluctant to consider amendments to Muslim family laws.

In the 2015 Bangladesh State Party report to the CEDAW Committee, the Government stated:

"The personal laws are in [line] with the religious provisions of different religious faiths, which in some cases have discriminatory provisions in marriage and divorce, inheritance, guardianship, etc. Modification of personal laws needs agreements by the leaders of all religious faiths. The society is not yet ready to accept such modification and the Government being mindful of the possible repercussion of the conservative religious groups, is taking cautious steps."³⁰

Despite civil society and international pressure to enact a uniform family code in Bangladesh, the Government has been reluctant to do so. The Government in its State Party report claims that the adoption of a uniform civil code is "difficult as the leaders of all religions should agree. The social situation is not yet mature for that. To change the deep-rooted gender norms and attitudes among individuals and in society, well-coordinated bottom-up and top-down approaches are necessary involving the entire society. Sensitization of various groups in a culturally sensitive manner is difficult and time consuming".³¹

INTERNATIONAL OBLIGATIONS

Convention on the Elimination of All Forms of Discrimination against Women

Bangladesh ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in November 1986 with reservations to four articles. Whilst it withdrew reservations to two articles in 2016, its reservations to Article 2 and 16 (1)(c) remain on the grounds that these Articles "conflict with Sharia law based on Holy Quran and Sunna".³²

Bangladesh was most recently reviewed before the CEDAW Committee during the 65th Session in 2016. During the review, the Government noted that it did not intend to reform its personal status laws. In its concluding observations, the CEDAW Committee raised concerns that personal status laws regulating marriage, divorce, inheritance, guardianship and custodial rights within the various religious groups, continue to discriminate against women and girls and that the State Party has yet to consider adopting a unified family code.³³ The Committee made the following recommendations to Bangladesh:

"11. The Committee urges the State party:

- a. To review and repeal all discriminatory laws and legal provisions without delay, in particular personal status laws, in order to harmonize them with its obligations under the Convention;
- b. To adopt, within a clear time frame, a unified family code to ensure the equality of women in matters of marriage, divorce, inheritance and child custody;
- c. To accelerate the adoption of the anti-discrimination law, which is in compliance with the Convention, within a specific time frame;

...

29 S. Nazneen, *Men Aboard? Movement for a Uniform Family Code in Bangladesh*, chp. 4 in M. Al-Sharmani (ed.), *Feminist Activism, Women's Rights and Legal Reform*, 2013.

30 Bangladesh 8th State Party Report to the CEDAW Committee, CEDAW/C/BGD/8, 29 May 2015, para. 23: https://tinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FBGD%2F8&Lang=en.

31 *Ibid.*, para. 97.

32 UN Treaty Collection, CEDAW Ratifications available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-8&chapter=4&lang=en#EndDec.

33 Committee on the Elimination of Discrimination against Women, Concluding Observations on the 8th periodic report of Bangladesh, CEDAW/C/BGD/CO/8, para. 10, 25 November 2016: <https://documents-ddsny.un.org/doc/UNDOC/GEN/N16/402/50/PDF/N1640250.pdf?OpenElement>.

17. The Committee recommends that the State party:

...

- c. Take immediate measures to end the harmful practice of child marriage by addressing the root causes, raising awareness among parents, teachers and community and religious leaders about the negative effects of child marriage on the health and wellbeing of girls, holding accountable those responsible and retaining 18 years of age as the legal minimum age of marriage for girls without exception. In doing so, the State party should be guided by joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2014) on harmful practices...

43. The Committee calls upon the State party to review its personal laws and adopt a uniform family code applicable equally to members of all religions and confessions in the country and ensure that women have equal rights to marital property during marriage and upon divorce.³⁴

Convention on the Rights of the Child

Bangladesh ratified the Convention on the Rights of the Child (CRC) in August 1990 with reservations to Article 14(1).³⁵ Its most recent review was during the CRC Committee's 70th Session in 2015. In its concluding observations, the CRC Committee recommended the following recommendations with regard to child marriage and harmful practices:

"45. The Committee urges the State party to ensure that the minimum age of marriage set in the Children Act is applied. It also recommends that the State party:

- a. Develop awareness-raising campaigns and programmes on the harmful effects of early marriage on the physical and mental health and wellbeing of girls, targeting households, local authorities, religious leaders and judges and prosecutors;

- b. Establish protection schemes for victims of child and forced marriage who file a complaint;
- c. In the light of joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices (2014), take active measures to put an end to harmful practices against children in the State party."³⁶

Sustainable Development Goals

Bangladesh has made commitments towards meeting the Sustainable Development Goals (SDGs), including Goal 5 on gender equality and the empowerment of women and girls. SDG Indicator 5.1.1 identifies family law as one of the legal frameworks that must be reformed to accelerate progress to promote, enforce, and monitor gender equality. Reform of family laws with provisions and procedures that discriminate against women and girls is a key component for ensuring progress under the SDGs.

KEY BARRIERS AND CHALLENGES TO REFORM

- ✎ Within Muslim communities in Bangladesh traditional and religious leadership is male-dominated and male-led with the result that efforts to reform Muslim family laws by Muslim women's groups are undermined by conservative groups, particularly if they challenge perceived "religious" or Islamic law.
- ✎ Civil society and women's groups in Bangladesh are more secular-leaning in their advocacy, campaigning to remove religion from marriage and family matters.
- ✎ There appears to be a lack of political will by Government to reform existing family laws and consider introducing a uniform civil law.
- ✎ Bangladesh is a highly populated country with a multitude of socio-political and development-related issues, including high rates of poverty, illiteracy and inequalities across community and geographic regions. Discussions and debates relating to marriage and family matters and particularly access to justice, legal rights and procedures are not uniform across the country.

³⁴ Ibid.

³⁵ United Nations Treaty Collection, CRC Ratifications available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsq_no=IV-1.1&chapter=4&lang=en#EndDec.

³⁶ Committee on the Rights of the Child, Concluding Observations on the 5th periodic report of Bangladesh, CRC/C/BGD/CO/5, 30 October 2015: https://ibininternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FBGD%2FCO%2F5&lang=en.

**RECOMMENDATIONS FOR REFORM OF
MUSLIM FAMILY LAW IN BANGLADESH****Recommendation 1**

The Government should conduct national and community consultations on the problems and challenges relating to family laws and practices. Muslim women's groups should be directly engaged in this process.

Recommendation 2

The Government should set up an inclusive inquiry to determine the merits of a uniform family code in consultation with representatives from civil society, media and the legal community and including all ethnic, indigenous and minority groups.

Recommendation 3

The Child Marriage Restraint Act should be amended to repeal exceptions permitting child marriage below the age of 18 years.

Recommendation 4

Registration of all marriages, whether civil or religious, should be mandatory with explicit sanctions for non-registration of marriage. Procedures for Muslim men and women to obtain a divorce should be equalised.

Recommendation 5

The Government should take enact legislation to combat domestic violence, in consultation with women's rights and civil society groups.

Recommendation 6

The Government should take concrete steps to enable it to withdraw reservations to CEDAW Article 2 and Article 16(1)(c).



Brunei Darussalam

Brunei Darussalam



CONTEXT

Brunei Darussalam is a small nation on the island of Borneo, with an estimated population of 433,285 people. According to the latest demographic survey, Malays constitute 66.3% of the population, while the remaining population is made up of 11.2% Chinese and 3.4% indigenous communities. Islam is the state religion of Brunei and is practiced by a majority of its people (66%), while 13% practice Buddhism and 10% practice Christianity.¹ Most Muslims are Sunni and follow the *Shafi'i* school of jurisprudence, which also constitutes the primary source of law in the country.²

According to the 2018 Human Development Report Statistical Update, released by the United Nations Development Programme (UNDP), Brunei ranks 39 out of 189 countries placing it as a “very high human development” category.³ In the 2018 World Economic Forum Global Gender Gap Index, Brunei was ranked 90 out of 149 countries indicating a significant narrowing of its gender gaps in women’s labour force participation, specifically with regard to legislators, senior officials and managers, and professional and technical workers.⁴

LEGAL FRAMEWORK

Constitution of Brunei Darussalam

There are no provisions relating to guarantees of equality enshrined in Brunei’s Constitution.⁵ Article 3 of the Constitution declares Islam, in accordance with the rules of *Shafi'i* jurisprudence (*fiqh*), as the official religion of the State. The preference for *Shafi'i* jurisprudence is also reflected in s.43(1) of the Religious Council and *Kadis* (Muslim judge) Courts Act.⁶

In April 2019, the Government enacted a new Syariah⁷-based Penal Code which introduced various rigid and controversial *hudud* punishments and provisions, such as stoning for extramarital sex, amputation for stealing, the criminalisation of abortion, charging pubescent children as adults for conviction of offences, and lashing for homosexual acts.⁸

Human Rights Watch, in a commentary of the changes to the code, summarised its impact as follows:

“Provisions of the Sharia penal code violate Brunei’s obligations under international human rights law, including the rights to life, freedom from torture and other ill-treatment, expression, religion, privacy, and individual autonomy, among others. The code is discriminatory on its face and violates many rights of women, children, and lesbian, gay, bisexual, and transgender people, among others.”⁹

DOMESTIC LAWS

A. Family laws

The Bruneian Islamic Family Law Act (BIFLA) is the main codified law that governs matters relating to marriage and family relations of the Muslim majority population in Brunei.¹⁰ In the absence of codified laws that sufficiently address a particular matter of personal status of Muslims, according to s.144 of BIFLA, the rules of any Muslim sect, which the court considers valid, apply.

Marriage and family relations of Brunei’s non-Muslim minority communities are governed by laws relating to civil marriages or their own laws and customs.¹¹

1 World Population Review 2019, Brunei: <http://worldpopulationreview.com/countries/brunei-population/>, accessed 15 July 2019.

2 Emory University Scholar Blog on Brunei: <https://scholarblogs.emory.edu/islamicfamilylaw/home/research/legal-profiles/brunei-negara-brunei-darussalam/>, accessed 15 July 2019.

3 UNDP Human Development Report, *Brunei Statistical Update 2018*: http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/BRN.pdf accessed 15 July 2019.

4 Global Gender Gap Reports 2018: <http://reports.weforum.org/global-gender-gap-report-2018/>.

5 Brunei’s Constitution, 1959, available at: http://www.agc.gov.bn/AGC%20Images/LOB/cons.doc/dokumen-dokumen_perlebagaan_2008.pdf.

6 Religious Council and *Kadis* Courts Act, 1955, s.43(1), available at: <http://www.agc.gov.bn/AGC%20Images/LOB/pdf/Cap.77.pdf>; and Kerstin Steiner, *Comparative Law in Syariah Courts: A Case Study of Singapore, Malaysia and Brunei*, Comparative Law before the Courts (p. 601), Oxford University Press, 2015.

7 Malay spelling of Sharia.

8 Liang, Annabelle, *The Diplomat, Brunei’s Controversial New Shariah Laws Are Now in Effect*, 3 April 2019:

<https://thediplomat.com/2019/04/bruneis-controversial-new-shariah-laws-are-now-in-effect/>.

9 Human Rights Watch, *Brunei: New Penal Code Imposes Maiming, Stoning*, 3 April 2019: <https://www.hrw.org/news/2019/04/03/brunei-new-penal-code-imposes-maiming-stoning>.

10 Islamic Family Law Act, 2000: http://www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap217.pdf.

11 For instance, the Marriage Act, 1948: http://www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap076.pdf; Chinese Marriage Act, 1955:

http://www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap126.pdf; Married Woman Act, 1999: http://www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap190.pdf; as referenced in Brunei State Party report, U.N. Doc. CEDAW/C/BRN/1-2 (2013) (para. 16.1).

Key issues regarding Muslim family law

1. Framework of Muslim family law

BIFLA provides 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 her husband. This is implemented via the following provisions in the Act:

- As per s.61(1) of BIFLA, a husband is obligated to pay his wife maintenance.
- As per s.61(2) of BIFLA, a wife is obligated to obey the lawful wishes and demands of her husband or risk losing her maintenance. A wife is deemed disobedient (*nusyuz*) if, without valid reason, she: i. withholds her association with her husband; ii. leaves her husband’s home against his wishes; or iii. refuses to move with him to another home or place.
- Section 129 of BIFLA penalises a husband who fails to give proper justice to his wife.
- Section 130 penalises a wife who willfully disobeys an order of her husband.

2. Minimum age of marriage and unregistered marriages

According to the 2015 Brunei Statistical Yearbook, 4% of Muslims married in 2015 were below 19, of which three times more girls than boys fell into this category.¹²

BIFLA does not explicitly state a minimum age of marriage for Muslims.¹³ But other laws in the country for non-Muslims do: under the Marriage Act 1948 (which regulates marriages other than for Hindus, Buddhists, Dayaks or other minorities governed by other laws), marriages are valid if both parties to the marriage have reached 14 years of age.¹⁴ In the instance of Chinese marriages solemnised under the Chinese Marriages Act, the female must be over 15 years of age for marriage to be valid and registered.¹⁵

Despite the fact that the Compulsory Education Order of 2007 provides for nine years compulsory education for all children including girls,¹⁶ the Government of Brunei in its 2015 report to the Committee on the Convention on the Rights of the Child stated that the Government had no plans to increase the minimum age of marriage in the country.¹⁷

3. Women’s consent and capacity to enter into marriage

Consent of both parties, male and female, regardless of age, is mandated under BIFLA, thus prohibiting forced marriage. However, a prospective bride (including an adult woman) requires the consent of a marital guardian (*wali*) to enter into marriage. The guardian must be Muslim and a male relative.¹⁸

According to s.8(3) of BIFLA, a *wali* may only partake in the solemnising of the marriage of a prospective bride after she has given her consent.¹⁹ BIFLA also clarifies the requirement of consent of divorced women. Section 13(2)(b) provides that a divorced woman, once she has passed the waiting period after a divorce (*iddah*), must give “clear consent” to remarry.²⁰

Muslim marriages must be solemnised by a state-appointed official, known as *jurunikah*, who is authorised to conduct the solemnisation of Muslim marriages. The *jurunikah* will only solemnise a marriage after both the prospective bride and her *wali* have consented to the marriage.²¹ A *jurunikah* who has been authorised to “give away” a woman in marriage may solemnise the marriage of a woman who does not have a *wali*. In addition, if the prospective bride’s *wali* opposes the marriage, she may seek the authorisation of a judge to get married. The judge may authorise the marriage after determining that the *wali* has refused consent without reasonable grounds.²²

¹² Brunei Department of Statistics, *Brunei Darussalam Statistical Yearbook 2015* (table 1.18, p. 26), 2015:

http://www.dep.gov.bn/DEPD%20Documents%20Library/DOS/BDSYB/BDSYB_2015.pdf.

¹³ Brunei State Party report, U.N. Doc. CRC/C/BRN/2-3 (2015), paragraph 65.

¹⁴ Brunei State Party report 2015 to the Committee on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), referencing the Marriage Act (Cap. 76).

¹⁵ Chinese Marriages Act of Brunei: http://www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap126.pdf.

¹⁶ Brunei Darussalam, *Compulsory Education Order 2007* (No. S 56), International Labour Organisation:

http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=79080&p_country=BRN&p_count=90&p_classification=04&p_classcount=7.

¹⁷ Op cit. at fn 13, paragraph 66.

¹⁸ Islamic Family Law Act (2000), ss.2, and 12: http://www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap217.pdf.

¹⁹ Ibid., s.8(3).

²⁰ Ibid., s.13(2)(b).

²¹ Ibid., s.8(4).

²² Ibid., ss.8(7), 12(b).

Section 12 of BIFLA provides that a marriage is void and cannot be officially registered unless both parties to the marriage have consented to it. The mandatory registration of marriages is provided for in s.24. Non-registration of a marriage does not necessarily invalidate the marriage. However, the failure to register a marriage is an offence.²³

Section 35(a) of BIFLA makes it an offence for any person to use any force, threat, or deception to compel a person to marry against his or her will. Section 35(b) makes it an offence for any person who uses any force, threat or deception to prevent a man who has attained the age of 18 or a woman who has attained the age of 16 from entering into a valid marriage. Section 135 makes it an offence to: i. solemnise or make any regulation for the solemnisation of a marriage in contravention of BIFLA; or ii. willfully officiate any invalid marriage under BIFLA.

4. Marriage contracts

At the time of solemnisation of the marriage a couple can prepare the *Ta'liq* Certificate. This is a document containing the vows expressed by the couple. Both spouses may mutually agree to stipulate conditions of their marriage in the *ta'liq*. The *ta'liq* provisions must be registered by the registrar in the marriage register.²⁴ A breach of one or more of the vows may give rise to a wife's entitlement to seek a divorce. The *ta'liq* may be standard or include additional conditions mutually agreed by both parties.²⁵

Upon registration of a marriage, the Registrar of Muslim Marriages, Divorces, Annulments and *Ruju'* (Registrar) will issue copies of the following three documents in a form prescribed by law to both spouses: Marriage Certificate; Marriage Card; and *Ta'liq* Certificate.²⁶

5. Polygamy

A Muslim man may marry up to four wives at one time. Section 13(1) of BIFLA prohibits a woman from entering into a polygamous marriage. According to s.23(1), a man is prohibited from entering into a polygamous marriage except with the written permission of a judge. However, s.23(1) also provides that a man may officially register the polygamous marriage which was entered into without a judge's permission, subject to a penalty (fine, imprisonment or both) under s.123.

Section 23(4) of BIFLA makes it mandatory for the polygamous marriage to be solemnised and registered in accordance with the procedure set out with regard to a (first) marriage.

In order to obtain court permission for a polygamous marriage, an application for permission must be accompanied by a declaration by the man stating: i. the grounds on which the proposed marriage is claimed to be just and necessary; ii. his present income, particulars of his commitments and ascertainable financial obligations and liabilities; iii. the number of his dependents including persons who would be his dependents as a result of the proposed marriage; and iv. whether the consent or views of the existing wife were obtained or not regarding the proposed marriage. The judge may grant permission if he is satisfied that the application would be approved in accordance with *Hukum Syara'* (Syariah).²⁷

6. Unequal provisions for divorce

Under BIFLA, the four main mechanisms for divorce are as follows:

- a. unilateral repudiation (*talaq*);
- b. conditional divorce (*tal'iq*);
- c. judicial divorce;
- d. redemptive divorce (*cerai tebus talāq or khul'*).

A marriage may also be annulled.²⁸

BIFLA makes it mandatory to register a divorce. The failure to register a divorce is an offence.²⁹

Unilateral divorce by husband (*talaq*)

A husband may unilaterally repudiate the marriage, which must generally take place in a court. Although a husband may pronounce *talaq* outside the court and without the permission of the court:³⁰

- ☞ Section 55 of BIFLA provides that he is required to report the pronouncement of the *talaq* to the court within seven days of the pronouncement;
- ☞ Section 124 makes it a punishable offence for a man to divorce his wife by pronouncement of *talaq* in any form outside the court and without the court's permission and prescribes a penalty (fine, imprisonment or both) for so doing.

²³ Ibid., ss.24, 32, 125, 139.

²⁴ Ibid., s.21.

²⁵ Ibid., s.21(1).

²⁶ Islamic Family Law Act (2000), ss.21, 22: http://www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap217.pdf.

²⁷ Ibid. ss.23(2), 23(3).

²⁸ Ibid., ss.40-51.

²⁹ Ibid., ss.54-55, 124-125, 139.

³⁰ Islamic Family Law Act, 2000, ss.41-42, 55, 124.: http://www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap217.pdf.

Judicial divorce by wife (*fasakh*)

A married woman may, if entitled to a divorce pursuant to the terms of her *Ta'liq* Certificate, apply to the court to pronounce that such a divorce has taken place. The court must, before approving the divorce, examine the application and make an inquiry as to its validity. If the court is satisfied the divorce is valid, the court must pronounce and record such a divorce.³¹

A wife's valid grounds for seeking a judicial divorce by way of *fasakh* include her husband's:

- i. prolonged absence for more than one year;
- ii. detention for a year or more;
- iii. failure to provide maintenance for more than four months;
- iv. imprisonment of more than three years (a wife may seek divorce after one year);
- v. failure to perform marital obligations for over a year;
- vi. impotence of which the wife was not aware;
- vii. incurable or severe physical or mental illness provided certain conditions are met.³²

In addition, a wife may seek judicial divorce by way of:

- ☞ *Syiqaq*, if she has been mistreated or assaulted by her husband, or if he has caused harm to her body, modesty, or property by words or actions. If the wife's claim is proven and reconciliation between the spouses is impossible, the court will grant a divorce. If her claim is not proven and she insists on her claim, the couple will be required to undergo a reconciliation process. If after three rounds of reconciliation and two different panels of two arbitrators *hakam*, reconciliation fails, the court will grant a divorce.
- ☞ *Dharar Syar'ie*, if her husband:
 - i. habitually assaults her or makes her life unbearable through cruelty;
 - ii. associates with "women of evil repute", or leads and "infamous life";
 - iii. attempts to force her to lead an immoral life;
 - iv. disposes of her property or denies her from exercising legal rights over it;
 - v. prohibits her religious practice;
 - vi. does not treat her equally with other wives in the event her husband is in a polygamous marriage.³³

Case studies

In the case of *Ahjasiah binti Hj. Anpal v Samsudin bin Osman*, the wife filed for divorce on the basis that her husband had failed to provide for her financially. The husband in turn claimed that his wife was disobedient *nusyuz*. After examining the evidence provided by both parties, the court found that the husband had failed to provide his wife with maintenance and that he had also failed to prove any of his claims that his wife was disobedient *nusyuz*. The court described such behaviour as a "serious matter."

In the case of *Serbanun binti Mumin v Mat Jani bin Sulaiman*, a wife again filed for divorce on the basis that her husband had failed to provide for her financially. The court heard the case despite the absence of the husband. The court considered the evidence provided by the wife and also required her to swear an oath that the evidence she provided was true, as the husband was not present. The wife swore the oath and the court granted the divorce.

Divorce by repudiation (*khul'*)

A wife may seek redemptive divorce (*khul'*), whereby she is granted a divorce in exchange for a mutually agreed sum of compensation paid to the husband. If both parties are unable to reach a mutual agreement on the amount of compensation to be paid, the court may assess the amount in accordance with *Hukum Syara'*, having regard to the status and financial means of the spouse, and to the dowry (*mas kahwin* or *mahr*). Once the amount of compensation has been fixed by the court, should the husband still refuse the terms of the divorce, the court will nonetheless grant the divorce.³⁴

B. Violence against women in the family

There is no specific legislation that criminalises acts of domestic violence in Brunei. However, BIFLA contains provisions on *Dharar Syar'ie'* that are specifically applicable to domestic violence.

Section 60A of BIFLA defines *dharar Syar'ie'* as:

- ☞ "willfully or knowingly causing, or attempting to cause, a family member fear of hurt;
- ☞ causing hurt to a family member by such act which is known or ought to have been known would result in hurt;
- ☞ compelling the family member by force or threat to engage in any conduct or act from which she or he has a right to abstain;

³¹ *Ibid.*, s.45.

³² *Ibid.*, s.46.

³³ *Ibid.*, ss.43-44.

³⁴ *Ibid.*, s.48.

- ❧ wrongfully confining or restraining a family member against her or his will;
- ❧ continual harassment with intent to cause distress, annoyance or humiliation, or knowing that it is likely to cause distress, annoyance or humiliation, to a family member;
- ❧ causing destruction, damage or loss of property of a family member, or causing financial loss to a family member.”

Sections 60B and 60C of BIFLA mandate a court to issue a protection order, or expedited protection order, restraining a perpetrator of *dharar Syarie* from approaching the family member concerned after being satisfied that *dharar Syarie* has been committed or is likely to be committed against the family member concerned and that it is necessary for the protection of the family member.

Section 60D mandates the court to attach a power of arrest to a protection order or expedited protection order. Section 60E mandates a court to award compensation to a victim of *dharar Syarie* who has suffered personal injuries, destruction or damage to property, loss of property or financial loss as a result of the *dharar Syarie*.

Section 128 makes it an offence for husbands and wives to ill-treat each other.

In addition to BIFLA, the Brunei Penal Code contains more general prohibitions that are applicable to domestic violence. For instance, the Penal Code criminalises:

- i. acts that intentionally cause hurt or grievous hurt;
- ii. acts that insult the modesty of a woman;
- iii. rape.³⁵

The Penal Code does not criminalise marital rape. Instead, the Penal Code exempts forced sexual intercourse (rape) by a man with his wife from being a crime unless the wife is under 13 years old.³⁶

NATIONAL LEVEL REFORM EFFORTS

Civil society

According to CIVICUS,³⁷ the operating conditions for civil society activities in Brunei are highly restricted due to the role and function of the absolute monarch and a governing system which “does not tolerate dissent or the creation of an independent civil society”.³⁸

The recent reform of the Penal Code to be a *Syariah*-based Penal Code adds further restrictions to the rights of citizens with regard to individual and family matters.

Human Rights Watch and multiple other international organisations and agencies have raised serious concerns about recent legislative changes in Brunei, which impose maiming and stoning as punishments.³⁹ In April 2019, for example, 140 civil society organisations operating in member states of the Association of South-East Asian Nations (ASEAN) issued a statement calling on the Government of Brunei to halt the full implementation of *Syariah*-based law through the new Penal Code provisions.⁴⁰ Given these new legislative realities and pre-existing challenges to open debate and civil society advocacy in Brunei, it is hardly surprising that local women’s groups and civil society organisations have made little progress in reforming discriminatory family laws in the country.

INTERNATIONAL OBLIGATIONS

Convention on the Elimination of All Forms of Discrimination against Women

Brunei ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in May 2006 with a reservation to paragraph 2 of Article 9 and paragraph 1 of Article 29 of the Convention.⁴¹

Brunei was most recently reviewed before the CEDAW Committee during the 59th Session in 2014. During the review, the Government noted that it did not intend to reform its personal status laws. In its Concluding Observations,⁴² the CEDAW Committee raised concerns regarding reports that judges often authorise marriages of minor girls based on Muslim personal laws and the lack of mandatory registration of marriages. The Committee recommended that the Government of Brunei take the following action with respect to laws governing marriage and family relations:

35 Brunei Penal Code 1952, ss.319-338, 354-355, 375, 509: <http://www.agc.gov.bn/AGC%20Images/LOB/pdf/Cap22.pdf>.

36 *Ibid.*, s.375.

37 CIVICUS is a non-government organisation which works to strengthen civil society across the world.

38 CIVICUS MONITOR, *Tracking Civil Space – Brunei*, 2019: <https://monitor.civicus.org/country/>.

39 Human Rights Watch – Brunei 2019: <https://www.hrw.org/asia/brunei> and monitors threats and the closing down of civic space.

40 ASEAN SOGIE Caucus, *Statement of ASEAN Civil Society Organizations on the Full Enforcement of Sharia Law in Brunei Darussalam*, April 2019, available at: <https://aseansogiecaucus.org/news/external-news/132-statement-of-asean-civil-society-organizations-on-the-full-enforcement-of-sharia-law-in-brunei-darussalam>.

41 United Nations Treaty Collection–CEDAW Ratifications, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-8&chapter=4&lang=en#EndDec.

42 CEDAW Committee Concluding Observations, Brunei CEDAW/C/BRN/CO/1-2, 14 November 2014:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fCO%2f1-2&Lang=en.

- “39. The Committee recommends that the State party:
- a. Reform the Islamic Family Law Act, taking into consideration the experiences of countries with similar religious backgrounds and legal systems that have successfully harmonized their national legislation with their legally binding obligations under the Convention, specifically with regard to matters of property, divorce, inheritance and the requirement of authorization from the guardian (*wali*) in order to enter into marriage;
 - b. Repeal the law that penalizes unmarried women who leave their parents or *wali*;
 - c. Raise the minimum age of marriage for all girls and boys to 18 years;
 - d. Take systematic and proactive measures to discourage polygamy, with a view to prohibiting it, in accordance with joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women and general comment No. 18 of the Committee on the Rights of the Child on harmful practices.”

Convention on the Rights of the Child

Brunei ratified the Convention on the Rights of the Child (CRC) in December 1995 with the following reservations:

“The Government of Brunei Darussalam expresses its reservations on the provisions of the said Convention which may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the State religion, and without prejudice to the generality of the said reservations, in particular expresses its reservations on Article 14, Article 20 paragraph 3, and Article 21 subparagraphs b, c, d and e of the Convention.”⁴³

Brunei’s more recent review under this Convention was during the 71st Session in 2016. In its Concluding Observations, the CRC Committee recommended the Government of Brunei take the following action with regard to child marriage:

“44. The Committee urges the State party to take effective measures to prevent and combat the practice of child marriage, including all necessary legislative measures, as well as to develop awareness-raising campaigns and programmes on the harmful effects of early marriage on the physical and mental health and wellbeing of girls, targeting households, local authorities, religious leaders, judges and prosecutors.”⁴⁴

Sustainable Development Goals

Brunei has made commitments towards attaining the Sustainable Development Goals (SDGs), including Goal 5 on gender equality and empowerment of women and girls. SDG Indicator 5.1.1 has already identified family law as one of the legal frameworks that must be reformed to accelerate progress to promote, enforce, and monitor gender equality. The reform of family laws with provisions and procedures that discriminate against women and girls is a key component for ensuring progress under the SDGs.

As a member of ASEAN, Brunei Darussalam committed in 2013 to the ASEAN Declaration on the Elimination of Violence against Women and Violence against Children, which acknowledges the importance of strengthening efforts to protect children from all forms of violence, including child marriage in the region.⁴⁵

43 United Nations Treaty Collection – CRC Ratifications: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV:11&chapter=4&lang=en#EndDec.

44 CRC Committee Concluding Observations for Brunei Darussalam, 2016, CRC/C/BRN/CO/2-3:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fBRN%2fCO%2f2-3&lang=en.

45 ASEAN Commission on the Rights of Women and Children, The Declaration on the Elimination of Violence against Women and Elimination of Violence against Children in ASEAN, 2013.

KEY BARRIERS AND CHALLENGES TO REFORM

- ✔ Brunei demonstrates a high level of development and economic prosperity, however, its governing system, one of the few absolute monarchies left in the world, headed by the Sultan, restricts freedom of assembly and expression and as such, poses a significant challenge to women's rights and human rights groups and activists.
- ✔ Brunei continues to be ruled under a state of emergency declared in 1962, which tightly restricts the activities of Civil Society Organisations (CSOs); there is a strong "chilling effect" when all CSO activities are known to be closely monitored.
- ✔ Brunei's society is strongly conservative in terms of religious teachings and the control exercised by the State and its institutions over religious scholarship and discussions. The media is also heavily censored and monitored.
- ✔ Brunei has restrictive laws, lacks constitutional guarantees of equality and legislative avenues to seek redress to rights violations, especially for women and girls.

RECOMMENDATIONS FOR REFORM OF MUSLIM FAMILY LAW IN BRUNEI

Recommendation 1

The Government should urgently repeal provisions in the Syariah Penal Code which violate the human rights and fundamental freedoms of its citizens.

Recommendation 2

The Government should implement its international treaty obligations with urgency by reviewing laws which contradict commitments made under these treaties.

Recommendation 3

The Government should recognise the harm caused to its citizens by repressive State adherence to a State of Emergency and other conservative laws that restrict the ability of all citizens, especially women and girls, to realise the full enjoyment of their human rights and for civil society to thrive.



India

India



CONTEXT

The major religions practised in the Republic of India include Hinduism, Islam and Christianity. Muslims in India account for 14.2% of the population (approximately 200 million people). India has the second largest Muslim population in the world after Indonesia.¹ The majority of Indian Muslims are Sunni, while Shias form a large minority. India's Muslim population is ethnically diverse and includes communities such as Bohras and Kohjas, and it is also home to a sizeable population of Sufis (Islamic mystics) and Ahmaddiyas (a specific sect founded by Mirza Ghulam Ahmed).

According to statistical research and census data, the literacy rate of Muslims in India ranks below the national average. Poverty rates among Muslim communities are also high. The socio-economic and political standing of Muslims is also limited due to various factors, including historical marginalisation and the contemporary political climate that has led to increased discrimination and subjugation of Muslim communities.²

According to the 2018 Human Development Index,³ released by the United Nations Development Programme (UNDP),⁴ India ranks 130 out of 189 countries. In the 2018 World Economic Forum (WEF) Global Gender Gap Index, India was ranked 108 out of 149 countries indicating a "medium human development" rate. According to WEF, India continues to rank third lowest in the world on health and survival and remains the world's least-improved country over the past decade.⁵

LEGAL FRAMEWORK

Constitution of The Republic of India

The preamble of the Indian Constitution of 1949 affirms that India is a "sovereign socialist secular democratic republic". Article 15(1) of the Constitution states "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them." Article 26 guarantees every recognised religious

denomination or section the freedom to manage religious affairs (subject to constraints imposed by the requirements of public order, morality and health).⁶

Article 44 of Part IV of the Indian Constitution on Directive Principles of State Policy states, "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." In the recent past, particularly under the Bharatiya Janata Party (BJP)-led Government, there has been contentious debate as to whether a uniform civil code (UCC) should replace the personal status laws that govern different religious communities in India. The BJP has previously called for the establishment of a UCC and the call was reiterated in its 2019 election manifesto. However, Muslim groups have advocated against a UCC, including Muslim women's rights groups like the Bharatiya Muslim Mahila Andolan (BMMA), which has been campaigning for Muslim family law reform but has rejected calls for a UCC.⁷

DOMESTIC LAWS

A. Family laws

Matrimonial laws in India, including laws on marriage, divorce and related issues, are governed by status laws that govern the different religious communities in India. The Hindu Marriage Act 1955 applies to Hindu communities, Christians are governed by the Indian Christian Marriage Act 1872 and the Divorce Act of 1869, and the Parsi Marriage and Divorce Act of 1936 applies to Parsis. Muslim personal law as applied in India is based on the *Hanafi* school of jurisprudence *fiqh*, in combination with other schools of jurisprudence, and also includes elements of prevailing local customs.

These Muslim personal laws apply throughout India (except for Goa, and Jammu and Kashmir). The Jammu and Kashmir Muslim Personal Law (Shariat) Application Act of 2007⁸ applies to the state and is administered through the Family Courts. A civil law regime applies in Goa and the Goa Family Law⁹ governs all residents irrespective of their faith.

1 Census of India 2011, *Population by religious community – 2011*, Office of the Registrar General & Census Commissioner.

2 C. Zissis, *India's Muslim Population*, Council on Foreign Relations, 22 June 2007: <https://www.cfr.org/background/indias-muslim-population> accessed 27 June 2019.

3 UN India, *India ranks 130 on 2018 Human Development Index*: <https://in.one.un.org/un-press-release/india-ranks-130-2018-human-development-index/> accessed 19 June 2019.

4 UNDP, *Human Development Indices and Indicators: 2018 Statistical Update* <http://hdr.undp.org/sites/all/themes/hdr/theme/country-notes/LKA.pdf>.

5 Economic Times, *India ranks 108th in WEF Global Gender Gap Index 2018*, 18 December 2018: http://economictimes.indiatimes.com/articleshow/67145220.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

6 The Constitution of India available at: <https://www.india.gov.in/my-government/constitution-india/constitution-india-full-text>.

7 Bharatiya Muslim Mahila Andolan (BMMA) India, *Muslim Women Reject Uniform Civil Code, Call for Reform in Muslim Personal Law*, 2015 <https://bmmaindia.com/2015/11/07/muslim-women-reject-uniform-civil-code-call-for-reform-in-muslim-personal-law/>.

8 Jammu and Kashmir Muslim Personal Law (Shariat) Application Act of 2007: <http://jammukashmir.nic.in/common/showOrder.aspx?actCode=N11116>.

9 C. D'Souza, *Family Laws of Goa – Research And Reforms*: <http://www.fid.ulisboa.pt/wp-content/uploads/2014/12/Souza-Carmo-Family-Laws-of-Goa-Research-And-Reforms.pdf>.

All citizens of India have the option of civil marriage and divorce according to the Special Marriage Act 1954,¹⁰ a civil law which applies to all persons of all religions and ethnicities on matters of marriage and divorce. However, in practice couples belonging to specific religious communities generally solemnise marriages according to their own religious rituals and ceremonies under the specific laws that apply to their community.

The Guardian and Wards Act 1890¹¹ applies to all minor children regardless of religion or ethnicity and is a comprehensive code defining the rights and liabilities of guardians and wards.

B. Muslim family laws

There is no codified Muslim family law in India. Muslims in India can choose to be governed by the Muslim Personal Law (Shariat) Application Act 1937.¹² The Act does not set out specific provisions relating to aspects of marriage, it merely makes the following general statement:

“Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq*, *ila*, *zihar*, *lian*, *khula* and *mubaraat*, maintenance, dower guardianship, gifts, trusts and trust properties, and *wakfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).”

The resolution of personal matters is largely dependent therefore on the individual discretion of judges. In the case of divorce, the Dissolution of Muslim Marriages Act 1939¹³ outlines the circumstances in which Muslim women are able to divorce their husbands, as well as their rights once divorced by their husbands. Following years of campaigning by Muslim women’s groups for an abolishment of the unjust practice of triple *talaq* (instant divorce), the practice was banned in August 2018.

C. Administration of Islamic laws

The Family Court Act 1984 established Family Courts to oversee matters of marriage, marital breakdown and related issues including child custody. Muslim personal status law matters are overseen by the Family Courts with judges applying the *Hanafi* school of jurisprudence.

However, following the establishment of the All India Muslim Law Board in 1973 – a non-governmental organisation formed to oversee the implementation of Muslim personal status laws in India – informal Sharia courts with *Quazis* (Muslim judges) were formed to oversee and facilitate primarily matters relating to Muslim divorces, including reconciliation prior to divorce. Under the guise of Alternate Dispute Resolution, these Sharia courts act as an alternative to civil courts for Muslims seeking divorce.¹⁴ The *Imarat-e-Shariah*, the largest Sharia-based institution in India, trains most of the *Quazis*, all of whom are Muslim men.

The *Quazis* operate outside of the civil court structure and do not use civil procedure in their practice, although their decision-making is recognised and generally accepted by Muslim communities. Case procedures and outcomes are dependent upon the discretion, understanding and interpretation of Islamic law and attitudes of individual *Quazis*.

Key issues regarding Muslim family law

Since there is no codified Muslim family law in India, the rules and practice relating to marriage (such as entering into marriage; consent and capacity of women to marry) and divorce (including procedures for divorce, maintenance, child custody and matrimonial property) are largely based on customary practice, enforced by *Quazis*. As a result, in practice, the application of Muslim family laws in India leads to multiple forms of discrimination against Muslim women. On the following pages we outline the five most significant issues that have been raised by Muslim women’s groups and organisations over the past decade in relation to legal reform of Muslim family laws.

10 The Special Marriage Act 1954: <http://unstats.un.org/unsd/vitalstatkb/Attachment566.aspx?AttachmentType=1>.

11 Guardians and Wards Act 1890: <http://unstats.un.org/unsd/vitalstatkb/Attachment544.aspx?AttachmentType=1>.

12 The Muslim Personal Law (Shariat) Application Act 1937: <http://bdlaws.minlaw.gov.bd/act-173/section-21540.html>.

13 The Dissolution of Muslim Marriages Act 1939: https://indiacode.nic.in/handle/123456789/2404?view_type=browse&sam_handle=123456789/1362.

14 Outlook Magazine, *Qazi Courts Or Quasi-Justice?*, 12 December 2005: <https://www.outlookindia.com/magazine/story/qazi-courts-or-quasi-justice/229490> accessed 27 June 2019.

1. Codification of Muslim family law

While multiple laws allow for Muslims to be governed by Islamic law in marriage and family matters, the foremost issue with regard to Muslim family law in India is that there is no specific codified law relating to marriage and divorce matters. The existence of a parallel and informal Sharia court system, coupled with increased judicial discretion of *Quazis* and civil court judges to interpret Islamic law, means that in practice the procedures and application of family laws are not uniform for all Muslim women and men across India. While Indian Muslims have the choice of marrying under civil law, community and family pressure result in few Muslim couples opting to do so.

According to a Bharatiya Muslim Mahila Andolan (BMMA) survey in 2016 of 4,710 Muslim women across 10 Indian states, 83.3% of Muslim women surveyed believed that codification of Muslim family law will help them obtain justice.¹⁵

2. Minimum age of marriage and unregistered marriages

The Child Restraint Act 1929 (amended by Act 2 of 1978) sets the minimum age of marriage as 21 years for men and 18 years for women. The Act, however, is silent on the dissolution of marriages below the minimum age. In 2006, the Government passed the Prohibition of Child Marriage Act 2006, making the minimum legal age of marriage in India 18 years with no exceptions.

In 2017, in the case of *Independent Thought v Union of India & Anr*,¹⁶ the Supreme Court of India was asked to decide whether sexual intercourse between a man and a wife, being a girl aged between 15 and 18 years, is rape. The case explicitly challenged Exception 2 to s.375 of the Indian Penal Code, which stated that it was not rape if a man had sexual intercourse with a girl above 15 years of age if that girl was his wife. The Supreme Court held that sexual intercourse with a girl under 18 is rape regardless of whether she is married or not and stated:

- ☞ A child is a person below the age of 18 years who is entitled to the protection of her human rights, including the right to live with dignity.
- ☞ Sexual intercourse with a girl under 18 years is rape, whether it is with or without her consent, against her will or not, whether it is by her husband or anybody else.

- ☞ Exception 2 to IPC s.375 is discriminatory by creating an unnecessary and artificial distinction between a married girl child and an unmarried girl child.

Despite strong legislation prohibiting child marriage, the practice continues to be prevalent in India, especially in rural areas of the country. Furthermore, the registration of marriage is not compulsory in India and marriages can be recognised as valid despite non-registration, in practice enabling marriages with minors, who are primarily minor girls.

According to the United Nations Children's Fund (UNICEF), India has the highest absolute number of child marriages in the world (15,509,000) with 27% of girls married before their 18th birthday and 7% married before the age of 15. In 2018, UNICEF reported that, between 2006 and 2016, India showed a significant decline in child marriage rates from 47% to 27%.¹⁷ However, the 2011 Census indicated that more than five million girls were still married before the legal age of 18.

In 2013, Muslim organisations and conservative groups, such as the Muslim League in Kerala, approached the Supreme Court to make the case that the Prohibition of Child Marriage Act should not apply to Muslims as it violated Muslims' fundamental right to practise their religion.¹⁸

In 2018, a public interest litigation case was filed seeking to direct government officials not to interfere with marriages solemnised under the Muslim Personal Law (Shariat) Application Act. The Madras High Court ruled that the Prohibition of Child Marriages Act would prevail over the Muslim Personal Law (Shariat) Application Act because the former had been introduced to ensure the welfare of girls.¹⁹

In 2017, reports emerged of the sexual exploitation of young Muslim girls who were being sold to much older Muslim men of Middle Eastern countries like Oman and Qatar. According to one report of cases in Hyderabad, 20–30 young girls were lined up for Arab men to choose from. The men would pick one girl and agree a price with the broker depending on whether it would be a long-term marriage or a "time pass" marriage for the duration in which the man would stay in India. It was claimed the *Quazi* who acted as a marriage officiant lied about the ages of the girls. According to police reports, some of the girls did accompany their husbands back to their home country and they were then "forced into domestic servitude or sexual slavery."²⁰

15 Z. Soman & Dr N. S. Niaz, *Seeking Justice Within The Family: A National Study on Muslim Women's Views on Reform of Muslim Personal Law*, BMMA India 2016, available at: <https://drive.google.com/file/d/0B620GpkVZ9UQmx1T212VWHpWwE/view>.

16 Writ Petition (Civil) No. 382 of 2013.

17 UNICEF, *Ending Child Marriage: A profile of progress in India*, February 2019: <https://data.unicef.org/resources/ending-child-marriage-a-profile-of-progress-in-india/> accessed 29 June 2019. Girls Not Brides, *India profile*: <https://www.girlsnotbrides.org/child-marriage/india/>, accessed 27 June 2019.

18 MG Radhakrishnan, *Muslim groups want minimum marital age scrapped*, 22 September 2013: <https://www.indiatoday.in/featured/story/muslim-groups-want-minimum-marital-age-scrapped-211885-2013-09-22> accessed 4 July 2019.

19 PTI Madurai, *Child marriage act prevails over Muslim Personal Law: Madras HC*, 1 April 2015: <https://www.thehindubusinessline.com/news/child-marriage-act-prevails-over-muslim-personal-law-madras-hc/article7057892.ece>.

20 R. Srivastava, *Indian child brides sold in 'package deals' to men from Gulf states*, Reuters, 10 October 2017: <https://www.reuters.com/article/us-india-trafficking-marriage/indian-child-brides-sold-in-package-deals-to-men-from-gulf-states-idUSKBN1CF1FZ>.

3. Polygamy

Polygamy has been abolished for all communities in India except Muslims. Under the application of Muslim personal status law, a Muslim husband has the right to contract marriage with four women simultaneously without any conditions or standard procedures. Muslim women activists reported that the practice of polygamy, coupled with many of these marriages being unregistered, has had detrimental impact on many Muslim women and children. According to the BMMA survey conducted in 2016 across 10 Indian states, 91.7% of Muslim women said that a Muslim man should not be allowed to marry a second wife during the existence of the first marriage.

In February 2015, the Supreme Court of India upheld a decision by the Uttar Pradesh Government to dismiss one of its employees on the grounds of misconduct for contracting a second marriage during the existence of his first marriage without its prior permission. The Supreme Court stated that what was protected under Article 25 (right to practice and propagate any religion) of the Indian Constitution was the religious faith and not a practice “which may run counter to public order, health or morality”, concluding that “[p]olygamy is not an integral part of religion and monogamy was a reform within the power of the State under Article 25”.²¹

Since 2017, Muslim women have been filing fundamental rights cases asking the Supreme Court to declare the practice of polygamy unconstitutional. According to a 2018 petition filed in Delhi, polygamy “... is in blatant contravention of Articles 14 (equality before law), 15 (prohibition of discrimination on grounds of religion, race, caste, sex or place of birth) and 21 (right to life and personal liberty) of the Constitution”. In March 2018, the Supreme Court examined the constitutional validity of the practice of polygamy (among other practices like *nikah-halala*) based on the petition. The Supreme Court directed the case to the Government of India for an official stance on polygamy, which has yet to be released.

4. Unequal provisions for divorce

a. Unilateral *talaq* divorce by husband

Divorce conditions and procedures are different for Muslim women and men. Men are able to obtain a *talaq* or unilateral repudiation of marriage without any restrictions or reasons for divorce. Until 2018, Muslim men were allowed to divorce their wives by repeating the word *talaq* three times. Other Muslim groups follow a method of *talaq* called the *talaq-i-hasan*, where the husband pronounces three *talaqs* on separate occasions, spanning a period of three months. In the event that he chooses to reconcile with his wife, or the couple cohabits during this period, the divorce is revoked.

Conservative Muslim groups and organisations (primarily male-led) supported the practice of triple *talaq* as a valid method of divorce. Following years of advocacy by Muslim women’s groups and the filing of fundamental rights cases by victims of the practice, the Supreme Court of India declared instant triple *talaq* unconstitutional on 22 August 2017.

In September 2018, triple *talaq* was banned in India through an Executive Order after the Muslim Women Protection of Rights on Marriage Bill 2017, intended to ban the practice, failed to pass in Parliament at the time. Triple *talaq* was rendered a criminal offence and a victim or a blood relative of the victim can file a case with the police against the man who pronounces triple *talaq*. The Order also enables a magistrate to grant bail to the accused only after hearing testimony from the wife of the accused.²² In July 2019, India’s Parliament finally approved the Muslim Women Protection of Rights on Marriage Bill, officially outlawing triple *talaq*.²³ Muslim women activists from the BMMA welcomed this “historic”²⁴ law, which affords Muslim women some degree of power in relation to the dissolution of their marriage.

b. Judicial divorce by wife

While Muslim men can divorce without any reason or conditions and out-of-court divorces are considered valid, Muslim women can seek divorce only if they meet certain conditions and seek authorisation by a court. Under the Dissolution of Muslim Marriages Act 1939, the grounds upon which a woman is entitled to obtain a divorce include:

- ☞ If the whereabouts of the husband has not been known for a period of four years.
- ☞ If the husband has neglected or failed to provide for her maintenance for a period of two years.
- ☞ If the husband has been sentenced to imprisonment for a period of seven years or more.
- ☞ If the husband has failed to perform his marital obligations for a period of three years.
- ☞ If the husband was impotent at the time of marriage and continues to be so.
- ☞ If the husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease.
- ☞ If the husband treats the wife with cruelty, even if such conduct does not amount to physical violence.
- ☞ If the wife has been given in marriage by her father or guardian before she attained 15 years of age.

21 A. Choudhary, *Polygamy not integral part of Islam*: SC, Times of India, 10 February 2015: http://timesofindia.indiatimes.com/articleshow/46180105.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cpsst.

22 Z. Saberlin, *India: Triple talaq or instant divorce now a criminal offence*, 19 September 2018: <https://www.aljazeera.com/news/2018/09/india-triple-talaq-instant-divorce-criminal-offence-180919073349658.html>.

23 BBC News, *Triple talaq: India criminalises Muslim “instant divorce”*, 30 July 2019, available at: <https://www.bbc.com/news/world-asia-india-49160818>.

24 The Guardian, *Historic day as India outlaws “triple talaq” Islamic instant divorce*, 31 July 2019: <https://www.theguardian.com/world/2019/jul/31/triple-talaq-india-hails-historic-day-as-parliament-outlaws-islamic-instant-divorce>.

- ✔ If the husband associates with women of evil repute or leads an infamous life or attempts to force her to lead an immoral life.
- ✔ If the husband disposes of her property or prevents her exercising her legal rights over it.
- ✔ If the husband obstructs her in the observance of her religious profession or practice.
- ✔ If he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran; or carries out any other ground recognised as valid for the dissolution of marriages under Muslim law.

c. *Nikah-halala*

Linked to the issue of triple *talaq*, another customary practice that exists in Indian Muslim communities as a result of a gross misinterpretation of Islamic law is the practice of *nikah-halala*. If a husband has divorced his wife through triple *talaq* and subsequently wants to reconcile with her, the ex-wife is required to marry another man, consummate that marriage, then divorce or be divorced from him before being able to remarry her former husband. This practice is particularly prevalent among communities that believe the pronouncement of instant triple *talaq* renders the woman as divorced from the man and no longer a *halal* or lawful partner for him.

Over the past few years, following increased pressure from Muslim women's groups for the State to act to address discriminatory practices such as *halala*, there has been an increase of media attention and public debates on the practice. Cases have emerged in the media of Muslim women being forced to marry and consummate a marriage with a male friend or relative (including a case involving a father-in-law²⁵) of her husband²⁶ and/or with men arranged by local religious leaders or so-called Islamic scholars. There have been cases where religious leaders have offered to marry and divorce the women themselves for a price, ranging from Rs20,000 up to 1.5. lakhs.²⁷ Women activists and human rights groups have fiercely criticised the practice as rape.²⁸

Together with the call to ban triple *talaq* and polygamy, Muslim women have also petitioned the Supreme Court for a ban of the practice of *nikah-halala*.²⁹ No decision has yet been made by the Supreme Court. In June 2019, Indian President Kovind addressed the issue of *nikah-*

halala in an address to Parliament, stating that "To secure equal rights for every sister and daughter in the country, eradication of social evils like triple-*talaq* and *nikah-halala* is imperative."

NATIONAL LEVEL REFORM EFFORTS

A. Civil society

Over the past decade, India has seen strong advocacy efforts by Muslim women's groups on legal reform of Muslim family laws and related discriminatory practices. The Bharatiya Muslim Mahila Andolan (BMMA), a Muslim women-led movement, has been at the forefront of campaigns to reform Muslim family laws in India.

Case study

Bharatiya Muslim Mahila Andolan (Indian Muslim Women's Movement)³⁰

The origins of BMMA can be traced back to the days following the tragic events of 9/11 in 2001 and the Hindu-Muslim riots in Gujarat in 2002, when a group of Muslim women came together to speak and share concerns about issues relating to Muslim identity in India. Despite equality being enshrined in the Constitution, there remained deep-seated discrimination relating to the socio-economic and political marginalisation of Muslims in India, with Muslim women particularly impacted in Muslim communities and within their own families. BMMA was officially established in 2007 with a two-pronged strategy: first, to claim basic rights for Muslims as equal citizens of India, and second, to ensure gender justice in the Muslim family.

As part of its approach, BMMA began engaging with poverty-stricken, marginalised Muslim communities, especially Muslim women, on projects relating to improving livelihoods, economic empowerment and access to basic services like water and hospitals. In the course of their work, many family law-related issues emerged, including triple *talaq*, polygamy, *nikah-halala*, the lack of registration of Muslim marriages, child custody and access to justice. In the words of Zakia Soman, co-founder of BMMA, "we catapulted into action on law reform because of the lived realities that Muslim women face. The demand for Muslim family law reform came from Muslim women of India".³¹

25 Times of India, *Bareilly woman claims serial 'halala'*, 7 February 2019: <https://timesofindia.indiatimes.com/india/bareilly-woman-claims-serial-halala/articleshow/67876738.cms>.

26 R. Iyengar, Indian Express, *What is Halala? How was it established? Where does it stand in modern times?*

<https://indianexpress.com/article/what-is/what-is-nikah-halala-how-it-was-established-and-where-it-stands-in-modern-india-triple-talaq-4618415/>.

27 J. Khan, India Today, *Exposed: How maulvis take money for one-night stand with divorced women trying to save marriage*, 16 August 2017:

<https://www.indiatoday.in/india/story/nikah-halala-islamic-scholars-one-night-stand-divorced-muslim-women-marriage-1029887-2017-08-16>.

28 S. Dhingra, The Print India, *Nikah halala: Is it rape or religion?*, 27 August 2018:

<https://theprint.in/india/governance/nikah-halala-is-rape-trafficking-and-cheating-all-in-ones-say-muslim-women/105880/>.

29 D. Roy, *Muslim Woman Who Filed PIL in SC Against Nikah Halala, Polygamy Faces Rape, Death Threats*, 29 June 2018:

<https://www.news18.com/news/india/muslim-petitioner-who-filed-pil-against-nikah-halala-polygamy-faces-rape-death-threats-1795681.html>.

30 Musawah Interview with Zakia Soman, Co-founder of BMMA, 21 May 2019.

31 Ibid.

32 Z. Soman & Dr N. S. Niaz, *Seeking Justice Within The Family: A National Study on Muslim Women's Views on Reform of Muslim Personal Law*, 2016.

BMMA analysed the legal realities and framework relating to Muslim family laws and practices in India and undertook two nationwide studies, *Seeking Justice within Family*³² and a survey on triple *talaq*, *No More Talaq Talaq Talaq*,³³ which sought the perspectives of Muslim women across 10 Indian states on matters such as a codified Muslim family law, polygamy, triple *talaq* and *nikah-halala*. They held consultations in 2008 to formulate a draft bill on Muslim family law and in 2014 submitted their draft bill to parliamentarians and political parties. However, there has been little movement forward. BMMA has also undertaken a signature campaign seeking to ban the triple *talaq* deemed as “un-Quranic”, collecting approximately 50,000 signatures in 2016.³⁴

In 2016, BMMA decided to undertake strategic litigation and file petitions at the Supreme Court against triple *talaq*, *halala* and polygamy as violations of the fundamental rights of Muslim women. The petition against triple *talaq* was filed in May 2016 and the Supreme Court declared the practice unconstitutional in August 2017. BMMA says there is still a lot of work to be done to eradicate the practice of triple *talaq*, given that the BJP ordinance criminalising triple *talaq* does not offer an alternative mode of divorce for Muslim men.³⁵

According to Zakia Soman and other members, BMMA has faced an immense backlash from both conservative groups and secular groups who claim that BMMA is aligning with the right-wing Hindu Government to achieve its intended outcomes. BMMA has a membership of over 100,000 women across India and has been instrumental in initiating and informing the debate on Muslim women’s rights and reform of Muslim family law as a central issue in the media and on the Government’s agenda.³⁶

B. Government

As indicated above, the Government and the Supreme Court of India have been instrumental in the criminalising of triple *talaq* and the uptake of petitions pertaining to polygamy and *nikah-halala*. A brief timeline of reform is set out below.

In 2006, the Government passed the Prohibition of Child Marriage Act 2006, making the minimum legal age of marriage in India 18 years with no exceptions. In 2017, the Indian Supreme Court ruled that sexual intercourse

with a girl under 18 is rape regardless of whether she is married or not.

In August 2017, the Supreme Court of India deemed instant triple *talaq* unconstitutional. In September 2018, triple *talaq* was banned in India through an Executive Order. In July 2019, India’s Parliament finally approved the Muslim Women Protection of Rights on Marriage Bill, officially outlawing triple *talaq*.

In March 2018, the Supreme Court examined the constitutional validity of the practice of polygamy (among other practices like *nikah-halala*) based on petitions by Muslim women. The Supreme Court directed the case to the Government of India for an official stance on polygamy, which has yet to be released.

INTERNATIONAL OBLIGATIONS

Convention on the Elimination of All Forms of Discrimination against Women

India ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in July 1993. India was most recently reviewed before the CEDAW Committee during the 58th Session in 2014. In its Concluding Observations,³⁷ the CEDAW Committee raised concerns regarding reports that judges often authorise marriages of minor girls based on Muslim personal laws and the lack of mandatory registration of marriages. The Committee recommended to the State Party the following with regard to marriage and family relations:

“39. The Committee urges the State party:

- a. To speedily enact legislation to require compulsory registration of all marriages and to consider withdrawing its declaration regarding article 16 (2) of the Convention;
- b. To ensure that the Prohibition of Child Marriage Act is implemented without exception;
- c. To automatically void all child marriages and ensure that the Protection of Children from Sexual Offences Act applies also to child brides;
- d. To strengthen efforts to raise awareness about the prohibition of child marriage and the harmful effects of the practice on the health and education of girls and to effectively investigate, prosecute and punish cases of forced and early marriage...

41. The Committee reiterates its previous concluding observations, recalls article 16 of the Convention and calls upon the State party to ensure equality between women and men in marriage and family relations by:

33 Z. Soman and Dr N. S. Niaz, *No More Talaq Talaq Talaq: Muslim Women Call for a Ban on an UnIslamic Practice*, 2017: <https://bmmaindia.files.wordpress.com/2016/01/triple-talaq-report.pdf>.

34 Sabrang India, *50,000 Signatures and Counting: Muslims Support BMMA’s Campaign to Abolish Triple Talaq*: <https://sabrangindia.in/article/50000-signatures-and-counting-muslims-support-bmmas-campaign-abolish-triple-talaq>.

35 The Wire, *The Story of BMMA*, 25 August 2017: <https://www.youtube.com/watch?v=esRkV6-3ru0>.

36 Musawah Interview with Zakia Soman, Co-founder of BMMA, 21 May 2019.

37 CEDAW Concluding Observations for India, CEDAW/C/IND/CO/4-5, 24 July 2014:

https://tinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIND%2fCO%2f4-5&Lang=en.

India cont

- a. Ensuring that all the laws on marriage and family relations governing the various religious groups, in addition to their further amendment, are in full compliance with articles 15 and 16 of the Convention and the Committee's general recommendation No. 21 on equality in marriage and family relations and general recommendation No. 29 on the economic consequences of marriage, family relations and their dissolution;
- b. Reviewing the application of the Special Marriage Act to remove procedural barriers regarding the application for permission to marry and the registration of marriages."

Convention on the Rights of the Child

India ratified the Convention on the Rights of the Child (CRC) in December 1992. The most recent review of India was during the 66th Session in 2014. In its Concluding Observations³⁸ the CRC Committee recommended the following:

"52. The Committee urges the State party to ensure the effective implementation of the Prohibition of Child Marriage Act, 2006, including by emphasizing that the Act supersedes the different religious-based Personal Status Laws. The Committee also recommends that the State party take the necessary measures to combat the requirement of dowries, child marriage and the practice of devadasi, including by conducting awareness-raising programmes and campaigns with a view to changing attitudes and instituting counselling and reproductive education, with a view to preventing child marriages, which are harmful to the health and wellbeing of girls."

Sustainable Development Goals

India has made commitments towards attaining Sustainable Development Goals (SDGs), including Goal 5 on gender equality and the empowerment of women and girls. SDG Indicator 5.1.1 has already identified family law as one of the legal frameworks that must be reformed to accelerate progress to promote, enforce, and monitor gender equality. Reform of family laws with provisions and procedures that discriminate against women and girls is a key component for ensuring progress under the SDGs.

India is also a member of the South Asian Initiative to End Violence Against Children (SAIEVAC), which adopted a regional action plan (2018–2025) to end child marriage.³⁹

KEY BARRIERS AND CHALLENGES TO REFORM

- ~ The Government of India is led by the Bharatiya Janata Party, a right wing party with a policy reflecting Hindu-nationalist positions. This has

meant that Muslim women's groups are continuously cautious and cautioned against the intentions of the Government in supporting the abolishment of customary practices within the Muslim communities, like triple *talaq*, polygamy and *nikah-halala*.

- ~ Within the Muslim communities in India, the institutional set-up of traditional and religious leadership is male-dominated and male-led; therefore, reform efforts by Muslim women's groups are directly challenged and hindered by conservative groups.
- ~ Muslim women advocating for reform have faced numerous challenges from both religious and secular groups given the political climate in which reforms have been discussed and debated. There are high risks for individual Muslim women who have filed petitions with the Supreme Court and subsequently received death threats and other threats of violence.
- ~ The high levels of illiteracy and poverty within Muslim communities in India has led to information about legal rights and human rights being limited and not uniform across the country.

RECOMMENDATIONS FOR REFORM OF MUSLIM FAMILY LAW IN INDIA

Recommendation 1

The Prohibition of Child Marriage Act 2006 should be implemented fully and uniformly across all religious groups in India without exceptions.

Recommendation 2

Marriages should be registered mandatorily, including those under the jurisdiction of Sharia law.

Recommendation 3

The Government of India should promptly issue its opinion on matters of Muslim family law that have been referred to it by the Supreme Court, taking into consideration the body of evidence of the impact of discriminatory practices on Muslim women and their calls for reform.

Recommendation 4

Matters relating to polygamy and the customary practice of *nikah-halala* should be addressed by the Supreme Court without delay. Petitioners who have faced threats of violence should be given protection to ensure their security.

Recommendation 5

A codified Muslim family law with a legal framework that recognises the equal rights and responsibilities of a husband and wife in marriage, and marriage as a partnership of equals, should be introduced with Muslim women's groups consulted during the drafting process.

³⁸ CRC Concluding Observations for India, CRC/C/IND/CO/3-4, 7 July 2014: <https://undocs.org/CRC/C/IND/CO/3-4>.

³⁹ Girls Not Brides, India: <https://www.girlsnotbrides.org/child-marriage/india/> accessed 23 June 2019.



Malaysia

Malaysia



CONTEXT

Malaysia is a multicultural country with a diversity of religious and ethnic groups, comprising Bumiputera¹ (69.1%), Chinese (23%), Indian (6.9%), and others (1%).² Muslims in Malaysia constitute 61.3% of the population.³ They primarily belong to the Sunni sect and follow the *Shafi'i madhab* (school of Islamic jurisprudence).

According to the United Nations Development Programme's 2018 Human Development Report, Malaysia ranked 57 out of 189 countries, moving up one place since 2017. In the 2018 Gender Inequality Index, Malaysia ranked 62 out of 160 countries.⁴

LEGAL FRAMEWORK

Constitution of Malaysia

Malaysia operates a plural legal system based on English common law, Islamic law and customary law. The federal legislature (Parliament)⁵ enacts the majority of laws, including laws on contracts, torts, property, crime, and constitutional and administrative matters. These laws are enforced through a federal judiciary. Islamic laws (except for Islamic finance) are enacted by the state legislative bodies⁶ and only apply to Muslims.

In Malaysia, there are 14 states (one of which is the Federal Territories encompassing three areas, Kuala Lumpur, Labuan and Putrajaya). Each of the 14 states enacts its own set of laws through the state legislature, governing Muslims in that state. The head of state (in many states being the Sultan) is also the head of religion. Laws require the assent of the head of state and public gazette prior to enforcement.

The Federal Constitution of Malaysia "is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

The Constitution guarantees fundamental liberties, which are set out in Articles 5–13. Article 8 on equality and non-discrimination stipulates "All persons are equal before the law and entitled to the equal protection of the law." Article 8(2) states:

"(2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment."

DOMESTIC LAWS

A. Family laws

The Law Reform (Marriage and Divorce Act) 1976 regulates marriage relations for non-Muslim citizens in Malaysia. All Muslims are governed under Islamic Family Law (IFL) enactments, which are legislated at the state level. A Muslim does not have the option to marry a non-Muslim under the General Marriage Act.

In 1984, the Federal Parliament enacted the Islamic Family Law (Federal Territories) Act 1984 (IFLA) for the Federal Territories (Kuala Lumpur, Labuan, and Putrajaya). IFLA contains multiple provisions which are discriminatory towards women. Many of the states adopted slightly altered versions of IFLA. Several states, including Kelantan, Melaka and Kedah, have adopted their own family law enactments that restrict women's rights in marriage and divorce even more than IFLA.

In 1976, the Law Reform (Marriage and Divorce) Act was amended to abolish all forms of discrimination against non-Muslim women. Among other things, polygamy was banned. The same rights to enter into marriage and grounds for divorce applied to both men and women.

¹ Bumiputera consists of ethnic Malay and indigenous populations.

² Department of Statistics (2018), Current Population Estimates, Malaysia, 2017–2018:

https://www.dosm.gov.my/v1/index.php?r=column/cthemeByCat&cat=155&bul_id=c1pgTnFjb29H5SnNYNUpiTmNWZHArdz09&menu_id=L0pheU43NwVwRwVWSzkWdzQ4TlhUUT09

³ 2010 Census on Population and Housing, 2011:

https://www.dosm.gov.my/v1/index.php?r=column/ctheme&menu_id=L0pheU43NwVwRwVWSzkWdzQ4TlhUUT09&bul_id=MDMxdHZjWVtk1SfzTznkRXYzcVZjdz09

⁴ United Nations Development Programme (UNDP) 2018, Human Development Indices and Indicators: 2018 Statistical Update – Malaysia:

http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/MYS.pdf.

⁵ Federal Constitution of Malaysia, Articles 73–79.

⁶ Other areas where states legislate laws include land and other natural resources of the State.

In 1999, the Guardianship of Infants Act was amended to provide for the father and mother to have equal rights to guardianship of their children. The Distribution Act was amended in 1999 to provide for equal inheritance rights for widows and widowers. However, none of these law reforms were extended to Muslim women who remain discriminated against under family laws.

B. Muslim laws

IFLA was once regarded as one of the most progressive laws in the Muslim world. However, amendments to IFLA in 1994 and 2003 on issues including polygamy, divorce, division of marital property and children born out of wedlock significantly diminished the rights of Muslim women in Malaysia, rather than reflecting social developments and the changing circumstances of women.

The first round of law reform in 1994 removed a number of rights granted to women under the original IFLA of 1984. The amendments allowed divorces pronounced outside the courts and polygamy committed without the courts' permission to be subsequently registered as legal, following payment of a small fine for breaking the law.

The second amendment of IFLA in 2003 further discriminated against Muslim women by giving more legal rights to men and incorporating gender-neutral language to undermine the rights of Muslim women. Amendments were first introduced in the state of Selangor in 2003. Thereafter, the Federal Parliament enacted the Islamic Family Law (Federal Territories) (Amendment) Act 2006 for the Federal Territories. Discriminatory provisions that further dismantled the progressive provisions of the 1984 IFLA included reduction of a husband's burden of proof to justify a polygamous marriage in court; granting husbands the right to claim a share of matrimonial assets upon polygamous marriage; forcing a wife to choose between obtaining maintenance or matrimonial assets upon a husband's polygamous marriage; and granting men the right to *fasakh* divorce (which is the right of a woman to divorce her husband under certain conditions).

C. Administration of Islamic laws

Islamic laws are enforced by Syariah⁷ courts that are established at the state level. The Constitution⁸ limits the matters that can be legislated at state level under the Ninth Schedule of the Second List (State List). In relation to Islamic laws, the matters on this State List include:

"1... Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts,... organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam..." (emphasis added).

Article 121(1A) of the Federal Constitution (introduced in 1988) states that the civil courts have no jurisdiction in matters that fall within the Syariah court jurisdiction. This provision was introduced to remove jurisdictional overlaps between the two legal systems. However, over the years, the interpretation of this Article was corrupted to mean that, essentially, the civil courts had no power to judge on any matter that in any way involves Islamic laws or actions of Islamic authorities. This gave rise to significant injustices, particularly where the constitutional rights of individuals were being violated or undermined. The uncertainty was created by conflicting judgments over whether Islamic laws override constitutional rights and federal laws, and whether civil courts have the authority to judicially review the powers exercised by Islamic authorities.

Case Study

The issue of jurisdiction of courts was resolved in the case of unilateral conversion of children into Islam by one party in the marriage.⁹ The Federal Court, in a landmark judgment in January 2018, decided that the civil courts have jurisdiction over judicial review, interpretation of laws and administrative justice even where the matter refers to Islamic laws or Islamic authorities. The Federal Court also decided that in the best interest of the child, both parents must consent to the conversion of a child to Islam.

⁷ Malay spelling for Sharia.

⁸ Article 74(2) of the Federal Constitution of Malaysia states: "Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a state may make laws with respect to any of the matters enumerated in the State List (ie: the Second List set out in the Ninth Schedule) or the Concurrent List."

⁹ *Indira Gandhi A/P Mutho v Pengarah Jabatan Agama Islam Perak* available at: <https://www.layarburak.com/wp-content/uploads/2018/01/Grounds-of-judgment-by-Zainun-Ali.pdf>.

Key issues regarding IFLA

1. Discriminatory framework of the family law

The Islamic Family Laws of Malaysia are grounded on “reciprocal” or “complementary” rights (as opposed to equal rights) between spouses, whereby in return for maintenance and protection from her husband, a wife is expected to “obey” him. Her failure to obey can lead to a loss of maintenance.

This leads to privileges and rights granted to men in terms of marriage, divorce, guardianship, inheritance, etc. In practice, when men fail to undertake their roles and responsibilities, their privileges remain intact, while women never gain decision-making or household rights or privileges regardless of their contributions.

Under IFLA, a woman who “commits *nusyuz*” or disobeys any order lawfully given by her husband has committed an offence and can be fined:¹⁰ “a wife shall not be entitled to maintenance when she is *nusyuz*, or unreasonably refuses to obey the lawful wishes or commands of her husband”. Section 59(3) states, “As soon as the wife repents and obeys the lawful wishes and commands of her husband, she ceases to be *nusyuz*.”

2. Male guardianship (*wali*)

IFLA s.7 requires a woman, regardless of her age, to have a *wali* (male guardian) to solemnise her marriage; a man does not require a *wali*. Thus, IFLA directly discriminates against women, failing to grant women equal consent and capacity as men to enter into marriage. The inference of this provision is that women, regardless of age, are not capable of making decisions about who they marry.

3. Minimum age of marriage

The Child Act 2001 provides that “child” means a person under the age of 18 years.¹¹ In July 2010, the Malaysian Government removed its reservation to Article 16(2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on child marriage and Article 1 of the Convention on the Rights of the Child (CRC). However, the legislative provisions on the age of marriage have remained unchanged.

The minimum age of marriage under IFLA is 18 years for men and 16 years for women, with the exception that they may marry at younger ages in certain circumstances with the permission of the Syariah judge. In effect, there is no minimum age as long as the approval of the Syariah judge is obtained. However, no specific penalty

is provided if such approval is not obtained. Strictly speaking, the marriage would be in contravention of the law. However, a legal loophole under IFLA s.12 allows the judge in his or her discretion to consider if the marriage is in accordance with Islamic law (*fiqh*) – then the marriage may be registered nonetheless.

With regard to individual state laws, there has been some movement towards raising the minimum age of marriage to 18 years. Selangor recently amended its family law to this effect and other states like Sabah are considering doing the same.

Data indicates that the number of child marriages has increased since 2000.¹² A key concern is there have been no attempts to clarify what constitutes reasons for marriage under 18 years for boys and 16 years for girls. IFLA is 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 by the Court for an interview and the parents’ testimonies are accepted as sufficient.¹³ This has resulted in cases when marriage of a rapist to his victim was approved while the man was being prosecuted for rape (see below).

Case Study

A particularly harrowing incident in 2013 was the case of Riduan Masmud, who was charged with raping a 13-year-old girl. When the matter was brought to court, he informed the court that he had married the victim. The Public Prosecutor at that time decided to withdraw the case on the basis of the marriage. This caused a public outcry, which led prosecutors to reinstate the rape charge, resulting in the perpetrator’s conviction in 2014. Separately, Riduan also faced bribery charges for paying the girl’s father RM5,000 (£919) to give his consent to the marriage.¹⁴

4. Polygamy

Both sets of amendments to IFLA have made it easier for Muslim men to commit polygamy in Malaysia. The 1994 reform of IFLA repealed the fifth condition (no drop in standard of living of the existing family) that had to be fulfilled before the Syariah Court would permit polygamy. Additionally, while the 1984 law only allowed polygamy with the permission of the court, another 1994 amendment allowed an illegal marriage without the court’s permission to be registered upon payment of a minimal fine. Reforms in 2006 resulted in further leniency in a man’s ability to commit polygamy.

¹⁰ IFLA, s.59.

¹¹ Child Act 2001, s.2.

¹² Based on the 2010 Census, 80,000 married women were between 15 and 19 years old, while there were 70,000 young married men. Data on those between the ages of 10–14 married, widowed or separated have been removed from the 2010 census following shocking revelations from the 2000 Census that there were 10,267 children in that age group who were married. See also *Malay Mail*, Marriage trends and legal ages in Malaysia, 14 April 2017: <http://www.themalaymailonline.com/malaysia/article/three-things-about-child-marriages-in-malaysia>.

¹³ In 2012, it was reported that there was a total of 1,022 approvals out of 1,165 child marriage applications filed in the Syariah Courts, making the approval rate approximately 88%. A 2014 research study conducted by the Centre for Research on Women and Gender (KANITA) at Universiti Sains Malaysia (USM) found that obtaining permission from Syariah Courts had not been difficult (Endut and Mohd Hashim, 2014).

¹⁴ Daily Express, Rape-marry case man charged with bribing dad of victim, 4 June 2013, available at: <http://www.dailyexpress.com.my/news.cfm?NewsID=85483>.

The first condition was that he must prove the proposed marriage was “just and necessary”; this was amended to “just or necessary”.

Implementation of the remaining conditions for polygamy also remains weak. Currently, the four existing conditions to be met are:

1. the proposed marriage is just or necessary;
2. the man has the financial ability to support his existing and future dependents;
3. the man is able to treat all wives equally; and
4. the marriage will not cause harm to the existing wife.

Sisters in Islam, a Malaysian NGO, operates a legal clinic (*Telenisa*) that recorded 75 cases involving polygamy in 2016; 106 cases in 2017; and 176 cases in 2018. The largest number of complaints relating to polygamy were due to husbands contracting subsequent marriages without their wives’ consent or knowledge. Women’s rights activists report that often, judges do not apply the conditions strictly and frequently give permission even when all conditions are not met. Although the law requires that the existing wife, the prospective wife, and their families appear before the judge, often this is ignored or the existing wife is intimidated into agreeing.

Husbands in polygamous marriage often do not provide for their existing families. In 2018, 9.7% of existing wives complained that their husbands no longer support them and 10.8% complained that their children no longer receive maintenance from their fathers. Although there are penalties for an illegal polygamous marriage, they are lenient and do little as deterrence. It is an offence to commit polygamy without the permission of the Court. However, as noted, the marriage usually gets registered following payment of a minimal fine (s.123).

Case Study

One of Sisters in Islam’s *Telenisa* legal clinic clients discovered that she was in a polygamous marriage a few days after the solemnisation ceremony, when the first wife contacted her through social media. The first wife shared a copy of her marriage certificate, which was held in Thailand, as evidence. The client confronted her husband and he confessed that he was already married.

Following disclosure of the first marriage, the husband validated the first marriage in Malaysia and subsequently filed for divorce. The second wife felt cheated as she would not have agreed to marry if she had prior knowledge that her husband was already married.

5. Unequal divorce rights

Under IFLA, a husband can divorce his wife at will, while women are provided limited grounds for divorce and are required to meet specific conditions and/or obtain the consent of their husbands.

The husband can unilaterally divorce his wife by pronouncement of *talaq*, whether in person or even through text messages and other non-verbal means and does not need any specific reason to do so. Examples from Sisters in Islam’s *Telenisa* legal clinic include cases where the husband pronounced *talaq* in the middle of a fight but later retracted it, leaving the wife concerned whether “as per Islam” they remained married. This uncertainty carries larger ramifications for a range of issues – from whether they may continue sharing their marital bed to sharing a home, which causes not only psychological duress to the wife but also has legal and financial implications.

For the wife, the most common way to initiate a divorce is by *fasakh*. The conditions under which divorce is permissible include if the husband:

- ☞ Has failed to provide maintenance;
- ☞ Is insane or has a communicable sexually transmitted disease; or
- ☞ Treats his wife cruelly, including habitual assaults or making her life miserable by cruel conduct.

The Syariah Court requires the wife to provide strong grounds before pronouncing divorce through *fasakh*.

Case Study

Women from Sisters in Islam’s *Telenisa* legal clinic complain about the complexity and length of the procedure for a *fasakh* divorce. They are often intimidated by the process, which involves proving conditions and discussing marital issues before mostly all-male judges. Moreover, many women have complained of gender bias in the court system, where they are pressured to accept low financial maintenance or compensation or forced to reunite with their husbands on the premise that they lack strong grounds for divorce.

6. Guardianship of children

Muslim men and women do not have equal rights in guardianship in Malaysia. One significant problem with the provisions on guardianship of children in IFLA is its provision for the right of fathers to make decisions about the person and property of their children. Under IFLA s.88, the father is considered to be “the first and natural guardian” of the child/children, and if he is dead, guardianship passes to the child’s paternal grandfather and thereon the chain of executors appointed by father or grandfathers respectively.

Traditionally, the legal guardians were persons who held responsibility for the children's maintenance. However, present day realities show that mothers share the burden of meeting the family's financial needs. Divorced or widowed mothers often face difficulties in obtaining financial assistance from ex-husbands or their relatives. There is no statutory provision for the father's loss of guardianship in the case of irresponsibility regarding the children's maintenance, while a mother may lose her right to physical custody of the children on several grounds.

Muslim women did not benefit from law reforms granting men and women equal guardianship rights as custodial mothers continued to face difficulty in obtaining necessary permission/signatures (for example, in matters relating to schools, healthcare, travel) from male guardians. This led to the government issuing an Administrative Directive to enable all mothers, including Muslim mothers, to sign official documents on matters relating to their children. Notwithstanding this, the right of Muslim mothers to be guardians of their children must also be explicitly recognised by law.

7. Inheritance rights

Inheritance rights between Muslim women and men in Malaysia are unequal. The rules on inheritance for Muslims are largely based on rules of inheritance (*faraid*) in Islamic jurisprudence (*fiqh*).¹⁵ The present laws on inheritance require that male heirs be given a double share, which is based on the argument that men have a duty to provide for women.

The concept of men receiving a greater share in inheritance was not a feature that was special to Islamic law in Malaysia. For instance, the Distribution Act 1958 for non-Muslims previously provided that the husband of a deceased woman would receive the whole of her estate, while the wife of a deceased man would only receive one-third of his estate if he had children, or one-half if he had no children. However, this discrimination against non-Muslim women was removed in the 1990s.

Discriminatory rules also apply in relation to insurance and the Employees Provident Fund (EPF).¹⁶ The Insurance Act was amended in 1996 to provide that the Muslim beneficiary named in an insurance policy acts only as the administrator of the estate, as the deceased

insurance monies are to be distributed according to *faraid*. This means if a husband buys a policy and names his wife as the beneficiary to protect her wellbeing upon his death, his wish is denied under *faraid* rules. The same applies to EPF funds. In 2000, the National Fatwa Council issued a fatwa to extend the *faraid* rule to EPF funds. If a wife and daughters are named as beneficiaries, they will only act as administrators. Under rules for inheritance, a daughter inherits half of what a son receives; a wife with children is entitled to only one-eighth while a wife with no children is entitled to one-quarter; the remainder passes to the husband's surviving heirs. If he has no surviving heirs, the remainder passes to *Baitulmal*.¹⁷

D. Violence against women in the family

The Domestic Violence Act 1996 (DVA) criminalised various forms of domestic abuse. It was amended in 2011 and 2017 to afford better protection for victim-survivors.¹⁸ DVA s.2 defines "domestic violence" to include the following:

- i. willfully or knowingly placing, or attempting to place, the victim in fear of physical injury.
- ii. causing physical injury to the victim.
- iii. compelling the victim by force or threat to engage in any conduct or act, sexual or otherwise, from which the victim has a right to abstain.
- iv. confining or detaining the victim against the victim's will.
- v. causing damage to property with intent to cause distress or annoyance to the victim.
- vi. causing psychological abuse which includes emotional injury to the victim.
- vii. causing the victim to suffer delusions by using any intoxicating substance or any other substance without the victim's consent.¹⁹
- viii. threatening the victim with intent to cause the victim to fear for her safety or the safety of a third person.²⁰
- ix. communicating with the victim, or communicating about the victim to a third person, with intent to insult the modesty of the victim through any means, electronic or otherwise.²¹

¹⁵ Farid S. Shuaib, *The Islamic Legal System in Malaysia*, Pacific Rim Law & Policy Journal, 21:1 (pp.94–95), 2012.

¹⁶ A mandatory contribution by employers and employees for the purposes of retirement and savings.

¹⁷ *Baitulmal* in ancient Arabia is the treasury of the State. In Malaysia, the *Baitulmal* collects monies from sources including properties where there are no inheritors (and *zakat*) and determines the manner of its safekeeping or disposal. The *Baitulmal* is part of the Islamic State administration.

¹⁸ Malaysia State Party Report, U.N. Doc. CEDAW/C/MYS/3-5 (2016), para. 23, available at: <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>.

¹⁹ Domestic Violence Act 1994, s.2.

²⁰ Domestic Violence Amendment Act 2017, s.2.

²¹ *Ibid.*

Penal Code s. 326A also penalises domestic violence under certain circumstances and includes sanctions of terms twice as long as those that would otherwise be the maximum sentence where the victim is the perpetrator's spouse in the instances of i. rape; ii. sexual assault by object; iii. gross indecency; and iv. the utterance of any words or making of any sounds or gestures with the intent of outraging a person's modesty.²²

Women's rights groups have noted that the DVA has major gaps as it does not extend protection to non-married intimate partners, including engaged persons. Implementation of the DVA has also been inconsistent. In practice, the time taken to obtain an Interim Protection Order against a perpetrator of domestic violence ranges between 24 hours to three months. The DVA is also not uniformly implemented across states leading to further inconsistencies, with case outcomes largely dependent on the discretion of the police, the welfare department and the courts.²³

Marital rape is exempted under s.375 (definition of the offence of rape) of the Penal Code which provides: "Sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force, or is recognised in Malaysia as valid, is not rape." However, this exemption does not apply i. where the wife has obtained an injunction restraining her husband from having sexual intercourse with her; or ii. where the wife is living separately from her husband during the *iddah* (post-divorce waiting) period.

In addition, Penal Code s.375A provides that any man who during the subsistence of a valid marriage causes hurt, or fear of death or hurt, to his wife or any other person in order to have sexual intercourse with his wife shall be punished with imprisonment of up to five years.²⁴ According to s.377C of the Penal Code, rape with an object is not considered rape – it is considered sex "against the order of nature". Additionally, IFLA s.127 provides that a man who ill-treats his wife or cheats his wife of her property (or *vice versa*) commits an offence.²⁵

The Government of Malaysia in its 2016 report to the CEDAW Committee explained that the DVA was enacted to curb the use of violence as an instrument to settle domestic disputes and as a platform for the victims (spouse, former spouse, child, incapacitated adult or any member of the family) to seek protection and justice.²⁶ The Act has been amended to protect victims not only from physical abuse but also from emotional, mental and psychological abuses. The Malaysian Government also stated that:²⁷

- ↪ The Penal Code was amended to increase the penalties for offences relating to rape and incest.
- ↪ Although the term "marital rape" is not explicitly included in s.375A of the Penal Code, the Section is intended to provide further legal protection to wives.
- ↪ There are other provisions in the Penal Code which may be used by wives to seek legal protection. For instance, a husband may be charged for an offence of causing injury.

NATIONAL LEVEL REFORM EFFORTS

A. Civil society

On child marriage

In June 2018, news of a polygamous marriage of an 11-year-old girl with a 40-year-old man went viral. It was the man's third marriage. The marriage was conducted at the Malaysia-Thailand border and had not been registered in Malaysia, constituting an offence under the State laws of Kelantan. The man had entered into the polygamous marriage without court approval. He pleaded guilty to these offences, paid a fine of RM1800 (RM900 per offence), and the marriage was then registered in Kelantan.

Women's groups including the Joint Action Group for Gender Equality coalition, international human rights organisations, Malaysia's human rights institute *Suhakam*, and other bodies, called for stern and immediate action by the newly elected *Pakatan Harapan* Government to safeguard this child's welfare and to ensure that the laws were amended to make child marriage in Malaysia illegal. In September 2018, condemnation on the issue of child marriage continued when news spread that a 15-year-old Malaysian girl was married to a man almost three times her age. The teenager became the second wife of the 44-year-old in July after an Islamic court gave permission for the pair to wed in the conservative, rural state of Kelantan.

In both cases, officers of the Welfare Department were sent to visit the girls. The 11-year-old Thai girl was eventually sent back to her home in Thailand. Deputy Prime Minister Wan Azizah Wan Ismail, whose portfolio includes women's issues, suggested there was little the Government could do to stop the union, as Islamic courts have jurisdiction over the issue of marriage between Muslims.

²² Penal Code ss.323–331, 352(A), 375, 377CA, 509 available at:

<http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Penal%20Code%20%5BAc%20%574%5D2.pdf>

²³ NGO CEDAW Shadow Report for the Malaysian Government's Review by the CEDAW Committee at the 69th CEDAW Session, February 2018, available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MYS/INT_CEDAW_NGO_MYS_30011_E.pdf.

²⁴ *Ibid.*, fn 18 at paras. 8–15 and 23.

²⁵ IFLA (as amended) s.127.

²⁶ *Ibid.*, fn 18 at para. 23.

²⁷ *Ibid.*, fn 18 at paras 8–15 and 23.

B. Government

On child marriage

In October 2018, the Prime Minister instructed all states to raise the minimum age of marriage for Muslims and non-Muslims to 18 years. The Chief Ministers of each state were also asked to consider wider legal reform. As of April 2019:

- ~ The Islamic Family Law (State of Selangor) Enactment 2003 and the Syariah Court Civil Procedure (State of Selangor) Enactment 2003 were amended in September 2018 to increase the minimum marriage age from 16 to 18 years. The process was fast, as the amendment had the full support of the Sultan of Selangor. However, the Syariah court in Selangor is still allowed to make exceptions provided certain conditions are met.
- ~ In November 2018, it was reported that a roundtable consisting of the Kelantan State Government, Kelantan Islamic Affairs Department, and the state governing party's Law and Human Rights Committee (*Lajnah Undang-Undang dan Hak Asasi Manusia*) concluded that child marriage is consistent with the Syariah Law and therefore a "necessity" in the state.
- ~ The Sabah State Government announced that it is proposing to amend the Islamic Family Law Enactment and the Native Courts Enactment and any other relevant laws to ban child marriage.
- ~ The federal legislation governing age of marriage for non-Muslims, the Law Reform (Marriage and Divorce) Act 1976, had not been amended.
- ~ The Islamic Family Law (Federal Territory) Act 1984 had not been amended.

Islamic Family Law (Federal Territory) Act 1984

In 2006, amendments that were introduced to IFLA were met with public outrage. This led the then-Prime Minister to instruct the Attorney General's Chambers to form a committee, including representatives from women's rights groups, to review the discriminatory amendments. A series of new recommendations was proposed and agreement on these amendments reached in 2006. However, 13 years later, these relatively progressive amendments are yet to be submitted to Parliament.

INTERNATIONAL OBLIGATIONS

Convention on the Elimination of All Forms of Discrimination against Women

The Government of Malaysia ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in July 1995, with reservations to Articles 5(a), 7(b), 9, and 16. On 6th February 1998, the Government of Malaysia notified the Secretary-General of a partial withdrawal of reservations to Articles 2(f), 9(1), 16(b), 16(d), 16(e), and 16(h). In July 2010, the government removed its reservations to CEDAW Articles 5(a), 7(b), and 16(2). However, reservations still remain in relation to five CEDAW Articles: 9(2), 16(1)(a), 16(1)(c), 16(1)(f), and 16(1)(g). These are barriers that preclude the full equality for women in family life.

Malaysia's last review before the CEDAW Committee was during the 69th CEDAW Session in February 2018. In its Concluding Observations following the review, the CEDAW Committee made the following recommendations to the Malaysian Government with regard to reform of IFLA:

"12 (c) Take effective measures to ensure that civil law and Syariah law are in full compliance with the provisions of the Convention at the local, state and federal levels so as to ensure that the rights of all women are legally guaranteed on an equal footing throughout the State party. The Committee reminds the State party that provisions of its internal law cannot be used as justification for its failure to abide by its obligations under the Convention;...

54 (a) Provide safeguards against violations of women's human rights in all family and marriage matters by enabling State courts or administrative bodies to review all decisions and provisions of the Syariah law system, including actions taken by Islamic authorities, in accordance with the Federal Court judgment of 29 January 2018 in the *Indira Gandhi* case, as well as the Committee's general recommendation No. 33 and general recommendation No. 29 (2013) on the economic consequences of marriage, family relations and their dissolution; [*this was also noted as a follow-up issue on which the Government must show progress in two years.*]

(b) Ensure that Muslim women have equal rights in all family and marriage matters, including equal capacity as men to enter into marriage and to divorce, and that they enjoy equal rights with regard to the maintenance, custody and guardianship of their children and inheritance;

- (c) Prohibit the unilateral religious conversion of children to Islam by a father who converts to Islam;
- (d) Discourage and prohibit polygamy in accordance with the Committee's general recommendation No. 21 (1994) on equality in marriage and family relations and general recommendation No. 29 and the joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child;
- (e) Raise the minimum age of marriage to 18 for women and men for both civil and Muslim marriages and require the full consent of women for any marriage".²⁸

Convention on the Rights of the Child

Malaysia ratified the Convention on the Rights of the Child (CRC) in February 1995, with reservations to Articles 1, 2, 7, 13, 14, 15, 28(1)(a), and 37. In 2010, it lifted reservations to CRC Article 1 (defining the age of a child); Article 13 (regarding freedom of expression); and Article 15 (regarding freedom of assembly and participation). In 2011, the government signed two of three Optional Protocols to the CRC on the sale of children, child prostitution and child pornography, and on children in armed conflict. The State Party had its first review before the CRC Committee in 2007. In its Concluding Observations,²⁹ the Committee made the following recommendations in relation to family laws:

"The Committee recommends that the State party conduct an international comparative study on the implications of the dual legal system of civil law and Syariah law and, based on the results of this assessment, take necessary measures to reform this dual system with a view to removing inconsistencies between the two legal systems in order to create a more harmonious legal framework that could provide consistent solutions, for example, to family-law disputes between Muslims and non-Muslims. The Committee also recommends that the State party undertake a comprehensive review of the national legal framework with a view to ensuring its full compatibility with the principles and provisions of the Convention. The Committee further recommends that the State party take all necessary measures to expedite the process of necessary law reforms."

Malaysia has not been reviewed by the CRC Committee in the last 12 years and there is no indication of an upcoming review.

Sustainable Development Goals

Malaysia has made commitments towards attaining the Sustainable Development Goals (SDG), including Goal 5 on gender equality and empowerment of women and girls. SDG Indicator 5.1.1 has already identified family law as one of the legal frameworks that must be reformed to accelerate progress to promote, enforce, and monitor gender equality.

KEY BARRIERS AND CHALLENGES TO REFORM

Campaigns to reform discriminatory laws against Muslim women pose challenges for a number of reasons:

- ✎ Islamic laws come under state jurisdiction. This means any comprehensive reform effort must be attempted at the federal level with the requirement that all 14 states approve the legal reforms.
- ✎ These laws bear the label "Islamic". Therefore, there is wide belief among political and religious leaders that only the *ulama* (religious scholars) have the authority to deliberate and make decisions on such laws, without the requirement for broader consultation. As a result, the most discriminatory interpretations of Islamic texts have often been codified into law.
- ✎ Women's groups campaigning for equality and justice for Muslim women are labelled as deviants, and their demands regarded as anti-Islam and anti-Syariah. For this reason, very few men in authority, not least political leaders, are willing to take the side of women's rights activists in their campaigns to reform discriminatory laws.

²⁸ Concluding Observations of the CEDAW Committee on Malaysia CEDAW/C/MYS/CO/3-5, 14 March 2018: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fMYS%2fCO%2f3-5&Lang=en.

²⁹ Concluding Observations of the CRC Committee on Malaysia, CRC/C/MYS/CO/1, 25 June 2007, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fMYS%2fCO%2f1&Lang=en.

RECOMMENDATIONS FOR REFORM OF MUSLIM FAMILY LAW IN MALAYSIA

Musawah's mapping of Muslim family laws across 31 countries indicates that laws which consider women and men as equal partners in a marriage also contain fewer discriminatory provisions with regard to other aspects of marriage and family life. Hence, a comprehensive reform of IFLA is required to address multiple areas of discrimination and ensure equality for Malaysian Muslim women.

Recommendation 1

The Government should conduct a comprehensive review of Islamic Family Laws to provide Muslim women equal rights in relation to marriage and family matters. The review should be based on a progressive interpretation of Syariah and be grounded in a legal framework that ensures equal rights and accords equal protection of the law to both partners.

Reference should be made to the extensive rights-based scholarship on Islam and women's rights produced by scholars and activists and on progressive models of family law and should secure the following protections:

- ☞ Muslim women should have the equal right and capacity to consent to marriage without requiring the permission of a male guardian or a judge.
- ☞ A mandatory requirement that the first wife's views be taken into consideration in the decision to grant approval for polygamy.
- ☞ Reintroduction of the requirement that a polygamous marriage must not reduce, directly or indirectly, the standard of living of the man's existing wife (or wives) and children.
- ☞ Amendment of IFLA s.23 to provide that prior to allowing a husband to enter into an additional marriage, the court will decide the amount of maintenance payments for the existing wife and children, and assets owed to the existing wife. This allocation of payments and assets should occur automatically, without requiring the first wife to file a special application for this relief.

- ☞ Men and women have the equal right to divorce, including the grounds for and procedures to obtain a divorce and all divorces should require the knowledge of both spouses and their attendance in court.
- ☞ Amendment of IFLA s.88 to grant equal rights of legal guardianship to both mothers and fathers based on the best interest of the child.
- ☞ Amendment of IFLA s.83(A) to remove all reference to a woman's loss of custody as a result of remarriage. Reference should only be made with regard to the welfare of the child.

Recommendation 2

The Government should amend the Domestic Violence Act to extend protection to unmarried intimate partners.

Recommendation 3

The Government should repeal the marital rape exception included in s.375 of the Penal Code.



Pakistan

population (5%–16%) in Pakistan follows the *Shia Ithna Ashari* school and there is a legal presumption that Shia Muslims follow this school in terms of its application of family law.¹⁴

The Muslim Family Laws Ordinance (MFLO) adopts a moderate interpretation of Muslim family law.¹⁵ Marriage is not specifically defined in MFLO nor the rights and obligations of the husband and wife explicitly detailed, except for s.9, which states:

“If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives may, in addition to seeking any other legal remedy available, apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.”¹⁶

Family matters, including dissolution of marriage, provision of maintenance and child custody are administered by the Family Courts, established through the Family Courts Act 1964.

Key issues regarding Muslim family law

1. Minimum age of marriage and unregistered marriages

The United Nations Children’s Fund estimates that Pakistan has the sixth highest number of child brides in the world, with approximately 21% of girls being married before 18 years and 3% before 15 years. A number of factors have contributed to this high rate of child marriage, including traditional customs in rural areas that involve the bartering of young brides, and family practices that entail marrying girls to their immediate cousins.¹⁷

In 1961, the Child Marriage Restraint Act was amended to make the minimum legal age for marriages 16 years for females and 18 years for males.¹⁸ Sections 4–6 of the Act criminalised and penalised the following:

- ↪ Males over 18 years who contract a child marriage;
- ↪ Whoever performs, conducts or directs any child marriage;
- ↪ Parents or guardians, who do any act to promote a child marriage, permit it to be solemnised or negligently fail to prevent it from being solemnised.

According to the Act, before marriage a female had to prove her age by providing her National Identification Card number to the marriage registrar, and he in turn had to verify her age.¹⁹ However, the reality on the ground was somewhat different, with case law in courts arguing that whilst the marriage of a girl below 16 years constituted an offence, the marriage was valid under principles of Muslim laws if the female had attained puberty.²⁰

In 2013, the minimum legal age for marriage in the Sindh province of Pakistan was raised to 18 years for both females and males, without exceptions (Section 2, Sindh Child Marriages Act). The Act further criminalised and penalised acts relating to child marriages.

In February 2017, the Pakistan Government made an amendment to the Penal Code to strengthen penalties for those guilty of being involved in child marriage. Under the amendment, offenders faced a minimum of five years in prison and could serve up to 10 years. Offenders also faced a fine of up to 1 million rupees (US \$9,500). Before the amendment, offenders faced a minimum of three years in prison and a fine of 500,000 rupees.²¹

15 Martin Lau, *Sharia and National Law in Pakistan*, Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present, (p. 415), Leiden University Press, 2010: <https://openaccess.leidenuniv.nl/bitstream/handle/1887/21170/file221087.pdf?sequence=1>.

16 Muslim Family Laws Ordinance, 1961, s.9: <http://pakistancode.gov.pk/english/UY2Fqalw1-apaUY2Fqa-clyXsg-ijiiiiiiiiiiiiii>.

17 Girls Not Brides, *Pakistan*: <https://www.girlsnotbrides.org/child-marriage/pakistan/>, accessed 23 July 2019.

18 Child Marriage Restraint Act 1929 as amended in 1961, s.2, available: <http://pakistancode.gov.pk/english/UY2Fqalw1-apaUY2Fqa-ap%2Bbsg-ijiiiiiiiiiiiiii>.

19 Bilquees Bano, *Factors Reinforcing Girl Child Marriages in Pakistan*, Save the Children, 2015:

<https://everyone.savethechildren.net/articles/factors-reinforcing-girl-child-marriages-pakistan>; and Immigration and Refugee Board of Canada, *Pakistan: Information on marriage registration, including mixed marriages*, 2013: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/03/04/PAK104253.E.pdf>.

20 Case law: *Behram Khan v Mst. Akhtar Begum*, PLD 1952 Lahore 548; *Allah Diwaya v Mst. Kammon Mai*, PLD 1957 Lahore 651; *Bakhshi v Bashir Ahmed*, PLD 1970 SC 323; *Zafar Khan v Muhammad Ashraf Bhatti and another*, PLD 1975 Lahore 234. See also *Women Living Under Muslim Laws, Knowing Our Rights: Women, Family Laws and Customs in the Muslim World* (p. 71), The Russell Press, Third Edition, 2006: http://www.wluml.org/sites/wluml.org/files/import/english/pubs/pdf/knowing%20our%20rights/kor_2006_en.pdf.

21 Saleem Shaikh & Sughra Tunio, Reuters, *Pakistan seeks to curb child, forced marriages with harsher punishment*, 7 February 2017: <https://www.reuters.com/article/us-pakistan-child-marriage/pakistan-seeks-to-curb-child-forced-marriages-with-harsher-punishment-idUSKBN15M274>.

22 The CII is a statutory body with a minimum of eight and a maximum of 20 members, including one woman, whose function is to advise parliament on whether laws are in agreement

Most recently, in April this year, the Pakistan Senate passed the Child Marriage Restraint (Amendment) Bill 2018. The Bill mandated a minimum age of 18 years for marriage throughout the country. It was passed by the Senate amidst staunch opposition from conservative groups and bodies like the Council of Islamic Ideology (CII)²² who have advised that Pakistani laws prohibiting child marriage are “un-Islamic”. Whilst the advice of the CII is not legally binding, it is worthy of note that an earlier attempt to introduce a Bill to increase the minimum age of marriage to 18 years was withdrawn in 2016 by lawmakers following the Council’s pronouncements.²³ However, after the Bill was tabled in the National Assembly, it was passed to the Standing Committee on Law and Justice for members to review and consult the CII. In May, the CII recommended against passing the legislation²⁴ and in August 2019, the Bill was rejected by the National Assembly’s Standing Committee on Law and Justice.²⁵

2. Women’s consent and capacity to enter into marriage

As per Pakistan’s majority-Muslim family laws and the Penal Code, prospective brides and grooms must both consent to the marriage, regardless of age.²⁶ Based on the rules of *Hanafi fiqh*, an adult woman does not require the consent of a marital guardian *wali* to enter into marriage.²⁷

In accordance with these laws, the Pakistani higher courts have consistently ruled that adult Muslim women have a right to choose in marriage, for example, *Mst. Humera Mehmood v The State and Ors.*²⁸ And in *Hafiz Abdul Waheed v Asma Jehangir*,²⁹ the Supreme Court held that the consent of a guardian is not required for a marriage of an adult Muslim female.

Registration of marriages is mandated under Section 5 of MFLO.³⁰ MFLO allows for both spouses to stipulate conditions in their marriage contract, in addition to the standard marriage contract which includes provisions to specify agreement pertaining to dower, maintenance and other related areas drawn up between parties.³¹

The Penal Code criminalises and penalises forced marriages.³² However, in some rural areas of Pakhtun Province, traditional customs such as *ghag* are practiced, in which a man lays claim to marry a girl even against her family’s wishes and regardless of her consent. The practice continues despite the Elimination of *Ghag* Act 2013, primarily due to lack of awareness about the Act, lack of enforcement by the Government of the Act, lack of available support services provided by the Government, and general community acceptability.³³

3. Polygamy

Section 6 of MFLO requires a husband to apply for written permission from the Arbitration Council (the Union Council Chairperson plus a representative for each of the husband and wife or wives) to contract another marriage. His application must include reasons for the proposed marriage and whether the consent of his existing wife or wives has been obtained. It also mandates the Arbitration Council to permit the polygamous marriage only if it is satisfied that the proposed marriage is necessary and just, subject to such conditions (if any) as may be deemed fit.

The Arbitration Council is obligated to record the reasons for its decision regarding the proposed polygamous marriage. It is a criminal offence for any man to contract a polygamous marriage without the permission of the Arbitration Council.

According to information gathered by the Immigration and Refugee Board of Canada and media reports, the Arbitration Council is an ineffective mechanism to permit polygamous marriages because there is a lack of acceptance by men of the law stipulating its authority (ie: MFLO, s.6) and a lack of awareness of the same law by women. As such, many men do not seek the permission of the Arbitration Council and in instances where they do, the permission of the Arbitration Council is deemed by men a mere formality.³⁴

Section 495 of Pakistan’s Penal Code criminalises the concealment of a previous marriage. The penalty is imprisonment of up to ten years and/or a fine.³⁵

with Islamic jurisprudence. The council does not have legislative power.

23 Girls Not Brides, *Pakistan - Child marriages around the world*: <http://www.girlsnotbrides.org/child-marriage/pakistan/>; also CII: *Of What Use?* Editorial in Dawn, 28 May 2016: <http://www.dawn.com/news/1261054>; and Ishaan Tharoor, *Washington Post*, *Bill banning child marriage fails in Pakistan after it's deemed 'un-Islamic'*, 15 January 2016: https://www.washingtonpost.com/news/worldviews/wp/2016/01/15/bill-banning-child-marriage-fails-in-pakistan-after-its-deemed-un-islamic/?utm_term=.798a3a040782

24 Pakistan Today, *CII opposes child marriages but won't support legislation*, 4 May 2019: <https://www.pakistantoday.com.pk/2019/05/03/cii-opposes-child-marriages-but-wont-support-legislation/>.

25 Muhammad Anis, *The News*, *NA body on law rejects Child Marriage Restraint Bill*, 22 August 2019: <https://www.thenews.com.pk/print/515514-na-body-on-law-rejects-child-marriage-restraint-bill>.

26 Pakistan State Party report, United Nations Doc CEDAW/C/PAK/4 (2011), paragraph 478: <https://undocs.org/CEDAW/C/PAK/CO/4>.

27 Tahseen Butt & Associates, *Laws of Pakistan Relating to Marriage, Divorce, Custody and Maintenance*: http://www.tahseenbutt.com/divorce_lawyers_pakistan.html.

28 PLD 1999 Lahore 494.

29 PLD 2004 SC 219.

30 Op cit. at fn 7, s.5.

31 For example, Form II of the West Pakistan Muslim Personal Law (Application Act) 1962: http://kpcode.kp.gov.pk/uploads/The_West_Pakistan_Muslim_Personal_Law.pdf.

32 Penal Code (1860), ss.310A, 365B, 498B, available: <http://pakistancode.gov.pk/english/UY2Fqalw1-apaUY2Fqa-ak%3Dsg-ijiiiiiiiiii>.

33 Maria Kari, *The Express Tribune Blogs*, *Do you know what ghag is?* 20 September 2016: <https://blogs.tribune.com.pk/story/40303/doi-you-know-what-ghag-is/>;

See also, *An Act to eradicate a social evil called "Ghag"*, Provincial Assembly of Khyber Pakhtunkhwa, available: http://www.af.org.pk/Acts_Fed_Provincial/KP_Bill%20Acts_since%202002/KP%202013/Elimination%20of%20Custom%20of%20Ghag%20Act_%202013.pdf.

34 Immigration and Refugee Board of Canada, *Pakistan: Practice of Polygamy, including legislation rights of the first wife versus the second, including whether she has the right to refuse a second wife (2011-2013)*, 18 December 2013, available at: <http://www.refworld.org/docid/52eb9ea04.html>.

35 Penal Code 1860, s.495: <http://pakistancode.gov.pk/english/UY2Fqalw1-apaUY2Fqa-ak%3Dsg-ijiiiiiiiiii>.

36 Dissolution of Muslim Marriage Act, 1939, s.2(iiia): <http://pakistancode.gov.pk/english/UY2Fqalw1-apaUY2Fqa-claW-sg-ijiiiiiiiiii>.

The Dissolution of Muslim Marriages Act (DMMA) permits a wife to seek dissolution of the marriage if her husband has taken an additional wife in contravention to the provisions of MFLO.³⁶

Despite these safeguards, which can deter polygamy, the practice remains prevalent in Pakistan. According to Pakistan's 2012/13 Demographic and Health Survey, about 4% of marriages are polygamous. The survey also found:

- ↪ Women in the Balochistan province were most likely to report having co-wives (8%), followed by women in the Sindh province (4%).
- ↪ Women in their 30s were more likely to have co-wives when compared to women within other age brackets.
- ↪ Rural women were more likely to report having co-wives than urban women (4% versus 3%).
- ↪ Women living in poorer households were more likely than women living in richer households to have co-wives. For instance, 5% of women living in households in the lowest wealth quintile reported having co-wives, compared to 2% of women living in households in the highest quintile.
- ↪ Lower-educated women were slightly more likely to report having co-wives than higher-educated women. For instance, 4% of married women with no education reported having co-wives, compared to 3% of women who have attained secondary or higher education.³⁷

4. Unequal provisions for divorce

Pakistani law provides for the following mechanisms for divorce:³⁸

i. Divorce by way of unilateral repudiation (*talaq*)

MFLO provides for unilateral repudiation by the husband. The husband must send a written notice of the repudiation to the Arbitration Council and supply a copy to the wife.³⁹ A husband may delegate his unilateral right to divorce to his wife (*isma*) through a stipulation in the marriage contract,⁴⁰ thus permitting her to pronounce *talaq* upon herself (*talāq-i-tafwid*). Column 18 of the standard marriage

contract points to whether the husband has delegated the power of divorce to the wife and if so, under what conditions. Column 19 states whether the husband's right to divorce is in any way curtailed.⁴¹

ii. Divorce by mutual consent (*mubarat*)

Where both husband and wife may sign a Mutual Divorce Deed.⁴²

iii. Redemptive divorce (*khul'*)

A wife can apply To dissolve the marriage by *khul'* by filing suit in the Family Court. This can be done without the consent of the husband if she foregoes her financial rights.⁴³

iv. Divorce by way of judicial decree (*fasakh*)

A wife can invoke valid grounds for seeking divorce by way of judicial decree which include a husband's

- i. prolonged absences for more than four years;
- ii. failure or inability to provide maintenance for more than two years;
- iii. taking of an additional wife in contravention with the provisions of the MFLO;
- iv. imprisonment for more than seven years;
- v. failure to perform, without reasonable cause, his marital obligations for a period of three years;
- vi. impotence at the time of marriage and thereafter;
- vii. severe physical and mental illness.⁴⁴

In addition, the wife may seek divorce on the basis that her husband treats her with cruelty, including:

- i. he habitually assaults her or makes her life miserable;
- ii. associates with women of evil repute or leads an infamous life;
- iii. attempts to force her to lead an immoral life;
- iv. disposes of her property or prevents her from exercising her legal rights over it;
- v. obstructs her in the observance of her religion profession or practice.⁴⁵

37 Pakistan National Institute of Population Studies and ICF International, *Pakistan Demographic and Health Survey (table 4.2.1, p. 62), 2012/13*: <http://dhsprogram.com/pubs/pdf/FR290/FR290.pdf>.

38 Shaqulfa Omar, *Dissolution of Marriages: Practices, Laws and Islamic Teachings*, Institute of Policy Studies Policy Perspective 4:1: <http://www.ips.org.pk/islamic-thoughts/1120-dissolution-of-marriage-practices-laws-and-islamic-teachings>.

39 Op cit. at fn 7, s.7; see also Ali Shaik, *Law of Divorce & Khula in Pakistan*, available at: [https://www.ma-law.org.pk/pdf/Law%20of%20Divorce%20in%20Pakistan%20\(Article\).pdf](https://www.ma-law.org.pk/pdf/Law%20of%20Divorce%20in%20Pakistan%20(Article).pdf).

40 Op cit. at fn 7, s.8; see also Gul & Gul Law Form, *Pakistan Divorce Law (FAQ)*, available at: <https://gmlaw.wordpress.com/pakistan-divorce-law-faq/>.

41 See for instance Form II of the West Pakistan Rules Under Muslim Family Ordinance (1961): <http://pakistancode.gov.pk/english/UY2Fqalw1-apaUY2Fq-apaUY2FwbZo%3D-sg-iiiiiiiiii>.

42 Op cit. at fn 7, s.8; see also Ali Shaik, *Law of Divorce & Khula in Pakistan*, p. 3, available at: [https://www.ma-law.org.pk/pdf/Law%20of%20Divorce%20in%20Pakistan%20\(Article\).pdf](https://www.ma-law.org.pk/pdf/Law%20of%20Divorce%20in%20Pakistan%20(Article).pdf).

43 Ibid. p. 4; see also Gul & Gul Law Form, *Pakistan Divorce Law (FAQ)*, available at: <https://gmlaw.wordpress.com/pakistan-divorce-law-faq/>.

44 Op cit. at fn 36, s.2.

45 Op cit. at fn 36, s.2(viii).

46 Aurat Foundation, *Pakistan: NGO Alternate Report on CEDAW*, Submission to the CEDAW Committee for the 54th Session, [pp. 91-92], 2012, available at:

According to a civil society 2012 Shadow Report to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Committee,⁴⁶ a closer examination of divorce rights between women and men shows that divorce rights between the two genders are unequal. For instance, a man may by way of *talaq* need only send a notice to the Arbitration Council of the pronouncement, attempt reconciliation and, if reconciliation is not possible, the divorce stands.

However, a woman has to prove grounds for divorce in court if her husband does not consent to a divorce or she has not been delegated the right to divorce. With regard to the latter, families and elders often cross out the clause delegating the right of divorce in the standard marriage contract at the time of marriage saying that it is a bad omen to talk about divorce. And although redemptive divorce (*khul'*) is available to the wife, she may not have the financial means to forgo her financial rights or compensate her husband for such a divorce.

NATIONAL LEVEL REFORM EFFORTS

A. Civil society

Pakistan has a long-standing history of women's rights activism and women taking up key leadership positions from courts to politics. Pioneer organisations like *Shirkat Gah Women's Resource Centre* provide support services for women affected by forced marriages and carry out research into and documentation of cases of honour-based killings and crimes and other customary practices.

While there is currently no national strategy advocating for comprehensive amendments to provisions in Muslim family laws which discriminate against Muslim women, Pakistani women activists have been strongly advocating to increase the minimum age of marriage to 18 years without exceptions, as well as calling for an end to violence against women including honour-based violence. Groups such as *Human Rights Focus Pakistan* among other civil society organisations have been calling for an end to kidnappings, forced conversions and forced marriages of girls in line with Sustainable Development Goal 5.

On 8 March 2019, a collective of women called "*Hum Auratein*" (We the Women) organised the "*Aurat March*" for gender equality and justice. Marches took place in Lahore, Islamabad, Hyderabad, Quetta, Peshawar and Faisalabad and a cross section of women from various

backgrounds across Pakistan participated. Conservative groups considered the *Aurat March* "controversial" and its organisers were subject to various threats as part of a backlash.⁴⁷ Issues raised in the manifesto released by its organisers included calling upon the Government to amend legislation to raise the minimum age of marriage to 18 years, and demanding an end to violence against women and girls and a reform of laws to ensure increased justice and redress for victims of violence.⁴⁸

B. Government

On child marriage

As discussed earlier, various Senators and National Assembly members remain active in attempting to get the Child Marriage Restraint (Amendment) Bill 2018 passed by the legislature in order to increase the age of marriage to 18 years without exceptions. However, there is strong opposition from religious parties, including Jamiat Ulema-e-Islam and Jamaat-e-Islami, the Minister for Religious Affairs and the Minister of State for Parliamentary Affairs, to name only two. And the CII has recommended against passing the legislation.⁴⁹

INTERNATIONAL OBLIGATIONS

Convention on the Elimination of All Forms of Discrimination against Women

Pakistan ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in March 1996. Pakistan was most recently reviewed by the CEDAW Committee in 2013, during the 54th Session. In its Concluding Observations concerning marriage and family relations, the CEDAW Committee made the following recommendations to the Pakistan Government:⁵⁰

"38. The Committee recalls article 16 of the Convention and calls on the State party:

- a. To adopt the Hindu Marriage Bill, the Christian Marriage (Amendment) Bill and the Christian Divorce Amendment Bill;
- b. To revise the Dissolution of Muslim Marriages Act (1939) with the aim to repeal discriminatory provisions against women; and to amend the relevant legislation to raise the minimum age of marriage for girls to 18;

http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PAK/INT_CEDAW_NGO_PAK_13269_E.pdf.

47 Alia Chughtai, Al Jazeera News, *Pakistani women hold 'aurat march' for equality, gender justice*, 8 March 2019:

<https://www.aljazeera.com/news/2019/03/pakistani-women-hold-aurat-march-equality-gender-justice-190308115740534.html>.

48 *Courting the Law* [Pakistan Legal News & Analysis Portal], *#AuratMarch2019: Manifesto*, 7 March 2019:

<http://courtingthelaw.com/2019/03/07/news-events/auratmarch2019-manifesto-complete-text/>.

49 *Op cit.* at fn 25.

50 Concluding Observations on Pakistan [CEDAW/C/PAK/CO/4], available at:

http://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/PAK/CO/4&lang=En.

51 CRC Committee Concluding Observations on Pakistan 9CRC/C/PAK/CO/5):

- c. To take the necessary measures to ensure that marriage and family cases are efficiently handled and heard by civil courts;
- d. To conduct research on the extent of the phenomenon of abduction of girls for the purposes of forced conversion and forced marriages and develop a comprehensive strategy to address this phenomenon to ensure the effective investigation of cases, prosecutions and punishment of perpetrators as well as the provision of remedies and support services for victims;
- e. To take necessary legislative measures to prohibit polygamy;
- f. To enact legal provisions to ensure that, upon dissolution of marriage, women have equal rights to property acquired during marriage, in line with article 16, paragraph 1 (h), of the Convention and the Committee's general recommendation No. 21 (1994)."

Convention on the Rights of the Child

Pakistan ratified the Convention on the Rights of the Child (CRC) in November 1990. Its more recent review was in 2016 during the 72nd Session. In its Concluding Observations concerning child marriage, the CRC Committee made the following recommendations to the Pakistan Government:⁵¹

"39. The Committee urges the State party to immediately:

- a. Enforce legislation to prohibit child marriage throughout the country and investigate and prosecute persons, including members of local councils (jirga), who endorse harmful practices in violation of the State party's laws and its international obligations;
- b. Develop awareness-raising campaigns and programmes on the harmful impact of child marriage on the physical and mental health and wellbeing of girls, targeting families, local authorities, religious and community leaders, judges and prosecutors and inform children, especially girls, about their rights under the Convention, including the right not to be subjected to forced marriage.

- c. In the light of joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices (2014), take active measures to put an end to harmful practices against children, such as burnings, acid attacks, mutilations, stripping and sexual harassment and bring perpetrators to justice."

Sustainable Development Goals

Pakistan has made commitments towards attaining Sustainable Development Goals (SDGs), including Goal 5 on gender equality and the empowerment of women and girls. SDG Indicator 5.1.1 has already identified family law as one of the legal frameworks that must be reformed to accelerate progress to promote, enforce, and monitor gender equality.

KEY BARRIERS AND CHALLENGES TO REFORM

- ✎ Pakistan is geographically, ethnically and linguistically diverse with many tribal and traditional communities still practicing traditional practices harmful to women and girls.
- ✎ Within the majority of Muslim communities in Pakistan, the institutional composition of traditional and religious leadership is male-dominated, male-led, and strongly political.
- ✎ While there are key champions within the political leadership, women's rights are not a national issue of concern for the Government of Pakistan.
- ✎ Reform efforts by Muslim women's groups are directly challenged and hindered by conservative groups especially when they are seen to challenge religious or Islamic law and practices. Muslim women advocating for gender equality have faced serious threats from both religious and conservative groups.

https://tinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fPAK%2fCO%2f5&Lang=en.

RECOMMENDATIONS FOR REFORM OF MUSLIM FAMILY LAW IN PAKISTAN

Recommendation 1

The Government of Pakistan should study the serious health implications for girls of not having a minimum age of marriage of 18 years and on the basis of global and national evidence move to apply a minimum age of marriage of 18 years uniformly across all religious groups and regions in Pakistan.

Recommendation 2

The Government of Pakistan should take concrete steps to address harmful customary and traditional practices, including forced marriage, which perpetuate violence against women and girls:

- ✔ The Government of Pakistan should implement widespread awareness-raising campaigns to educate women and girls about their legal rights, and to educate women and men that violence against women is a crime.
- ✔ The Government of Pakistan should radically improve support services for women and girls victims of violence, especially in areas where women and girls are vulnerable to harmful practices.

Recommendation 3

The Government of Pakistan should embark on a consultative process with full involvement of women's groups to assess the critical areas of discrimination faced by women in marriage, family matters and access to justice in Family Courts.

Recommendation 4

The Government of Pakistan should urgently reform laws relating to polygamy and ensure equality in the conditions and procedures of divorce for women and men.



Singapore

Singapore



CONTEXT

Republic of Singapore is a multi-ethnic and multi-religious country. According to the Department of Statistics, 43.2% of Singaporeans follow Buddhism and 18.8% follow Christianity.¹ Muslims are a minority in Singapore and constitute roughly 14% (826,787) of the total population.

Ethnically most Singaporean Muslims are Malays, but the community also comprises Tamil, Pakistani and Arab Muslims. The majority of Muslims in Singapore is Sunni and follows the *Shafi'i* school of jurisprudence.²

Singapore has made significant progress with regards to rankings in global development indices. The United Nations Development Programme's Human Development Index 2017 rates Singapore at number 9 out of 188 countries and territories, which puts the country in the "very high human development" category.³ Similarly, the World Economic Forum's Global Gender Gap Index 2018 rates the country 67 out of 144 and notes advances by women and girls are seen especially in the area of economic participation.⁴

Minority rights have been on the agenda of the Government through initiatives like the Presidential Council for Minority Rights and the Presidential Council on Religious Harmony, as well as changes to the Elected Presidency following an amendment to the Constitution passed in 2016, which reserved presidential elections for candidates from a particular racial group if no one from that group had been president for five continuous terms. The scheme declared Halimah Yacob to be the only eligible presidential candidate in September 2017 and resulted in the first female Parliamentary Speaker in Singapore becoming the first Muslim woman inaugurated as President of Singapore.

LEGAL FRAMEWORK

Constitution of the Republic of Singapore

Article 12(1) of the Singapore Constitution guarantees equality before the law and equal protection of the law, while Article 12(2) ensures non-discrimination on the basis of religion, race, descent or place of birth.⁵ Article 12(3) of the Constitution allows for different personal laws based on religious belief.

DOMESTIC LAWS

A. Family laws

Singapore has a plural legal system in relation to marriage and family matters. The non-Muslim majority of Singaporeans are governed by civil law under the Women's Charter of 1961 (the Women's Charter). Muslims are governed by the Administration of Muslim Law Act (AMLA) 1968.⁶ Muslims may marry non-Muslims. This marital union is considered a civil marriage and falls under the purview of the Women's Charter.⁷ However, two Muslims marrying do not have the option to marry under the Women's Charter and can only marry as per the AMLA.

Section 46 of the Women's Charter states that upon solemnisation of their marriage, a husband and wife will be mutually bound to cooperate with each other in safeguarding the interests of the marriage and in caring and providing for the children; they will also have equal rights in the running of the matrimonial household.⁸ AMLA, however, does not contain an equivalent provision.

1 Department of Statistics, *Singapore Highlights of General Household Survey, 2015*:

<https://www.singstat.gov.sg/inddata/search-by-theme/population/religion/visualising-data> accessed 30 April 2019.

2 Abbas, Ahmed Nizam bin, *The Islamic Legal System in Singapore*, Pacific Rim Law & Policy Journal, 21/1, (p. 166), 2012:

<https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1097/21PRPJ163.pdf?sequence=1> accessed 30 April 2019.

3 UNDP, *Briefing note for countries on the 2018 Statistical Update Singapore*, Human Development Indices and Indicators: 2018 Statistical Update:

http://hdr.undp.org/sites/all/themes/hdr_theme/countrynotes/SGP.pdf accessed 30 April 2019.

4 The World Economic Forum, *The Global Gender Gap Report, 2018*: http://www3.weforum.org/docs/WEF_GGGR_2018.pdf accessed 30 April 2019.

5 Constitution of the Republic of Singapore (1963) Article 12. Gender equality is not specifically mentioned.

6 Administration of Muslim Law Act 1968: <https://sso.agc.gov.sg/Act/AMLA1968> accessed 30 April 2019.

7 Women's Charter 1961, s.3.4: <https://sso.agc.gov.sg/Act/WC1961> accessed 30 April 2019.

8 *Ibid.*, s.46.

Implementation of AMLA occurs through the Syariah⁹ Court, which was constituted in 1958 through the enactment of the Muslim Ordinance of 1957. The establishment of the Court streamlined the administration of Muslim divorces and introduced mediation services as part of the divorce process.

B. Administration of the muslim law act

AMLA is administered by various agencies including the Islamic Religious Council of Singapore (MUIS),¹⁰ the Syariah Court and the Registry of Muslim Marriages (ROMM). The Act provides for a centralised system of administration on Muslim marriage and family matters.

ROMM has five *Kadis* and 27 *Naib* (Deputy) *Kadis* under its purview who are appointed by the President of Singapore.¹¹ *Kadis* can consider marriage applications and solemnise marriages with or without a *wali* (male guardian of the bride), while *Naib Kadis* can solemnise marriages only with a *wali*. At the Syariah Court, *Naib Kadis* administer the marriage registration, as well as divorce procedures.

AMLA does not refer to any *madhab* or Muslim school of jurisprudence that is applicable in the event that a particular personal status matter is not sufficiently addressed by the Act. However, s.33 of AMLA provides that the religious rulings (*fatwas*) of the MUIS should follow the rules of *Shafi'i* jurisprudence (*fiqh*) unless it is in the public interest to follow the tenets of another accepted *madhab*.¹²

Application of civil court system over Muslim family matters

The Family Justice Court (FJC) adjudicates cases relating to marriage and family relations of Singapore's non-Muslim majority population. Parties to a Muslim marriage may opt for the application of civil law and commence civil proceedings in the FJC with regard to: i. children (custody, care and control, and access); and ii. disposition or division of property on divorce. In addition, cases involving maintenance of the wife and children are heard in the FJC.¹³

In its 2015 State Party report to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Committee, the Government of Singapore stated that AMLA had been amended for closer alignment with civil law.¹⁴ According to the report:

- ✔ Muslim women and men can opt to pursue some matters in the FJC instead of the Syariah Court. These include divorce-related matters such as custody of children and disposition or division of property.
- ✔ The enforcement of Syariah Court orders has been made easier with the elimination of the need to register the order with the District Court before it becomes enforceable. Thus, like non-Muslim women, Muslim women may commence enforcement proceedings at the FJC without any prior registration.
- ✔ Aggrieved parties may lodge a Magistrate's complaint at the FJC for breach of Syariah Court orders, which is punishable upon conviction with a maximum sentence of six months' imprisonment.

Key issues regarding AMLA

AMLA contains multiple discriminatory provisions which do not consider women as equal to men under the Act. The framework of AMLA regards men as the protectors and providers of women and grants additional rights and privileges to Muslim men as a result.

The amendments specified by the Government in its CEDAW State Party report fail to address all legal inequalities in provisions of AMLA, specifically provisions rendering Muslim women unequal to their husbands when entering or leaving a marriage.

1. Male-only positions

Despite constitutional guarantees of non-discrimination, AMLA restricts key positions on ROMM and in the Syariah Court system to men only, specifically marriage registrars, *Kadis* and *Nabi Kadis*. This is despite changing realities on the ground that have enabled Muslim women to ascend to positions as high as the Presidency of Singapore.

⁹ Malay spelling of Sharia.

¹⁰ The MUIS is a statutory body which oversees Muslim affairs in Singapore.

¹¹ *Kadi & Naib Kadi*. Registry of Muslim Marriages [website]: www.romm.gov.sg/about_marriage/romm_kadi.asp accessed 30 April 2019.

¹² Administration of Muslim Law Act, ss.33, and 114; Abbas, p.163.

¹³ Supreme Court of Judicature Act 1960, ss.16-17A: <https://sso.agc.gov.sg/Act/SCJA1960>; Administration of Islamic Law Act (1966), ss.34-35A, <https://sso.agc.gov.sg/Act/AMLA1966> accessed 30 April 2019.

¹⁴ Government of Singapore, *Singapore State Party Report*, U.N. Doc. CEDAW/C/SGP/5 (2015) available at: <https://undocs.org/CEDAW/C/SGP/5> accessed 30 April 2019.

Section 90 of AMLA, the “Appointment of Registrar of Muslim Marriages” states, “The President of Singapore may appoint either by name or office any male Muslim of good character and position and of suitable attainments to be the Registrar of Muslim Marriages.” Similarly, s.91 “Appointment of *Kadis* and *Naib Kadis*” of the Act states, “... the President of Singapore may appoint suitable male Muslims of good character and position and of suitable attainments to be *Kadis* or *Naib Kadis*.”¹⁵

This effectively excludes qualified women from applying for and obtaining these positions solely on the basis of gender. This despite the fact that Muslim women judges already preside in the civil courts, including the FJC system.

2. Lack of consent and capacity for women to enter into marriages

As per AMLA, both prospective brides and grooms must consent to a marriage. However, a prospective bride still requires the consent of a *wali* to enter into marriage.¹⁷ The guardian is usually the father, grandfather, brother or uncle of the bride.

When a woman does not have a *wali*, a *Kadi* may act as guardian in his place. In addition, if the guardian of a prospective bride opposes the marriage on grounds that the *Kadi* considers unreasonable, the *Kadi* may solemnise the marriage anyway.¹⁶ Nonetheless, the requirement for consent of a *wali*, even in the case of an adult woman, undermines her full autonomy as an individual to enter into a marriage out of her own free will and choice.

3. Early and child marriage

As per s.96(4) of AMLA, the minimum legal age for marriage is 18 years for both Muslim females and males. This age was raised from 16 to 18 in 2008.

However, s.96(5) provides that a *Kadi* may authorise the marriage of a girl below 18 years, but who has attained the age of puberty.¹⁸ The law does not stipulate an absolute minimum age below which a marriage may not be authorised. Therefore, even a girl of 12 years or below who has attained puberty can be given in marriage.

4. Unequal divorce rights

Multiple forms of divorce are recognised under AMLA. However, these differ for husbands and wives. Husbands are entitled to *talaq* (unilateral repudiation) without conditions or reasons. *Talaq* divorce can be effectuated only via the Syariah Court, as s.102(5) of AMLA requires both the husband and wife to appear before the Syariah Court within seven days of the pronouncement of the *talaq* to apply for divorce.¹⁹

On the other hand, a Muslim woman can only divorce her husband according to certain conditions and requirements. They are able to obtain a *cerai taklik* (conditional divorce) when any of the conditions stipulated in the *taklik* (marriage contract) at the time of or after her marriage are violated. A woman can also obtain a *cerai fasakh* (judicial divorce) on certain grounds, including:

- a. Failure to provide maintenance for more than three months.
- b. Insanity or incurable or severe illness.
- c. Continuing impotence.
- d. Imprisonment of more than three years.
- e. Failure to perform his marital obligations with his wife for more than one year without reasonable cause.

In addition, a wife may seek divorce on the basis that her husband treats her with cruelty, which includes assault, adultery and failure to maintain, among some other conditions.²⁰

Both conditional and judicial divorces require some form of admissible evidence to be produced by women. In all judicial divorce cases initiated by women, including in instances of domestic violence, a wife’s testimony alone is insufficient to prove grounds for divorce.²¹

According to local advocates, admissible evidence includes police reports, protection orders, medical reports, private investigator reports, and default of maintenance payments ordered by the Family Courts. In cases of a husband’s failure to provide maintenance to or desertion of his wife for more than four months, evidence provided by two male witnesses (often family members) has also been accepted by the court. Women who are unable to provide documented evidence, for example in instances of verbal or psychological abuse, face additional challenges in proving wrongdoing of husbands.

¹⁵ Administration of Muslim Law Act (amendment 2009), ss.90-91.

¹⁶ *Ibid.*, s.95.

¹⁷ *Ibid.*, s.95(1).

¹⁸ *Ibid.*, s.96(4)-96(5).

¹⁹ Administration of Muslim Law Act (amendment 2009) ss.102(5)-130(2).

²⁰ *Ibid.*, s.49(1).

²¹ *Ibid.*, s.49(4).

5. Inheritance rights

AMLA also includes provisions for rights governing distribution of estates of Singaporean Muslims.²² The provisions with regard to division of assets are unequal to men and women – in cases involving widows and widowers, as well as siblings, a woman in Singapore is entitled to half the share to which a man is entitled.

This issue was raised by the Government of Singapore in its 2015 report to the CEDAW Committee. The report acknowledged that under *faraidh* (Muslim inheritance law), men are apportioned a greater share of the inheritance than women. To address this, the MUIS Fatwa Committee issued three *fatwas* (religious rulings) to protect the financial welfare of Muslim women and their dependents under *faraidh* and to align Muslim law with civil law.

However, these *fatwas* do not address the discrimination that family members face regarding inheritance. For instance, according to one of the *fatwas* issued by MUIS, Muslims, while still alive, can make a gift of property or assets in favour of their spouse or children, including daughters. However, after death, property and assets can be distributed only with consent of the heirs, regardless of the nomination,²³ and is likely to benefit male heirs more than female heirs.

C. Violence against women in the family

Singapore has not adopted specific legislation to criminalise acts of domestic violence. However, the Women's Charter contains provisions in relation to domestic violence, which were significantly strengthened after a landmark amendment in 1996. Section 64 of the Women's Charter defines "family violence" as the following:

- "a. willfully or knowingly placing, or attempting to place, a family member in fear of hurt;
- b. causing hurt to a family member by such act which is known or ought to have been known would result in hurt;
- c. wrongfully confining or restraining a family member against his will; or
- d. causing continual harassment with intent to cause or knowing that it is likely to cause anguish to a family member."

Section 64 also states that family violence does not include any force used lawfully in self-defence or by way of correction towards a child below 21 years of age.²⁴

Sections 65(1) and 66(1) mandate a court to issue a protection order or an expedited protection order restraining a perpetrator or suspected perpetrator from using family violence against the family member after being satisfied that family violence has been committed or is likely to be committed against a family member and that it is necessary for the protection of the family member.²⁵ Sections 65 to 67 also mandate the court to make other ancillary orders to the protection order or expedited protection order that it deems necessary for the protection or personal safety of the family member(s) concerned.²⁶

Apart from the Women's Charter, violence against women is also covered in other legislation including the Penal Code and the Protection from Harassment Act.²⁷ The Penal Code contains general prohibitions that are applicable to domestic violence. For instance, the Penal Code criminalises: i. assault or use of criminal force with the intent of outraging a person's modesty; ii. rape; iii. sexual assault by penetration; and iv. the utterance of any words or making of any sounds or gestures with the intent of outraging a person's modesty.²⁸

The provisions in the Women's Charter and all other criminal laws, such as the Penal Code, apply to all women, including Muslim women.²⁹

Marital rape

Prior to May 2019, s.375(4) of the Penal Code generally exempted sexual intercourse by a man with his own wife from being a crime unless the wife was under 13. However, the law removed the exemption under certain circumstances where the marriage had broken down eg: i. wife is living separate and apart from the husband; ii. divorce proceeding is ongoing; iii. a protection order has been obtained by the wife against the husband; iv) a protection order application against a husband is ongoing but not yet concluded; iv. there is a court injunction in force restraining the husband from having sexual intercourse with the wife.³⁰

²² *Ibid.*, ss.111-112.

²³ Islamic Religious Council of Singapore, *Fatwa on CPF Nomination*, Office of the Mufti, 3 August 2010: <https://www.muis.gov.sg/officeofthemufti/Fatwa/CPF-Nomination> accessed 30 April 2019.

²⁴ Women's Charter 1961, s.64: <https://sso.agc.gov.sg/Act/WC1961> accessed 30 April 2019.

²⁵ *Ibid.*, ss.65(1), 66(1).

²⁶ *Ibid.*, ss.65-67.

²⁷ Protection from Harassment Act 2014: <https://sso.agc.gov.sg/Act/Rev/PHA2014/> accessed 30 April 2019.

²⁸ Penal Code 1872, ss.354-354A, 375, 376-376E, 509: <https://sso.agc.gov.sg/Act/PC1871#pr509> accessed 30 April 2019.

²⁹ Constitution of the Republic of Singapore 1963, Article 12: <https://sso.agc.gov.sg/Act/CONS1963> accessed 30 April 2019.

³⁰ Penal Code 1872, s.375(4): <https://sso.agc.gov.sg/Act/PC1871#pr509> accessed 30 April 2019.

Singapore cont

Amendments to the Penal Code were made in May 2019, repealing s.375(4) and 376A(5) which provided immunity to marital rape and thus criminalised marital rape in Singapore.³¹

NATIONAL LEVEL REFORM EFFORTS

A. Civil society

Women's groups in Singapore have been campaigning for the repeal of the exemption to marital rape in the Penal Code for over a decade. They have also made submissions on proposed amendments to the Penal Code during the consultation process of the Penal Code Review Committee.³²

In September 2018, the Law and Home Affairs Minister, K Shanmugam, stated that Muslim scholars who were consulted by the Committee gave an understanding that the proposal would have no contradiction with Islamic beliefs. He further stated: "The Muslim community, in reactions we had in our consultations, has taken a similar approach in today's Singapore – that the woman's autonomy should be respected and all religions, including Islam, do not prohibit that. But it's something we need to engage and explain much more."³³

As a result, recommendations of the Committee were incorporated in a Bill to amend various provisions of the Penal Code, which was passed on 6 May 2019.³⁴

B. Government

Government efforts to amend AMLA have been made one issue at a time, instead of a more comprehensive approach to reform multiple discriminatory areas.

Child marriage

↪ In 2008, AMLA was amended to raise the minimum age of marriage for Muslims from 16 to 18 years for both genders, in line with civil law. However, it withheld amending the provision that allowed a girl below the minimum age to get married under "special circumstances" and with the *Kadi's* permission. In its 2015 State Party report to the CEDAW Committee, the Government concluded that marriages below 18 years were rare and, since the amendment to the minimum age in 2008, the number of marriages below 18 years had dropped by 38%, from 29% in 2009 to 18% in 2014.³⁵

↪ In 2017, Parliament introduced new rules for Muslim couples where at least one party was below 21 years of age. The couple was mandated to attend a marriage preparation programme approved by the Ministry of Social and Family Development, and the minor's parents or guardians were also required to give consent to the marriage. Previously, only the consent of the *wali* was needed.³⁶

Inheritance

The MUIS Fatwa Committee issued three *fatwas* (religious rulings), in 2008, 2010 and 2012, intended to protect the financial welfare of Muslim women and their dependents under Islamic inheritance law and to align Muslim law with civil law. The rulings were as follows:

- ↪ The 2008 *fatwa* on joint tenancy recognised the surviving spouse (or co-owner) as the legal owner of a jointly held property upon the death of the other spouse (or co-owner).
- ↪ The 2010 *fatwa* on Central Provident Fund (CPF) nominations recognised that when Muslim CPF account holders make a nomination of their CPF savings in favour of their spouse or children upon their death, it is considered a valid gift.
- ↪ The 2012 *fatwa* on revocable insurance nominations allowed Muslim policyholders to nominate their spouse or dependents to receive the full payout from the insurance company as a valid gift.

Marital rape

In 2016, the Government announced the set-up of a Penal Code Review Committee³⁷ to consider areas of reform to the Penal Code. The report of the Committee³⁸ was released in August 2018 and included recommendations to repeal s.375(4) and s.376A(5) which provide marital immunity for rape. In February 2019, the first reading of the Criminal Law Reform Bill, which was drafted based on the Committee's report, was held in Parliament. The Bill was passed on 6 May 2019, leading to the repeal of marital rape immunity, as well as greater protection for vulnerable adults and young children.³⁹

31 Chong, Aaron, *Sweeping law reforms to outlaw marital rape, penalise voyeurism passed*, Channel News Asia, 6 May 2019:

<https://www.channelnewsasia.com/news/singapore/lawreforms-passed-outlaw-marital-rape-penalise-voyeurism-11508472> accessed 30 April 2019

32 AWARE 2018, *Proposed Amendments to the Penal Code: AWARE's submissions to the Government consultation*

<https://d2t1lspzrtif2.cloudfront.net/wp-content/uploads/Public-consultation-on-the-Penal-Code-review-2018-AWAREs-comments-and-recommendations-final.pdf>

33 Channel News Asia, *Sweeping changes proposed to Singapore Penal Code; attempted suicide to be decriminalised*, 12 February 2019:

<https://www.channelnewsasia.com/news/singapore/marital-immunity-for-rape-set-to-be-repealed-as-part-of-changes-11229224>

34 *Ibid* at fn 31.

35 Government of Singapore, *Singapore State Party Report*, U.N. Doc. CEDAW/C/SGP/5 (2015), available at:

<http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx> accessed 30 April 2019.

36 Ming, T.E., *New rules for Muslim minors seeking to get married*, Today Online, 1 August 2017,

<https://www.todayonline.com/singapore/new-rules-kick-muslim-minors-seeking-get-married> accessed 30 April 2019.

37 Factsheet on the Penal Code Review Committee: <http://www.cmc.gov.sg/content/dam/minlaw/corp/News/Factsheet.pdf>.

38 *Penal Code Review Committee Report*, August 2018, submitted to: Minister for Home Affairs and Minister for Law, Singapore:

<https://www.mha.gov.sg/docs/default-source/default-document-library/penal-code-review-committee-report3d9709ea6f13421b92d3ef8af69a4ad0.pdf>.

39 *Ibid* at fn 31.

INTERNATIONAL OBLIGATIONS

Convention on the Elimination of All Forms of Discrimination against Women

Singapore ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in October 1995, with reservations to Articles 2(a)-(f), Article 11, 16(1)(A), 16(1)(c), 16(1)(h), 16(2), 29(1) and 29(2) of CEDAW⁴⁰ on the following grounds:

“In the context of Singapore’s multiracial and multi-religious society and the need to respect the freedom of minorities to practice their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of article 2, paragraphs (a) to (f), and article 16, paragraphs 1(a), 1(c), 1(h), and article 16, paragraph 2, where compliance with these provisions would be contrary to their religious or personal laws.”

Singapore has withdrawn its reservation to Article 11 and partially withdrawn its reservations to Articles 2 and 16. These partial reservations are still retained on the pretext of protecting the rights of minorities in the practice of their personal and religious laws. With the exception of Singapore’s Muslim minority community, marriage and family relations of all communities in Singapore regardless of religion are governed by the Women’s Charter, which exclusively recognises civil marriages.⁴¹ Therefore, Article 12(3) of the Constitution and the reservations made to CEDAW apply expressly with regard to Muslim family law on marriage, divorce and inheritance.

Singapore had its fifth periodic review before the CEDAW Committee during the 68th CEDAW Session in November 2017. Following the review, the CEDAW Committee made the following recommendations relating to personal status laws and reform of AMLA:

“45. The Committee recommends that the State party undertake a comprehensive review of the Administration of Muslim Law Act, taking into account the experiences of other countries with populations of similar cultural backgrounds and with similar legal norms, to provide women with rights equal to those of men with regard to marriage, divorce and inheritance. In particular, it recommends that the State party:

- a. Abolish exceptions to the prohibition of marriage of girls under 18 years of age with regard to civil and Muslim marriages and request the full consent of the woman in all marriages;
- b. Intensify its efforts to discourage and prohibit polygamy...
- c. Ensure that women and men have equal rights to divorce, including with regard to grounds for divorce and standards of proof, and abolish the right of Muslim husbands to unilateral divorce (*talaq*);
- d. Guarantee the equal rights of women in all matters of inheritance, and provide for the equal choice of adjudication between religious and civil law regimes;
- e. Amend sections 90 and 91 of the Act to include women in key positions and professions within the Registry of Muslim Marriages.”

Convention on the Rights of the Child

The fourth and fifth combined Convention on the Rights of the Child (CRC) review for Singapore was in May 2019 during the 81st CRC Session. The CRC Committee made the following recommendation to the Singapore Government in its Concluding Observations with regard to raising the minimum age of marriage:⁴²

“18. The Committee urges the State party to:

- b. Remove all exceptions that allows for marriage under the age of 18 years, in particular subsection 96(5) of the Administration of Muslim Law Act, and to ensure compliance with such a prohibition;
- c. Conduct extensive public information campaigns to raise awareness on the prohibition on exceptions to marriage for persons under 18 years old.”

In 2013, Singapore co-sponsored a Resolution on Child, Early and Forced Marriage⁴³ at the Human Rights Council which recognised child, early and forced marriage as a human rights violation that “prevents individuals from living their lives free from all forms of violence” and negatively impacts the “right to education, and the highest attainable standard of health, including sexual and reproductive health”.⁴⁴

40 United Nations Treaty Collection: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg_no=IV-8&chapter=4&clang=en#EndDec accessed 30 April 2019.

41 Women’s Charter 1961: <https://sso.agc.gov.sg/Act/WC1961> accessed 30 April 2019.

42 CRC Committee Concluding Observations on Singapore. CRC/C/SGP/CO/4-5 (2019), available at: <https://undocs.org/CRC/C/SGP/CO/4-5>.

43 Girls Not Brides, States adopt first ever resolution on child marriages at HRC, 2013, available at:

<https://www.girlsnotbrides.org/states-adopt-first-ever-resolution-on-child-marriage-at-human-rights-council/> accessed 30 April 2019.

44 Ibid.

Sustainable Development Goals

As part of their Sustainable Development Goals (SDG) agenda, Singapore has made commitments towards attaining the SDGs including Goal 5 on gender equality and empowerment of women and girls. SDG Indicator 5.1.1 has already identified family law as one of the legal frameworks that must be reformed to accelerate progress to promote, enforce, and monitor gender equality.

KEY BARRIERS AND CHALLENGES TO REFORM

Like many other countries with minority Muslim populations, the Government treats Muslim male politicians and members of religious institutions as the main interlocutors of the Muslim community. In Singapore, any issue relating to the Muslim community comes under the purview of the Minister of Muslim Affairs. Therefore, only the matters that the Ministry undertakes or seeks to engage in are taken up at the Government level. Muslim advocates report that these are at the discretion of the Ministry and do not necessarily include matters relating to the rights of Muslim women. Muslim women advocates report that they do not have the same access to decision-makers as Muslim men do in already established religious institutions like MUIS.

The space to undertake activism and advocacy-related initiatives is also restricted in Singapore. Human rights-related work and media engagements of human rights organisations continue to be monitored. Singapore has severe restrictions on the right to peaceful assembly and expression, which were further restricted with amendments to the Public Order Act in 2017.⁴⁵

Given the barriers and challenges, women's rights advocacy and activism relating to reform of AMLA, both comprehensively as well as relating to individual issues such as child marriage, are challenging in Singapore. While women's rights groups are aware of the discriminatory provisions within AMLA, there is not yet any systematic documentation of lived realities in the form of cases, incidents and experiences of Muslim women. As a result, disaggregated data and cases related to the impact of AMLA on the lives of Muslim women in Singapore are not publicly available and/or part of the evidence considered by the Government when proposing amendments.

RECOMMENDATIONS FOR REFORM OF MUSLIM FAMILY LAW IN SINGAPORE

Musawah's mapping of Muslim family laws in 31 countries indicates that laws which consider women and men as equal partners in a marriage are likely to contain fewer discriminatory provisions with regard to other aspects of matrimony. Hence, a comprehensive reform of AMLA to address multiple areas of discrimination is needed to ensure equality for Muslim women in Singapore. Only by so doing will the Government of Singapore demonstrate progress in implementing the CEDAW Committee's Concluding Observations relating to reforming AMLA before Singapore's next CEDAW review.

We make the following recommendations to the Government of Singapore:

Recommendation 1

The Government should repeal or reform the Administration of Muslim Law Act 1968 with a new family law that grants husband and wife equal rights and responsibilities in marriage, within a legal framework that recognises marriage as a partnership of equals. This includes the following:

- Remove the prohibition of qualified women from all positions within the Syariah Court system.
- Ensure that Muslim women have an equal legal right to enter into marriage on their own accord without requiring permission of a male guardian or *Kadi*.
- Prohibit polygamy for Singaporean Muslim men.
- Ensure that Muslim men and women have equal rights to divorce, including the grounds considered for divorce and the standards of proof.

Recommendation 2

The Government should define 18 years as the minimum age of marriage for Muslim girls and remove all legal exceptions.

Recommendation 3

The Government should revert to the legal position before the introduction of the Administration of Muslim Law Act 1968 to provide Muslims the option to choose whether to distribute their estate and assets upon death under Muslim law or civil law.

The Government must ensure that it undertakes robust consultations with Muslim communities especially with Muslim women in any and all discussions regarding the reform of AMLA, taking into consideration the experiences and challenges of women with regard to its provisions and practice in the Syariah Court.

⁴⁵ Human Rights Watch, Singapore Chapter, World Report 2017: <https://www.hrw.org/worldreport/2018/country-chapters/singapore> accessed 30 April 2019.



Sri Lanka

Sri Lanka



CONTEXT

Muslims in the Democratic Socialist Republic of Sri Lanka currently account for 9.66% (1,967,523 million)¹ of the total population of 20.3 million people and constitute multiple ethnicities including Moors, Malays and Bohras. The majority of the community is Sri Lankan Moors, primarily a mixture of descendants of Muslim traders and merchants from the Arabian subcontinent and India. Sri Lankan Malays have their ancestry in the Malay Archipelago. Moors and Malays are categorised as Sunni Muslims belonging to the *Shafi'i madhab* (school of jurisprudence). The community also consists of other smaller minorities, including Memons, descendants from Sindh in Pakistan who identify as Sunni Muslims of the *Hanafi* sect, and Dawoodi Bohras, who identify as Shia Muslims.

According to the 2018 Human Development Report released by the United Nations Development Programme (UNDP),² Sri Lanka ranks 76 out of 189 countries. In the 2018 Gender Inequality Index, Sri Lanka was ranked 80 out of 160 countries.

LEGAL FRAMEWORK

Constitution of the Democratic Socialist Republic of Sri Lanka

Article 12(2) of the 1978 Constitution of Sri Lanka states, "No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds."

However, Article 16(1) in the Fundamental Rights chapter of the Constitution supersedes Article 12(2), with the provision:

"All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this [Bill of Rights] Chapter."

The existence of Article 16(1) means that all written and unwritten laws that existed prior to the 1978 Constitution of Sri Lanka remain "valid and operative" despite the fact they contain provisions that violate fundamental rights of citizens.³ The Article protects over 200 laws, which include family laws such as the Muslim Marriage and Divorce Act (MMDA)⁴ and the General Marriage Registration Ordinance (GMRO).⁵ The guarantee of fundamental rights is further restricted by Article 80(3) of the Constitution, which prevents judicial review of Acts once passed through Parliament.

Recent moves to present a new Constitution to the country have raised the debate on Article 16. The singular public position against its repeal in a new constitution has come from Muslim male politicians, who seek to retain Article 16(1) for all personal laws, especially the MMDA.⁶

DOMESTIC LAWS

A. Family laws

Sri Lanka has a dual legal system on matters relating to marriage and family, with a combination of civil and customary laws. The 1907 Sri Lankan GMRO is applicable to all citizens of the country with the exception of Muslims who marry within faith.⁷

The Kandyan Sinhalese, a sub-set of the majority Buddhist community belonging to former provinces of the Kandyan Kingdom, have the option to marry under the 1952 Kandyan Marriage and Divorce Act.⁸ The *Tesawalamai*⁹ is another customary law, which governs property ownership of Tamil inhabitants of the Jaffna peninsula.

MMDA of 1951 governs Muslim inhabitants throughout the country who marry within faith (including converts to Islam). Sri Lankan Muslims do not have the option to marry under GMRO, however, a Muslim marrying a non-Muslim can do so.

1 Department of Census and Statistics. *Census of Population and Housing 2012*: <http://www.statistics.gov.lk/>, accessed 9 April 2019.

2 UNDP Human Development Reports – Sri Lanka 2018: www.hdr.undp.org/sites/all/themes/hdr_theme/country-notes/LKA.pdf, accessed 9 April 2019.

3 Muslim Personal Law Reform Action Group, About Article 16(1): <https://mplreforms.com/article-16/>, accessed 30 March 2019.

4 The Muslim Marriage and Divorce Act (MMDA), 1951, available at: http://www.commonlii.org/lk/legis/consol_act/mad134294.pdf.

5 The General Marriage Registration Ordinance (GMRO), 1908, available at: http://www.commonlii.org/lk/legis/consol_act/m131146.pdf.

6 Women Action Network, Sri Lanka, *Article 16 of Constitution that makes Muslim women second-class citizens, must go*: <http://sri.lankabrief.org/2016/08/article-16-of-the-constitution-that-makes-muslim-women-second-class-citizens-must-go-wan/>, accessed 8 April 2019.

7 Op. cit. at fn 5.

8 The Kandyan Marriage and Divorce Act 1952, available at:

http://www.hrsl.lk/PFF/Urinary_Domestic_Laws/Legislation_related_to_children/1952%20No%2044%20Kandyan%20marriages%20and%20divorce%20act.pdf.

9 *Tesawalamai Pre-emption Ordinance 1947*: <https://www.srilankalaw.lk/Volume-VIII/thesawalamai-pre-emption-ordinance.html>.

B. Muslim marriage and divorce act

The Sri Lankan MMDA originates from a code of law on marriage and divorce imported from Batavia (present-day Indonesia) during the period of Dutch rule in 1770. The current Act embodies substantive provisions held by the preceding ordinances and code. While including provisions based on Sharia and Islamic legal practices, the Act also includes provisions relating to local customs followed by Sri Lankan Muslims at that time – such as that of *kaikuli* (dowry given by the bride's family to the groom)¹⁰ – which are alien to Islamic law.

Administration of MMDA

With the enactment of MMDA, a *Quazi* (Muslim judge)-based court system was also established. There are currently 65 *Quazi* courts in Sri Lanka with one *Quazi* each. Most *Quazis* have a defined geographical jurisdiction. However, this is not always the case. For example, the *Quazi* for the Memon community has island-wide ethnic jurisdiction for wherever Memon community members reside, and in Puttalam district, a special *Quazi* has been appointed for all internally displaced persons in that district.

Appeals from the *Quazi* courts go to a five-member all-male Board of *Quazis*.

Civil courts also play a role in administering Muslim family matters. In the event that cases are left unresolved or parties are aggrieved by the decisions of the Board of *Quazis*, cases are taken up at the Court of Appeals. The Magistrate's Court has the jurisdiction to give enforcement orders for default on payment of maintenance from husbands to their wives, and the District Court has applicable jurisdiction on child custody cases and facilitating the recovery of sums due on claims relating to dowry (*mahr* [marriage gift] and *kaikuli*).¹¹

Key issues regarding MMDA

MMDA is based on a legal framework that considers women as unequal to men, effectively granting husbands additional rights and privileges and denying wives equal protection of rights and access to justice. Not only

does MMDA contain specific provisions that violate the rights of Muslim women, it also outlines procedures that provide differential treatment of women leading to a wide range of practical problems in *Quazi* courts.¹²

Outlined below are selected examples of discriminatory provisions in the Act and practices in the *Quazi* court system.

1. Minimum age of marriage

In 1995, GMRO was amended to make the minimum age of marriage 18 years for men and women. However, MMDA does not stipulate a minimum age of marriage. Child marriage is therefore permitted for Muslims in Sri Lanka. According to s.23 of MMDA, a *Quazi* judge can even authorise marriage to a girl below 12 years of age. Solemnisation of such a marriage is still considered valid even without *Quazi* authorisation.¹³

The Sri Lankan Penal Code sets the age of consent at 16 years old.¹⁴ However, s.363 on Rape and Incest states:

"A man is said to commit 'rape' who has sexual intercourse with a woman under circumstances falling under any of the following descriptions: –

- e. with or without consent when she is under sixteen years of age, unless the woman is his wife who is over twelve years of age and is not judicially separated from the man."

Data on registered Muslim marriages between 2014 and 2016 indicates that there are occurrences of child marriages across the country, including girls as young as 12 years old in the Colombo district. Statistics also show that in some districts between 88% and 100% of underage marriages occur with brides who are 16 or 17 years of age.¹⁵ Women's groups note that many underage marriages may not be registered because MMDA recognises unregistered marriages as valid. Case studies documented by women's groups and Muslim women researchers also reveal that most girls drop out of schools to get married, often right after their Ordinary Level (O Level) examinations, making

10 C. Kodikara, *Muslim Family Law in Sri Lanka: Theory, Practice and Issues of Concern to Women*, Muslim Women's Research and Action Forum/Women Living Under Muslim Law, 1999.

11 Muslim Personal Law Reform Action Group, *Frequently Asked Questions about MMDA*: <https://mplreforms.com/aboutmmda> accessed 7 April 2019.

12 H. Cegu & H. Hamin, *Unequal Citizens: Muslim women's struggle for Justice and Equality in Sri Lanka*, 2016, available at: <https://mplreforms.com/unequal-citizens-study/>.

13 *Op. cit.* at fn 4.

14 Penal Code of Sri Lanka, available at: http://htlibrary.umn.edu/research/srilanka/statutes/Penal_Code.pdf.

15 Muslim Personal Law Reform Action Group, *Position Paper on Minimum Age of Marriage*, 2018: <https://mplreforms.com/2018/10/08/position-paper-1/>.

them particularly vulnerable to economic dependency on their husbands during marriage, and on male family members in cases of divorce, non-maintenance by husbands or abandonment.¹⁶

The gap in legislation relating to minimum age of marriage leaves Muslim girls at serious risk in comparison to their peers and violates Sri Lanka's international human rights obligations to protect the rights of all children.

Case study

Latifa's story

After Latifa completed her O Level exam, she wanted to continue studying but her parents insisted she get married. When she was 16, she married a 28-year-old man. Her husband turned out to be abusive, both physically and emotionally, and she developed health problems as a result. Unable to cope, Latifa filed for *fasah* divorce (which requires evidence and testimonies), but it was difficult for her to explain to the male *Quazi* her marital problems and the divorce proceeding stretched on. She only obtained her divorce a year after her initial application.¹⁷

2. Women as Quazis

The Judicial Service Commission (JSC) is mandated with handling the appointment of *Quazis*, as well as undertaking terminations and transfers of *Quazis* and Board of *Quazi* members. According to s.12 of MMDA, a *Quazi* can be any "male Muslim of good character and position and of suitable attainments". According to the JSC, *Quazis* are chosen based on four attainments: they are either lawyers; *Moulavis* or *Alim* (religious scholars); retired public officers in the staff grade; and/or graduates.¹⁸ There is no compulsory training for *Quazis*, nor are *Quazis* required to be knowledgeable about MMDA and its procedures.

Women are barred from *Quazi* positions, as well as positions of marriage registrars, jurors and Board of *Quazi* members. The position of *Quazi* is the only state-salaried judicial position that discriminates against women simply on the basis of sex.

3. Lack of consent and capacity for women to enter into marriages

MMDA does not mandate proof of consent of Muslim women to marry. Sunni brides who do not belong to the *Hanafi madhab* (which is the majority of Sri Lankan Muslim women) require the permission of a *wali* (male guardian) in order to enter into marriage. According to s.47(3) of MMDA,¹⁹ when women do not have a *wali* (eg: in instances where male relatives are absent or the woman has converted to Islam), the male *Quazi* is required to make an order authorising the marriage. Recent studies indicate that there are instances during which male guardians coerce or force women and girls into marriage.²⁰ Adult women belonging to the *Hanafi madhab* do not require permission from male guardians to enter into marriage.²¹ Women's groups have been demanding a declaration of consent verbally and via a signature/thumbprint before a marriage registrar to be a mandatory requirement for the solemnisation of a marriage.²²

Case study

Ayesha's story

Ayesha from the Mullitivu district was 14 years old when she was forced into marriage by her *wali*. On her wedding day, she was made to dress up on the pretext she was going to a cousin's wedding. Ayesha was locked inside a room and was only informed that she had been given in marriage when her husband entered the room later that night. The marriage was unsuccessful and Ayesha was divorced a few years later. She continues to bear the emotional trauma of her experience.²³

4. Polygamy

According to MMDA, a Muslim man can marry up to four wives legally, without any requirement of consent or fulfillment of any conditions. The only procedure that is required, according to s.24 of the Act,²⁴ is for the husband to inform the *Quazi* of his intention to marry 30 days prior to the marriage. The *Quazi* is required to merely place notices of the husband's intention in the local mosque. While it is compulsory according to MMDA for marriages to be registered, there is no provision or requirement to declare previous marriages.

¹⁶ FOKUS Women, *Hidden Truth: Gender Based Violence Against Muslim Women in Puttalam and Batticaloa*, 2016.

¹⁷ *Ibid.*

¹⁸ *Op. cit.* at fn 11.

¹⁹ *Op. cit.* at fn 4.

²⁰ H. Cegu, H. Hamin, *Unequal Citizens: Muslim women's struggle for justice and equality in Sri Lanka*, 2016, available at: <https://mplreforms.com/unequal-citizens-study/>.

²¹ Saleem Marsoof, *Muslim Matrimonial Law – Some Grey Areas*, 2012, available at: https://www.academia.edu/9905307/Muslim_Matrimonial_Law_-_Some_Gray_Areas.

²² Muslim Personal Law Reform Action Group, *Muslim Women's Demands*, 2017 <https://mplreforms.com/demands/>.

²³ Independent interview by Hyshyama Hamin, 2016.

²⁴ *Op. cit.* at fn 4.

Recent studies indicate that the practice of obtaining dowry from families of brides is also a motivating factor for polygamy. There have been cases where women who have objected to subsequent marriages face domestic violence and abuse at the hands of their husbands. Since financial capacity is not a prerequisite for polygamy, husbands sometimes divorce their wives when they are unable to bear the financial burdens of multiple families.²⁵

5. Unequal provisions for divorce

As per MMDA, the provisions for divorce are different for women and men, as well as for different *madhabs* and sects. Husbands are permitted to *talaq* or unilaterally divorce their wives without any reason. Procedurally, the husband is required to apply for a divorce via the *Quazi* court and make three pronouncements of divorce over a period of three months. In practice, the pronouncement of *talaq* does not require the presence of the wife and anecdotal evidence indicates that there are wives who are unaware that divorce proceedings are underway until they receive a notice from the *Quazi* or the divorce certificate. Testimonies collected by researchers reveal incidents where *Quazis* have been bribed by husbands to expedite *talaq* divorce cases.²⁶

Sunni wives are allowed to initiate *fasah* divorce, which requires proof of matrimonial fault of the husband on grounds of ill-treatment, cruelty, domestic violence, desertion and failure to maintain the family. Procedurally, the wife is required to present evidence, testimonies and witnesses before an all-male panel of jurors and *Quazi*.²⁷

As per s.28 of MMDA,²⁸ women who belong to other sects (eg: Dawoodi Bohras) do not have the option to divorce their husband, as the sect law does not recognise divorce initiated by the wife.

6. *Quazi* court-related issues

Multiple studies and anecdotal cases gathered by researchers also indicate that Muslim women face many challenges in accessing justice via the predominantly male *Quazi* court system. Women have reported mistreatment and bullying by *Quazis* and jurors, including threats, verbal abuse and intimidation.

Women are often told their testimonies are not sufficient and they need to come with, or communicate via, male relatives.²⁹ There have also been reports of bribery at *Quazi* courts. A recent case before the Right to Information Commission revealed that the JSC had received 230 complaints filed against *Quazi* judges between 2012 and 2017.³⁰

C. Violence against women in the family

According to the 2016 Demographic and Health Survey, 17% of ever-married women aged 15–49 have suffered domestic violence from their intimate partner, and 2% of ever-married women have suffered from domestic violence on a daily basis.³¹

The Penal Code criminalises many physical acts of violence, such as assault, kidnapping, and grievous hurt. However, there is no law that explicitly criminalises domestic violence. Marital rape is also not recognised as a crime, unless the wife is judicially separated from the husband.

The Prevention of Domestic Violence Act (PDVA) was enacted in 2005, after years of lobbying by women's groups. The Act is intended to prevent domestic violence, however, it only provides the ability to obtain protection orders from Magistrate Courts. This is a civil remedy with penal consequences attached to violating the protection order.³² According to women's groups, there are numerous problems with the implementation of the Act, with the result that only a few women have been successful in obtaining protection orders to escape domestic violence. Challenges to implementation include institutional and structural factors such as bureaucratic delays and inefficiency, as well as the lack of independence of law enforcement authorities, including judges. Judges' culturally influenced ideologies and norms, and the current approach of law enforcement, both place greater value on reconciliation and weigh against women seeking redress.

25 Op. cit. at fn 20.

26 Ibid.

27 Rule 7 requires the *Quazi* to empanel three Muslim assessors to support him in the hearing of the *fasah* application. Source: C. Kodikara, *Muslim Family Law in Sri Lanka: Theory, Practice and Issues of Concern to Women*, Muslim Women's Research and Action Forum/Women Living Under Muslim Law, 1999.

28 Op. cit. at fn 4.

29 FOKUS Women, *Discrimination of Muslim Women in the Quazi Courts in Puttalam and Batticaloa*, 2016.

30 Colombo Telegraph, *RTI Unearths 230 Complaints Against Quack 'Islamic' Judges*, March 2019: <https://www.colombo Telegraph.com/index.php/rti:unearths-230-complaints-against-quack-islamic-judges/>.

31 Demographic and Health Survey, Sri Lanka 2016, *Domestic Violence from Intimate Partner*: http://www.statistics.gov.lk/social/DHS_2016a/Chapter13.pdf accessed 6 July 2019.

32 Prevention of Domestic Violence Act 2005, available at: <https://sri.lankalaw.lk/Volume-VI/prevention-of-domestic-violence-act.html>.

NATIONAL LEVEL REFORM EFFORTS

A. Civil society

Although efforts to reform MMDA date back to 1954, amendments to the Act have been minimal. Muslim women have been at the forefront of demanding substantial reform. Muslim Women's Research and Action Forum (MWRAF), an organisation working on Muslim women's rights since the 1980s, established an Independent Committee for Muslim Personal Law Reform in 2005. They have also given testimonies before various other reform committees. Part of MWRAF's work involves supporting affected women with legal aid and documenting *Quazi* court cases.³³

Other community women's groups in different parts of the country have also been actively engaging in MMDA reform, especially in the past few years. The Muslim Women's Development Trust in Puttalam and the Islamic Women's Association for Research and Empowerment in the Ampara district are among women's groups that have been raising awareness about MMDA, providing legal support and counselling to affected women, documenting cases and advocating for reform.³⁴

In 2016, the Muslim Personal Law Reform Action Group (MPLRAG) emerged as a lobby group of individual lawyers, activists and researchers with the specific intention to push for MMDA reform. They released *Muslim Women's Demands*,³⁵ which outlined key amendments to MMDA, including raising the minimum age of marriage to 18 years without exception; allowing women to become *Quazis*, jurors, marriage registrars and members of the Board of *Quazi*; mandating written consent of brides and giving women equal autonomy to enter into marriages; and mandating consent of all parties to a polygamous marriage including existing and new wives. MPLRAG has also published Position Papers on each of the issues on which the 2009 Reform Committee has divergent views.³⁶

Throughout the MMDA reform process, women's groups have raised concerns that they are being excluded from the process and highlighted that the effort to reach compromise will inevitably lead to piecemeal reform, which will not address the discrimination that Muslim women and girls face in law and in practice.³⁷

B. Government

Since 1970, there have been five committees, including three government appointed committees, to suggest amendments to MMDA. The most recent committee was set up in 2009 and was headed by former Supreme Court Judge and Presidential Counsel Justice Saleem Marsoof. The Committee had 16 members comprised of Muslim judges and senior lawyers, members of the All Ceylon Jamiyyathul Ulama (ACJU) and women's groups. Of the 16 members, five were women.

Following significant pressure by women's rights groups and activists, the report of the Committee was submitted to the Minister of Justice in January 2018 – nine years after its appointment. While all 16 members of the Committee agreed unanimously on a few issues, the Committee was split halfway on many of the main issues currently being debated including:

1. Whether MMDA should apply differently to persons of different *madhabs* and sects.
2. Absolute minimum age of marriage.
3. Validity of marriage without registration.
4. Requirement of a *wali* for brides.
5. Women as *Quazis*.
6. Payment of compensation for fault-based divorce.
7. Upgrading of the *Quazi* court system to the standard of magistrate courts.
8. Presence of lawyers in *Quazi* courts.

Since the release of the report, the Minister of Justice, Thalatha Athukorala, has commented on multiple occasions that the Ministry is not able to take the reforms process forward because there are divided opinions among the 2009 Committee members.³⁸

In July 2019, Muslim Members of Parliament (MPs) decided on a set of MMDA amendments that included raising the minimum age of marriage to 18 years; women to be appointed as *Quazi* court judges; mandatory consent of brides and registration of marriages; and ensuring *Quazi* court judges are qualified to be attorneys-at-law.³⁹ However, in the subsequent weeks, conservative groups such as the ACJU heavily lobbied Muslim MPs to backtrack on some

33 Ed. F. Zackariya, C. Kodikara, *Women Claiming Rights and Spaces: Activism to Reform Muslim Personal Law in Sri Lanka*, Muslim Women's Research and Action Forum, Colombo, Sri Lanka, 2014.

34 *Op. cit.* at fn 20.

35 Muslim Personal Law Reform Action Group, *Muslim Women's Demands*, 2017 accessible at: <https://mplreforms.com/demands/>.

36 Muslim Personal Law Reform Action Group, *Position Paper on Minimum Age of Marriage*, 2018: <https://mplreforms.com/2018/10/08/position-paper-1/> and *Position Paper on Women Quazis*: <https://mplreforms.com/2019/02/12/women-as-quazis/>.

37 R. Hamin, Colombo Telegraph, *With Government Backing, Muslim Men Are Taking Over MMDA Reforms Once Again*, 2019: <https://www.colombotelegraph.com/index.php/with-government-backing-muslim-men-are-taking-over-mmda-reforms-once-again/>.

38 A. Ameer, Daily FT, *MMDA, ACJU, politicians and women*, 2019: <http://www.ft.lk/columns/MMDA-ACJU-politicians-and-women/4672967> accessed 27 March 2019.

39 R. Rizwie, Daily News, *Muslim MPs fast-track MMDA reforms, lobbyists caution*, 16 July 2019: <http://www.dailynews.lk/2019/07/16/local/191261/muslim-mps-fast-track-mmda-reforms-lobbyists-caution>.

of the progressive stances.⁴⁰ Despite the best effort of Muslim women's groups in consistent lobbying and advocacy, Muslim MPs regressed on original positions. The main stances on which they altered their opinion include women as *Quazi* court judges and allowing for exceptions to the minimum age of marriages (for 16 and 17 years with *Quazi* permission). The revised proposed set of amendments to the MMDA was submitted to the Cabinet of Ministers on 21 August 2019 and was passed as a supplementary paper by the Cabinet. While the proposed set of amendments includes some progressive changes to provisions in the MMDA, women's rights groups have raised serious concern that they still fail to address the most urgent and discriminatory issues facing Muslim women.⁴¹

INTERNATIONAL OBLIGATIONS

Convention on the Elimination of All Forms of Discrimination against Women

Sri Lanka ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1981. Its most recent review was during the 66th Session in February 2017. In its Concluding Observations, the CEDAW Committee recommended that the Government of Sri Lanka should make the following reforms with regards discriminatory personal status laws:⁴²

- "13. b. Amend all Personal Laws, including the Muslim, Kandyan and *Tesawalamai* Personal Laws, to remove discriminatory provisions regulating ownership, inheritance, transfer and disposal of land and property, as well as provisions regulating legal capacity, marriage, divorce, and child custody. [*This recommendation is also noted as a 'Follow-up issue' which the Government needs to show progress on in two years after its review.*]
45. b. Amend the General Marriage Registration Ordinance to ensure that Muslim women have the free choice to opt out from the Muslim Personal Law, so as to be registered under the general law;
- c. Ensure that property rights are governed by general civil contractual and property law rather than religious law;
- d. Increase the minimum age of marriage for all women in the State party to 18 years of age;

- e. Eliminate any restriction on women's eligibility to be appointed as *Quazis*, as Members of the Board of *Quazis*, Marriage Registrars and adjudicators; and
- f. Amend article 363 of the Penal Code to ensure that the crime of statutory rape applies to all girls under the age of 16, without exception."

Convention on the Rights of the Child

The sixth Convention on the Rights of the Child (CRC) Committee review for Sri Lanka was in January 2018 during the 77th CRC Session. The CRC Committee made the following recommendation to the Sri Lankan Government in its Concluding Observations:⁴³

- "15. Noting that, under the Muslim Marriage and Divorce Act, girls aged under 12 years may be married with the permission of a *quazi* (Muslim judge ruling on family matters), the Committee urges the State party to expeditiously increase the minimum age of marriage for all to 18 years of age without exceptions, including by amending article 16 of the Constitution in this regard."

Sustainable Development Goals

Sri Lanka has made commitments towards attaining Sustainable Development Goals (SDGs), including Goal 5 on gender equality and the empowerment of women and girls. SDG Indicator 5.1.1 has already identified family law as one of the legal frameworks that must be reformed to accelerate progress to promote, enforce, and monitor gender equality.

Sri Lanka is also a member of the South Asian Initiative to End Violence Against Children, which adopted a regional action plan (2018–2025) to end child marriage.⁴⁴

KEY BARRIERS AND CHALLENGES TO REFORM

In light of recent activity on MMDA reform, activists have identified various ongoing barriers and challenges to reform.

Muslim and non-Muslim politicians and Ministers consider the reform of MMDA as a "religious" issue, requiring the expertise of religious scholars. This perspective effectively positions Muslim religious and community leaders as the interlocutors between the Muslim community and the State, hence placing the onus of reforming the Act on them. Muslim politicians

⁴⁰ Ibid.

⁴¹ Muslim Personal Law Reform Action Group, *Cabinet Ministers Fail to Adequately Address MMDA Reform Concerns*, 23 August 2019: <https://mplreforms.com/2019/08/23/cabinet-ministers-fail-to-adequately-address-mmda-reform-concerns/>.

⁴² CEDAW Committee Concluding Observations on Sri Lanka CEDAW/C/LKA/CO/8, 2017: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fLKA%2fCO%2f8&lang=en.

⁴³ CRC Committee Concluding Observations on Sri Lanka. CRC/C/LKA/CO/5-6, 2018: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fLKA%2fCO%2f5-6&lang=en.

⁴⁴ Girls Not Brides, Sri Lanka: <https://www.girlsnotbrides.org/child-marriage/sri-lanka/> accessed 18 March 2019.

also fear that religious groups like the ACJU, with countrywide networks, control the voter base. The approach has given more prominence to religious leaders who promote the strictest and most conservative interpretations of Islamic law. It has also limited space for public debate on the issue and downplayed the cultural diversity of Muslim communities in Sri Lanka.

The ethno-religious dynamics between the majority Buddhist population and minority communities have also proven to be a challenge to MMDA reform. Incidents of hate speech and hate crimes against Muslim communities by radical Buddhist groups, such as the Bodu Bala Sena, have pushed the protection of minority rights to the forefront of the agenda for Muslim leaders and communities. Muslim women activists report that they are often shut down by families and community members when advocating for MMDA reform in order to protect the image of Muslim communities. Muslim women have pushed back on this “protectionist” approach by stressing that substantive MMDA reform will ensure both the protection of the rights of Muslim communities and improve the image of Muslims in Sri Lanka as being a progressive religious group, rather than a discriminatory one.⁴⁵

The articulation by Muslim interlocutors that MMDA is the cornerstone of ensuring minority rights for Muslims has also meant that State institutions and other bodies like the Human Rights Commission, tasked with the protection of fundamental rights of citizens, have been reluctant to take up cases of affected Muslim women and/or stances in promotion of comprehensive MMDA reform.

RECOMMENDATIONS FOR REFORM OF MUSLIM FAMILY LAW IN SRI LANKA

Musawah’s mapping of Muslim family laws in 31 countries indicates that laws which consider women and men as equal partners in a marriage are more likely to contain fewer discriminatory provisions with regard to other aspects of matrimony. Consensus-based piecemeal reform or upgrading the *Quazi* court system without substantive amendments to the Muslim Marriage and Divorce Act 1951 will not ensure an end to *de facto* and *de jure* discrimination of Muslim women and girls.

Recommendation 1

The Government of Sri Lanka should seek to demonstrate progress by 2020 on recommendations made by the CEDAW Committee in its Concluding Observations 2017, including, in particular, recommendation 13(b) on amendment of personal laws which is a priority women’s rights issue.

Recommendation 2

The Government should consider the Recommendations of the 2009 Reform Committee as suggestions that can be individually considered in light of the lived realities and experiences of Muslim women and girls.

Recommendation 3

The Government should treat statistical data, research and cases gathered by Muslim women’s groups as core evidence in making the case for comprehensive reform of the Muslim Marriage and Divorce Act.

Recommendation 4

The Government of Sri Lanka should consider the emerging feminist and rights-based scholarship on Islamic jurisprudence, as well as the diversity of Islamic legal tools and traditions, both of which support egalitarian family law reform.

Recommendation 5

The Government should define in law the minimum age of marriage as 18 without any exceptions in light of statistical data demonstrating that child marriages of 16 and 17-year olds constitute the majority of registered underage marriages.

Recommendation 6

The Government should remove the barrier preventing women from being appointed to all *Quazi* court positions including *Quazi*, marriage registrars, jurors and members of the Board of *Quazi*.

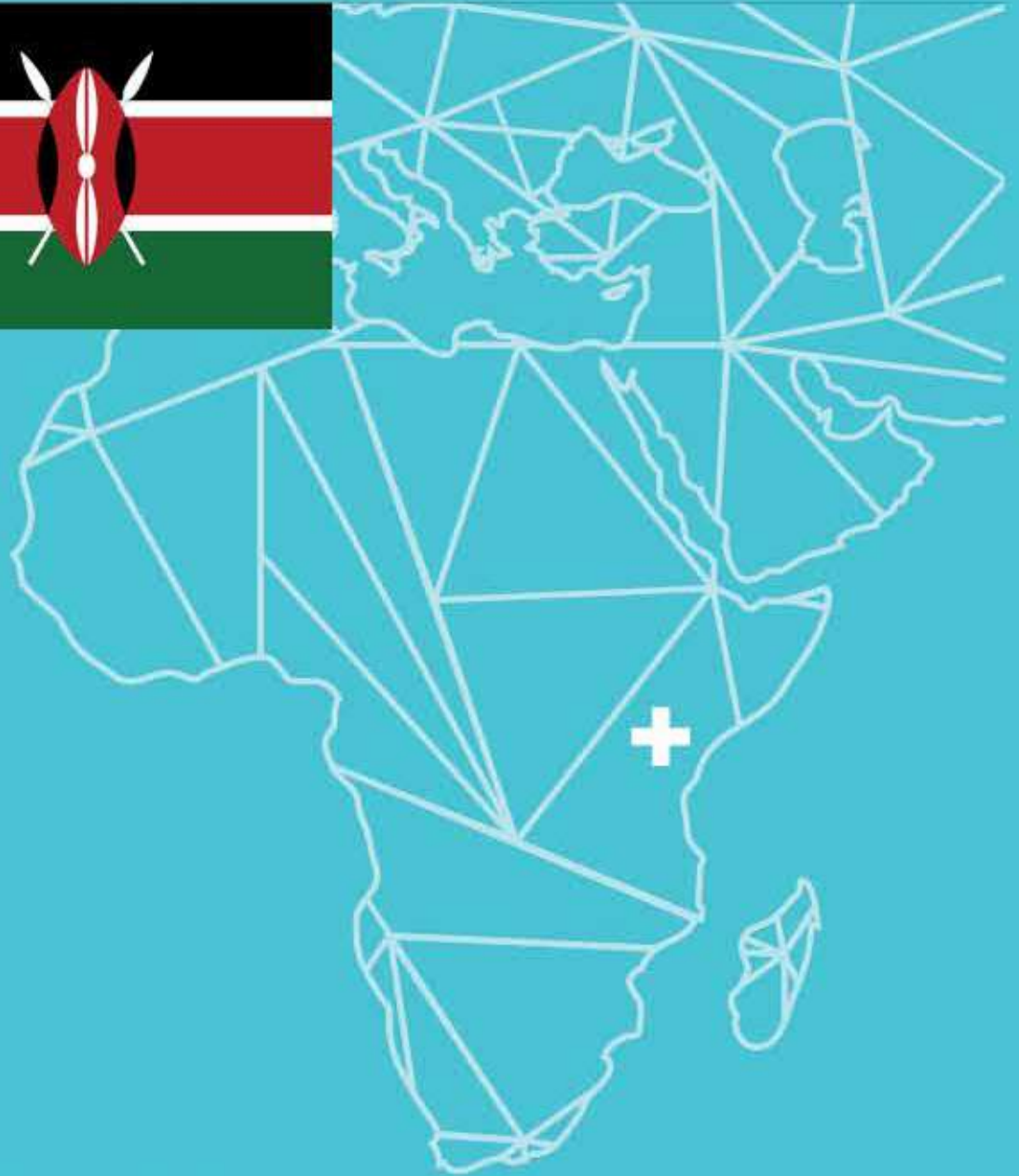
Recommendation 7

The Government should make it mandatory to obtain I. the consent of all wives and II. proof of financial capacity of husbands as a pre-requisite for entering into polygamous marriages. Couples should also be allowed to draw up marriage contracts stipulating a desire for a monogamous marriage only.

Recommendation 8

Women should be given full autonomy to enter into marriage and be granted equal legal rights and access to equal legal procedures as men in matters of divorce.

⁴⁵ Op. cit. at fn 20.



Kenya

Kenya



CONTEXT

According to the 2009 Census on Population and Housing, Muslims in the Republic of Kenya constitute 11.1% of the population.¹ However, some Muslim groups contest this figure and have placed the percentage as high as 30%.² Kenyan Muslims primarily belong to the Sunni sect (73%) and follow the *Shafi'i madhab* (School of Islamic Jurisprudence). There are also smaller communities of Ahmadi and Shia Muslims (7%), including Dawoodi Bohras. Muslim communities are primarily located in the coastal and northeastern regions of Mombasa, Lamu and Malindi.

LEGAL FRAMEWORK

Constitution of the Republic of Kenya

Article 27(1) of the Constitution of Kenya 2010 provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.³ Article 27(4) guarantees that, "The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."

In addition, the Kenyan Constitution specifically guarantees equality in marriage and family through Article 45, which provides that:

1. The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.
2. Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.

3. Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
4. Parliament shall enact legislation that recognises—
 - a. marriages concluded under any tradition, or system of religious, personal or family law; and
 - b. any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this Constitution" [emphasis added].

DOMESTIC LAW

A. Family laws

In April 2014, the President of Kenya signed into law The Marriage Act. This Act is the main codified law that governs marriage and family relations in Kenya and consolidated various laws governing religious, customary and civil marriages and divorces in the country. The Act also repealed previous legislation, including the Mohammedan Marriage and Divorce Registration Act, the Mohammedan Marriage Divorce and Succession Act, and the Hindu Marriage and Divorce Act.

The Marriage Act recognises five types of marriage: civil, customary, Christian, Hindu and Muslim.⁴ The provisions of the Act are applicable to all Kenyans unless stated otherwise in the Act.⁵ According to s.3(1) of the Marriage Act, marriage is defined as a voluntary union of a man and a woman, whether in a monogamous or polygamous union and registered in accordance with the Act. In line with Article 45(3) and other equality provisions in the Constitution, s.3(2) of the Marriage Act provides that parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage.

1 Kenya National Bureau of Statistics, 2009 *Census on Population and Housing*: <https://s3-eu-west-1.amazonaws.com/s3-sourceafrica.net/documents/21195/Census-2009.pdf> accessed 30 April 2019.

2 U.S Department of State, *Kenya*, International Religious Freedom Report, 2007, available: <https://2009-2017.state.gov/j/drl/rls/irf/2007/90103.htm> accessed 30 April 2019.

3 Constitution of Kenya 2010. Art 27(1), accessible: <http://www.kenyalaw.org/8181/exist/kenyalaw/actview.xql?actid=Const2010> accessed 30 April 2019.

4 The Marriage Act, No. 4 of 2014., accessible: http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf accessed 30 April 2019.

5 Information obtained from Kenyan advocate, February 2017. See also The Marriage Act, Part III (Christian Marriages), Part IV (Civil Marriages), Part V (Customary Marriages), Part VI (Hindu Marriages), Part VII (Marriages under Islamic Law).

In relation to customary marriages, new rules – Marriage (Customary Marriage) Rules 2017 – were introduced in 2017⁶ to give equality of status across all systems of marriage and mandating that couples married under customary law register their marriage at the office of the Attorney General.⁷

However, despite these progressive provisions in both the Constitution and the Marriage Act:

- ✓ Section 3(4) of the Marriage Act states that parties to a Muslim marriage shall only have the rights granted under Islamic law, albeit with a proviso that this section is subject to the requirements of s.3(2).
- ✓ Section 49(3) states that any provision in the Marriage Act that is inconsistent with Islamic law and practices shall *not apply* to persons who profess the Islamic faith.

While there is no restriction in the Marriage Act for Muslims to contract marriages under civil law, it is very rare for a Muslim couple to opt for a civil marriage, due to cultural and communal norms that only a Muslim marriage is recognised in the “eyes of God”.

B. Muslim family laws

Kenya does not have a codified Muslim family law; however, it has a functioning *Kadhi* (Muslim judge) court system that was established by the 1967 *Kadhi* Court Act. The 2010 Constitution of Kenya further strengthened the position of *Kadhi* Courts, and subsequent legislation established *Kadhi* Courts in 47 counties across the country. Article 107(5) of the Constitution provides that the *Kadhi* Courts have jurisdiction to determine questions of law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess Islam and submit to the jurisdiction of the *Kadhi* Courts.

Kenyan Muslims are under no legal obligation to have matters relating to marriage and family relations adjudicated by the *Kadhi* Courts. They may choose for their matters to be adjudicated by other competent courts including Magistrates’ Courts and High Courts, which apply civil law.⁸

Case study

According to Muslim women activists in Kenya, many Muslim women have opted to refer their cases to civil courts in the hope of a fairer process. Despite this, their cases are usually referred back to *Kadhi* Courts, where their husbands have filed cases simultaneously in the knowledge that *Kadhis* are likely to favour men and thus they will receive preferential treatment.

As there is no codified legislation on Muslim family matters, individual *Kadhi* judges determine cases and judgments through a combination of Sharia principles and judicial precedence.⁹ The interpretation of law and procedure also differs based on *madhabs* (Islamic schools of law). As the majority of Muslims in Kenya are Sunni Muslims of the *Shafi’i* School, generally, the rules of *Shafi’i* jurisprudence *fiqh* apply in Muslim personal status matters.¹⁰ However, Kenya also has a sizeable *Hanafi* community as well as a small Shia community who follow *Ja’fari*, *Zaydi* and *Ahmadi* jurisprudence. The diverse Muslim population in Kenya has in turn resulted in a diversity of applicable Muslim jurisprudence governing Muslim personal status matters in Kenya.¹¹

This means that depending on the interpretation, understanding and attitude of the individual *Kadhis*, cases of a similar nature may have different processes and outcomes leading to unpredictable standards of justice. Activists report that heavy reliance on judicial discretion is leading to arbitrary and differential procedures, practices and judgments being handed down to Muslim husbands and wives.¹²

⁶ Patrick Vidiya, *The Star*, *AG orders registration of customary marriages*, 9 June 2017:

<https://www.the-star.co.ke/news/2017-06-09-ag-orders-registration-of-customary-marriages> accessed 30 April 2019.

⁷ As stated in *The Kenya Gazette* No. 73, 9 June 2017: “It is notified for public information that commencement of the Marriage (Customary Marriage) Rules 2017, and in furtherance of section 96 of the Marriage Act 2014: (a) The Registrar of Marriages wishes to inform all parties married under African customary law that they are required to register their marriage starting 1st of August 2017.”

⁸ Information obtained from Kenyan advocate, February 2017.

⁹ Information obtained from Kenyan advocate, February 2017; K. O. Wanyonyi, University of Lund Student Paper, *The Kadhis Court in Kenya: Towards Enhancing Access to Justice for Muslim Women* (pp.20-24), 2016: <https://lup.lub.lu.se/student-papers/search/publication/887989Z>, accessed 30 April 2019.

¹⁰ Abdul Kadir Hashim, *Muslim Personal Law in Kenya and Tanzania: Tradition and Innovation*, *Journal of Muslim Minority Affairs* 25:3 (p. 452), 2005, accessible: https://profiles.uonbi.ac.ke/hashim/files/tradition_and_innovation.pdf and Emory Scholar Blogs, *The Republic of Kenya, Islamic Family Law*: <https://scholarblogs.emory.edu/islamic-family-law/home/research/legal-profiles/kenya-republic-of/>, accessed 30 April 2019.

¹¹ *Ibid.*

¹² Information obtained from Kenyan advocate, February 2017.

Key issues regarding *de facto* Muslim family law and *Kadhi* court system

1. Male-only judges

Article 170(2) of the 2010 Constitution of Kenya defines the required qualification of *Kadhi* judges as follows:

“A person shall not be qualified to be appointed to hold or act in the office of *Kadhi* unless the person—

- ☞ professes the Muslim religion; and
- ☞ possesses such knowledge of the Muslim law applicable to any sects of Muslims as qualifies the person, in the opinion of the Judicial Service Commission, to hold a *Kadhi* court.”

As per the Kenyan Constitution and 2012 *Kadhis* Court Act, there are no legal barriers to qualified Muslim women becoming *Kadhi* judges; however, no woman has ever been appointed. In practice and procedure, women appear to be discriminated against on the belief that a woman cannot preside over legal and religious matters in the same way a man can. One argument given is that since women require male guardians to enter into marriage and do not have the same rights of men in cases of divorce, they cannot hold *Kadhi* positions deciding on marriages and divorce cases.¹³ Women’s inability to become *Kadhi* judges in Kenya highlights the fact that there is systemic gender inequality in the *Kadhi* Court system, which considers women inferior to men despite constitutional guarantees of equality and non-discrimination. As such, women lack access to a safe, non-intimidating and women-friendly judicial system.

Case study

According to Muslim women activists, many women who go to *Kadhi* Courts seeking justice and redress, often in socially and financially vulnerable circumstances, are intimidated or taken advantage of by the male *Kadhis*. As a result of this, many women stop pursuing their cases.

2. Access to justice

Muslim women also face many barriers and challenges to accessing justices and redress in *Kadhi* Courts, including the physical set-up in which cases are handled, as well as procedural and practical issues.¹⁴ These include:

a. Set-up of *Kadhi* Courts

According to women activists, the structure and set-up of *Kadhi* Courts are not favourable to women, especially women affected by and/or vulnerable to domestic violence. Court proceedings are often held in open spaces where women are forced to conduct their cases in front of other people, mostly men. This can be intimidating and uncomfortable for women who find it difficult to express themselves in public, especially on sensitive matters.

b. Procedures are dependent upon judicial discretion

Since Muslim family law is not codified, procedures relating to family matters, particularly divorce, are not clearly defined. There are no guidelines for judges on how cases are to be handled in the *Kadhi* Courts, and there is no defined timeframe for procedures. Therefore, much of the process is dependent upon judicial discretion as exercised by individual judges. According to women activists, *Kadhis* often cause delays to proceedings and procrastinate on cases, without legitimate reasons given for such delays.

Affected women are also vulnerable to becoming victims of corruption. There have been cases recorded where court clerks colluded with court brokers to charge women money during their court processes, and other cases where payments have been made by husbands to influence *Kadhi* judges in their favour. Women thus face uncertainty in the process and timelines, but also the outcomes of their cases.

c. Chief *Kadhi* referral

Appeal cases can go to the Chief *Kadhi* for final adjudication. However, there is only one Chief *Kadhi* for the entire nation, leading to a severe backlog of cases. This also provides opportunities for corruption as a means to prioritise cases.

Women activists have observed a class difference in women’s experiences of access to justice; women from low-income or less advantaged backgrounds, who constitute the majority of court users, experience more challenging situations than women from middle-income families. Muslim women are particularly disadvantaged due to their poverty, illiteracy and difficulties in obtaining the support and guidance they need during and after their cases, whereas women from middle-income families and who have some knowledge of legal procedure are able to appeal to higher civil courts where their cases are heard and unfavourable *Kadhi* Court verdicts are overturned.

¹³ K. O. Wanyonyi, *op. cit.* at fn 9.

¹⁴ Information obtained from Kenyan advocate, February 2017.

3. Male guardianship (*wali*)

Article 45(2) of the Constitution provides that every adult has the right to marry a person of the opposite sex based on the free consent of the parties. Full and free consent of both the bride and groom is also mandated in the Marriage Act, in which s.11(1)(e) states that a union is not a marriage if the consent of either party has not been freely given.

Furthermore, the Marriage Act declares coercion and compulsion in marriage as a criminal offence. Section 89 states that a person who enters a marriage with either knowledge or reason to believe that consent was induced by coercion or fraud commits an offence and shall be liable to a penalty (imprisonment, fine or both).

Despite this national legislation, which applies to all citizens, the practice is different for the Muslim community. In the Muslim community, regardless of her age, a prospective bride requires the consent of a marital guardian *wali* to enter into marriage.¹⁵ According to women activists, a father, too, has the right to agree to a marriage on behalf of a virgin daughter of any age, even if it is against her will. Only if the prospective bride is an adult and has been previously married is her consent considered mandatory.

Consequently, marriage of a prospective bride who has not attained puberty or who has never been married does occur “behind the scenes” in Kenya, usually by force *ijbar*, coercion, or through power given to her *wali*.¹⁶

Case study

Kenyan women activists have observed that marriage without full and free consent of the girl or woman is very common in both urban and rural areas. If daughters refuse the marriage, they face various forms of intimidation, including isolation and detention in their homes. Alternatively, in communities of herders or nomads, obtaining the consent of a guardian is difficult due to travelling men, thus women who want to marry face various difficulties in obtaining guardian consent.

Some examples of issues faced by Muslim women:

1. Unconditional polygamy

Section 3(1) of the Marriage Act states that a marriage may be monogamous or polygamous. Section 6(3) of the Act states that an Islamic marriage is presumed to be polygamous or potentially polygamous, the presumption being such that s.8 provides for a couple to declare their intention to convert their potentially polygamous marriage to a monogamous marriage under certain conditions. In Kenya, a Muslim man may marry up to four wives at one time. There is no legal requirement for him to seek the permission of the court or his existing wife or wives to enter into a polygamous marriage.

According to Kenya’s 2014 Demographic and Health Survey, 11% of marriages in the country are polygamous.¹⁷ The survey also found that women in the Northeastern region of Kenya were most likely to report having co-wives (32%), followed by women in the Nyanza (19%) and Western (15%) regions.¹⁸

Case study

Kenyan women activists report that Muslim men marry for their own benefit. First wives are most often left abandoned or fail to get maintenance support from their husbands after the marriage becomes polygamous. This results in a high number of divorce cases and single mothers, not to mention the distress and psychological harm caused by a wife’s inability to withhold consent from plural marriages or being abandoned as a result.

In the State Party report to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Committee in 2017, the government of Kenya acknowledged this gap in the law by stating that:

“The Marriage Act however not only recognizes polygamous marriages but also allows the man to marry another wife without the first one’s consent. This is seen to contravene Article 45(3) of the Constitution that states that Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage. There is urgent need to bring those laws and customs in conformity with the Constitution.”¹⁹

15 Woodrow Wilson International Centre for Scholars, *Best Practices: Progressive Family Laws in Muslim Countries*, 2005: <https://www.wilsoncenter.org/sites/default/files/Best%20Practices%20%28English%29.pdf> accessed 30 April 2019.

16 Ibid; UNFPA Kenya, *Ending FGM and Child Marriage: The role of parliamentarians*, 2017: <https://kenya.unfpa.org/en/publications/endingfgm-and-child-marriage> accessed 30 April 2019.

17 Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey 2014* [table 4.2.1, p. 57]: <http://dhsprogram.com/pubs/pdf/FR308/FR308.pdf> accessed 30 April 2019.

18 The survey also revealed that rural women were more likely to report having co-wives than urban women (14% versus 7%); women living in poorer households were more likely than women living in richer households to have co-wives; and that less-educated women were more likely to report having co-wives than more-educated women.

19 Kenya State Party report to CEDAW Committee - CEDAW/C/KEN/8 (para. 30), 2016: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhtKb7yhsqf%2fiiazivw%2bcyfdy9GxZ4qs0%2f%2f6%2blSOPieXnIX5bSbMNMMy8LOQib1Msoi4if3a%2fRZoZGoB2%2bSHneb0l8QBLSNoBxBYwnuQYk8OjITNPEF>

2. Unequal divorce rights

Divorce conditions and procedures are different for Muslim women and Muslim men. Men are able to obtain a *talaq* or unilateral repudiation of the marriage without any restrictions or grounds for divorce.²⁰ There is no legislation or administrative practice governing *talaq* divorce in Kenya.²¹ Wives are able to obtain a *fasakh* (judicial divorce), which involves specifying ground(s) for divorce and is arbitrated by the court. Valid grounds for a wife seeking a judicial divorce include a husband's failure to provide maintenance; prolonged absence; imprisonment; failure to fulfill his marital obligations; and severe illness. A wife can also initiate a *khul'* (redemptive divorce) whereby she requires the consent of her husband to obtain a divorce and has to return the *mahr* (marriage gift) given by him.

The inequality in Muslim marriages and lack of protections against violations of the rights of women and children have contributed to the breakdown of family units. According to Kenyan women activists, *talaq* divorce often leads to abandonment and non-maintenance of former wives and children. Women who have been divorced suddenly and without any warning are left to raise their children as single parents with no other source of financial support. Children also suffer the impact of such abandonment and neglect. Women's groups are concerned that young children, especially from low-income families, are put at serious risk and that their emotional and economic vulnerability may encourage them to seek support from other sources.

C. Violence against women in the family

Article 29 of the Constitution provides that every person has the right not to be subjected to any form of violence from either public or private sources; not to be subjected to torture in any manner, whether physical or psychological; and not to be treated or punished in a cruel, inhuman or degrading manner.

In 2015, the Protection Against Domestic Violence Act (PDVA) was enacted, which criminalises acts of domestic violence such as:

- Abuse that includes child marriage, female genital mutilation, forced marriage, forced wife inheritance, interference from in-laws, sexual violence within marriage, virginity testing and widow cleansing.
- Damage to property.
- Defilement.

- Depriving the victim of access to the victim's place of residence.
- Economic abuse.
- Emotional or psychological abuse.
- Harassment.
- Incest.
- Intimidation.
- Physical abuse.
- Stalking.
- Verbal abuse.
- Any other conduct against a person, where such conduct harms or may cause imminent harm to the safety, health or wellbeing of the person.²²

Section 8(1) allows a victim to apply to the court for a protection order. Section 32(1) states that, where the victim of domestic violence suffers personal injuries or damage to property or financial loss as a result of the domestic violence, the court may award compensation as it deems just and reasonable.

Other legislation that may be applicable to domestic violence includes the Sexual Offences Act and the Kenyan Penal Code. Section 43(5) of the Sexual Offences Act, however, specifically exempts marital rape as an offence.²³

According to Kenya's 2014 Demographic and Health Survey:²⁴

- 47% of married women aged 15-49 reported having experienced *emotional, physical and/or sexual violence* from their spouse at least once, and 33% reported having experienced one or more of these forms of violence in the past 12 months.
- 37% of married women aged 15-49 reported having experienced *physical* violence from their spouse at least once, and 23% reported having experienced such violence within the 12 months prior to the survey.
- 13% of married women aged 15-49 reported having experienced *sexual* violence from their spouse at least once, and 10% reported having experienced such violence within the 12 months prior to the survey.
- 32% of married women aged 15-49 reported having experienced *emotional* violence from their spouse at least once, and 24% reported having experienced such violence within the 12 months prior to the survey.

20 See for example, *BMS v MHM* [2015] eKLR, <http://kenyalaw.org/caselaw/cases/view/107530/>.

21 Information obtained from Kenyan advocate, February 2017.

22 Protection Against Domestic Violence Act (2015), s.3 http://kenyalaw.org/ki/fileadmin/pdfdownloads/Acts/ProtectionAgainstDomesticViolenceAct_2015.pdf

23 Kenyan Sexual Offences Act (2006), s.43(5), available at:

http://kenyalaw.org:8181/exist/kenyalex/actview.xq?actid=No.%203%20of%202006#KE/LEG/EN/AR/S/NO.%203%20OF%202006/sec_43

24 Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey 2014* (tables 16.9.1, 16.14.1, 16.17.1, 16.18.1, pp. 308, 317, 323, 325): <http://dhsprogram.com/pubs/pdf/FR308/FR308.pdf>

- ✓ Among married women who had experienced spousal violence (physical or sexual) in the past 12 months, 43% reported experiencing physical injuries.
- ✓ 41% of women in Kenya never sought help and never told anyone about the violence they had experienced. Among women who have sought help, most sought help from their own family (65%) or their husband's family (31%). Only 7% sought help from the police.

According to women's rights advocates, although the law prohibits any form of violence against women, some forms of domestic violence such as wife battering are rampant. Among Kenyan Muslims, there are some who believe that what the law defines as violence against women is not and that some forms are culturally acceptable, such as female genital mutilation and marital rape.²⁵

NATIONAL LEVEL REFORM EFFORTS

Government

In the 2016 State Party report to the CEDAW Committee, the Government of Kenya stated that the Marriage Act 2014 made it easier for women to obtain matrimonial justice. The report noted that the enactment of the law was a major victory for women in Kenya as "it champions equality in marriage as well as reiterates the minimum age of marriage for all women across religious and cultural divides, as outlined in Section 4".²⁶

Unfortunately, this statement only applies to the majority non-Muslim population. Section 49(3) of the Marriage Act remains highly problematic because it provides an exception that can be used to deny Muslim women their legal right to equality in marriage. It contradicts the proviso in s.3(4) requiring Muslim marriages to comply with s.3(2), which provides for equal treatment at the time of, during and in the dissolution of a marriage. It allows for unequal and discriminatory practices regarding Muslim marriages to be excused under individual interpretations of what constitutes "Islamic law".

INTERNATIONAL OBLIGATIONS

Convention on the Elimination of All Forms of Discrimination against Women

The Government of Kenya acceded to Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in March 1984, without reservations. In October 2017, Kenya had its fifth review before the CEDAW Committee. The Committee in its Concluding Observations made the following recommendations to the Government of Kenya regarding reform of Muslim family laws:²⁷

- "9. In line with articles 1 and 2 of the Convention and target 5.1 of the Sustainable Development Goals, the Committee recalls its previous concluding observations (CEDAW/C/KEN/CO/7, para. 12 (d)) and recommends that the State party:
- a. Repeal or amend discriminatory provisions under religious and customary law in order to harmonize them with article 16 of the Convention;
 - b. Codify Muslim family law in a manner that is compatible with article 27 of the Constitution and articles 1, 2 and 16 of the Convention;
 - c. Appoint Muslim women as *kadhis* and alternative dispute resolution mediators in the *kadhi* court system.
- ...
51. The Committee recommends that the State party:
- ...
- d. Ensure equality between women and men in Muslim marriages and upon divorce, abolish the practice of a husband's right to divorce his wife unilaterally and require compulsory registration of all divorces."

Sustainable Development Goals

Kenya has made commitments towards the Sustainable Development Goals (SDGs), including Goal 5 on gender equality and empowerment of women and girls. SDG Indicator 5.1.1 has already identified family law as one of the legal frameworks that must be reformed to accelerate progress to promote, enforce, and monitor gender equality.

Kenya also was a member of the High-Level Panel of Eminent Persons, which was formed to advise the United Nations Secretary-General on the global development framework beyond 2015. UN Ambassador Macharia Kamau, the Permanent Representative of Kenya, co-chaired the UN General Assembly Open Working Group on SDGs.

²⁵ Information obtained from Kenyan advocate, February 2017.

²⁶ Op. cit. at fn 19 (para. 195).

²⁷ CEDAW/C/KEN/CO/8: <https://undocs.org/CEDAW/C/KEN/CO/8>.

KEY BARRIERS AND CHALLENGES TO REFORM

- It is a concern that the Kenyan Government, while reforming laws relating to equality and justice for women, has shown little concern for the rights of minority women governed by laws based on a particularly discriminatory understanding of Islam.
- In the context of Islamic extremism and related security issues, the government treats minority Muslim community issues such as the *Kadhi* Court system as a sensitive matter, which requires initiation by the Kenyan Muslim communities and their primarily male representatives.
- There is widespread reluctance within Muslim communities to discuss matters relating to reform of *Kadhi* Courts and Muslim family law given a common concern that Kenyan Muslims are already a targeted community in the government's anti-extremism efforts, which has included mass arrests and racial profiling of Muslims.²⁸
- While there is no restriction in the Marriage Act for Muslims to contract marriages under civil law, it is very rare for a Muslim couple to opt for a civil marriage. Activists note that this is largely due to the cultural and communal norm that only a Muslim marriage is recognised in the "eyes of God". Therefore, community-based customs and culture heavily influence women's (lack of) choices and rights in regards to marriage and divorce.

RECOMMENDATIONS FOR REFORM OF MUSLIM FAMILY LAW IN KENYA

Improve access to justice for Muslim women

Article 159 of the Kenyan Constitution mandates the judiciary to promote alternative dispute resolution (ADR) mechanisms in the administration of justice. This is further given effect by the Civil Procedure Act (Chapter 21 of the Laws of Kenya). In line with the Judiciary Transformation Framework 2012-2016 (JTR),²⁹ the judiciary has embraced ADR as an avenue for addressing the backlog of cases in the court system while making justice more accessible. The judiciary, however, has been reluctant to introduce mobile *Kadhi* Courts despite the JTR aspiration to bring justice closer to the people. And although the JTR framework establishes a "court users committee" to address challenges faced by women and men, this new, potentially transformative, framework currently does not apply to the *Kadhis* court system.

Recommendation 1

The Government should address the barriers and challenges to justice that Muslim women face and facilitate a process whereby Muslim women can contribute and engage in the *Kadhi* Court system.

Muslim women's groups have recommended forming a Women's Committee or similar official working group (with women lawyers, scholars, counselors and advocates) to liaise and work with *Kadhis* in each court. Such groups could also provide Muslim women who come to the court with legal advice, information on legal process and procedures, and support in mediating and arbitrating cases.

Codify Muslim family law in Kenya

The changing realities of women's lives today in Kenya necessitate the urgent need for a codified Muslim family law based on equality between spouses.

Recommendation 2

The Government should ensure that Muslim women are part of the process for reform of Muslim family law from the outset and that any and all reform responds to the lived realities of Muslim women and complies with the equality provisions of the Constitution and the Marriage Act.

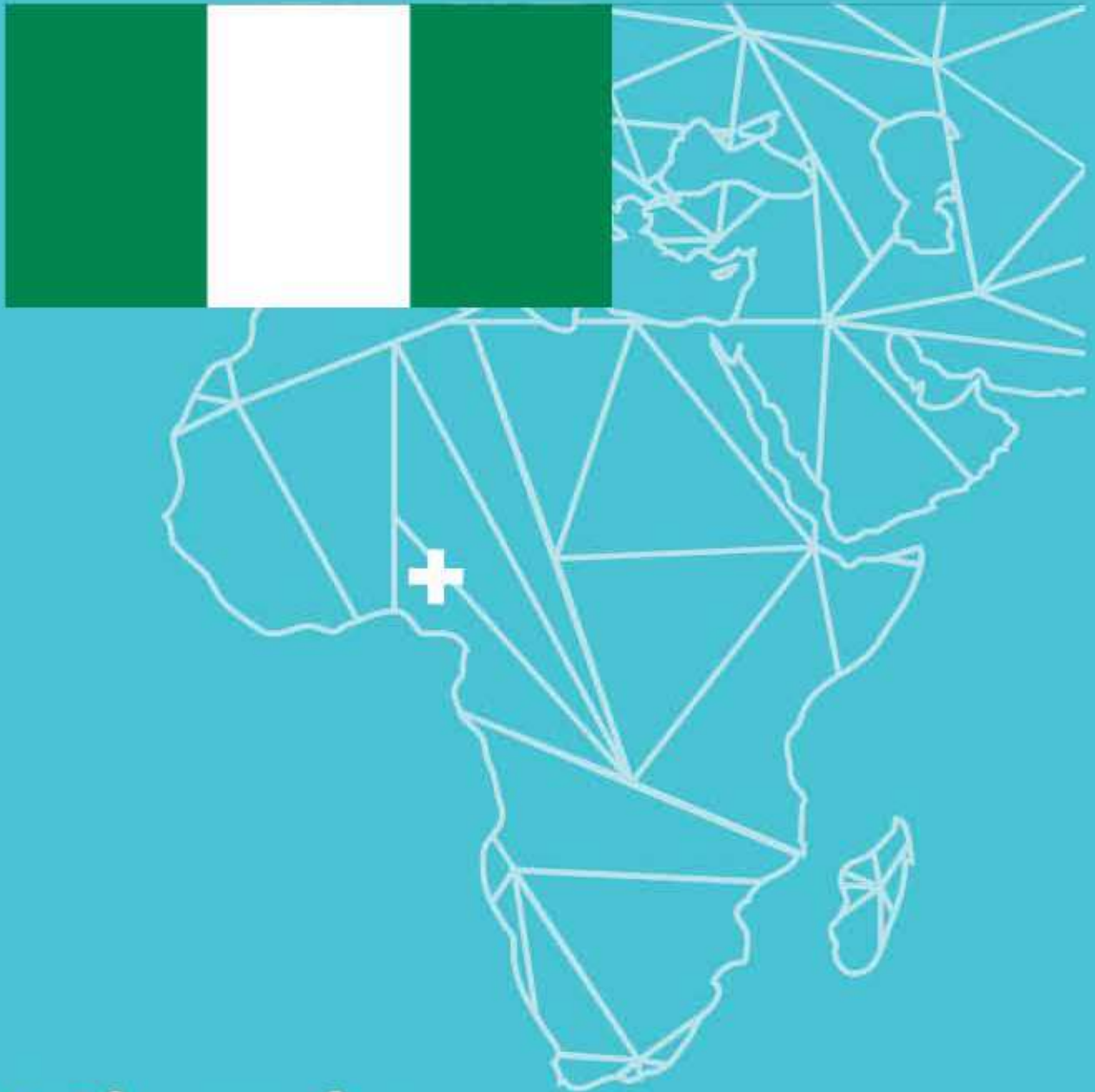
The reform of Muslim family law should be based on the principles of equality and justice by grounding the provisions for the family law in:

- diversity of Islamic jurisprudence and legal concepts;
- national laws and constitutional guarantees of equality;
- contemporary lived realities; and
- international human rights standards.

Lessons learned and positive legal developments from Muslim contexts with similar legal systems and family laws to Kenya should also be taken into consideration.

28. Ayesha Kajeer, *Muslims feel under siege in Kenya*, Al Jazeera Opinion, 13 Nov 2014: <https://www.aljazeera.com/indepth/opinion/2014/11/muslims-feel-under-siege-kenya-201411911737464684.html> accessed 30 April 2019.

29. Judiciary Transformation Framework 2012-2016: <http://kenyalaw.org/kl/fileadmin/pdfdownloads/JudiciaryTransformationFramework.pdf>.



Nigeria

Nigeria



CONTEXT

The Federal Republic of Nigeria is a federation of states and operates under a tripartite legal system: federal law, customary law¹ and Islamic law. These three tend to operate in different spheres, and marriage and family matters within each system operate by the rules of that system. There are 36 states in Nigeria and one Federal Territory (Federal Capital Territory of Abuja). The 36 states are commonly divided into Northern (19 states) and Southern (17 states).²

Muslims constitute 52% of the population.³ The majority of Muslims in Nigeria are Sunni Muslims (estimates between 70–90%).⁴ Sunni Islam has four main schools of Islamic jurisprudence and most Muslims in Nigeria follow the *Maliki* school, which is the basis of the Muslim personal status law.

LEGAL FRAMEWORK

Constitution of the Republic of Nigeria

The Nigerian legal system is based on the English common law. The 1999 Nigerian Constitution provides the framework for the administration of the Federal Government of Nigeria and the 36 states. Each of the 36 states and the Federal Capital Territory (FCT) Abuja have their own laws. Federal laws are only applied in the Federal Capital Territory (FCT) and to federal agencies and do not apply within the territory of the individual states until expressly adopted by a state.

The Constitution is the supreme law. Article 15(2) of the Constitution prohibits discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties. Article 42 of the Constitution provides for the right to freedom from discrimination on the grounds of community membership, ethnic group, place of origin, sex, religion or political opinion in the application of the law or any executive and administrative action of the Government.

Federal laws

The Federal Government has passed legislation including the Child Rights Act, which sets the minimum age of marriage as 18 years for males and females, and the Violence Against Persons Prohibition Act, which criminalises various forms of domestic violence. However, these national-level laws require formal adoption by each individual state to apply at state level.⁵ Both the Child Rights Act and the Violence Against Persons Prohibition Act have yet to be adopted by the Northern states.

In 2011, the Federal Government of Nigeria introduced the Gender and Equal Opportunities Bill,⁶ which seeks to domesticate the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), including requirements to adopt laws to ensure gender equality in both public and private spheres. The Bill, however, failed in the Senate, largely because of opposition on religious grounds particularly from Senators representing the country's predominantly Muslim Northern states. They claimed that the requirements of the Bill were in conflict with the Constitution, which enshrines freedom of religion.⁷

1 Classifications of customary law includes i. indigenous/ethnic law which applies to members of particular non-Muslim ethnic groups and ii. Muslim customary law which applies to Muslim communities. Islamic law has also been categorised as a separate legal system given its prominence in legal practices, particularly in Northern states.

2 The 19 Northern states are Adamawa, Bauchi, Benue, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Nasarawa, Niger, Plateau, Sokoto, Taraba, Yobe and Zamfara. The 17 Southern states are Abia, Akwa Ibom, Anambra, Bayelsa, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Imo, Lagos, Ogun, Ondo, Osun, Oyo and Rivers.

3 PEW FORUM, *Religious Demography of Sub-Saharan Africa*, Appendix B, available at:

<https://www.pewresearch.org/wp-content/uploads/sites/7/2010/04/sub-saharan-africa-appendix-b.pdf>.

4 Leonard Madu, *The Nigerian Voice*, *Who are the Sunnis and the Shiites*, 19 February 2013: <https://www.thenigerianvoice.com/news/108270/who-are-the-sunnis-and-the-shiites.html>.

5 Constitution of the Republic of Nigeria 1999 (Nigerian Constitution 1999), Second Schedule, Part II, s.4.

6 Federal Government of Nigeria, *Gender and Equal Opportunities Bill 2011*, available at: http://www.aacoalition.org/images/Gender_and_Equal_Opportunities_Bill_National.pdf.

7 Global Legal Monitor, *Nigeria: Gender Equality Bill Fails in the Senate*, Library of Congress, 28 March 2016:

<http://www.loc.gov/law/foreignnews/article/nigeria-genderequality-bill-fails-in-the-senate/>.

State laws

18 of the 19 Northern states of Nigeria have Sharia Courts of Appeal with one state (Benue) sharing a Sharia Court of Appeal based in another state (Plateau).⁸ The Northern states have adopted a separate Penal Code of Northern Nigeria⁹ and 12 individual Northern states have their own Sharia-based Penal Codes.

There are no separate family courts, and cases across the country are heard by State High Courts. In cases where an order of maintenance is ordered by the High Court, the order can be enforced by a magistrate court or a district court under s.114(1) of the Matrimonial Causes Act. Lagos State has created a family court to deal with disputes relating to guardianship, custody and adoption (outside of matrimonial causes in its Child Rights Law 2007).

Muslim family law

Nigeria does not have codified laws relating to Muslim marriages and family relations. The majority of the population in the Northern states of Nigeria are Muslim; as such, Islamic law and practices that govern Muslim marriages and family relations (Muslim family laws) are mainly applied in these states. The 1999 Constitution gives Sharia courts separate jurisdiction. Section 262 of the Constitution grants the Sharia Courts of Appeal the right to decide questions of personal law for Muslims, including marriage, guardianship, inheritance, and succession. These matters are governed by a combination of Sharia principles, Nigerian customary practices and judicial precedents.¹⁰ Since the majority of Muslims in Nigeria are Sunni Muslims of the *Maliki* school, generally, the rules of *Maliki* jurisprudence *fiqh* apply in Muslim personal status matters.¹¹

Key issues regarding Muslim family laws

The uncodified Muslim personal laws and practices on the ground result in a marital legal framework based on “reciprocal” or “complementary” rights (as opposed to equal rights) between the two spouses.¹² As a result, Muslim women face discriminatory practices in multiple areas of marriage and family including restrictions on their right to marry, divorce, inherit or hold property. This discrimination denies them equal protection as provided in s.15(2) and s.42 of the Constitution. In its State Party Report to CEDAW in 2016, the Federal Government stated that the equal rights granted to women in the Constitution should not be exempted under Sharia law but acknowledged that in practice, women living under the jurisdiction of Islamic law are not afforded equal rights.¹³

1. Child and forced marriage

According to the United Nations Children’s Fund (2017), Nigeria has the third-highest absolute number of child brides in the world. 44% of girls in Nigeria are married before their 18th birthday and 18% are married before the age of 15, making Nigeria the country with the 11th highest prevalence rate of child marriage globally.¹⁴

In 2003, Nigeria passed the Child Rights Act, which prohibits marriage under the age of 18 years. The Government has expressed that child marriage is a serious issue that it intends to address. However, the Child Rights Act is federal law and does not apply in states outside federal territory unless explicitly adopted. Only 23 of the 36 states have domesticated the Child Rights Act in their respective states. Of these 23 states, 16 are Southern states. Only seven of the 19 Muslim-majority Northern states have adopted the Child Rights Act.¹⁵

8 P. Ostien & A. Dekker, *Sharia and National Law in Nigeria*, in J. M. Otto (ed.), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, (p. 578), Leiden, The Netherlands: Leiden University Press, 2010.

9 Penal Code of Northern Nigeria: <https://www.equalitynow.org/northern-nigeria-the-penal-code>.

10 Op. cit. at fn 5, pp.585-586.

11 E.I. Nwogugu, *Family law in Nigeria*, HEBN Studies in Nigerian Law, 3rd Edition, (p. 76), 2014. P. Ostien & A. Dekker, op. cit. at fn 5, p.585.

12 P. Fournier et al., *Engendering Legal Reforms: Islamic Law in Africa and East Asia*, *Amsterdam Law Forum*, 3:2, (p. 112), 2011: <http://amsterdamlawforum.org/article/view/213>.

13 Nigeria State Party Report, U.N. Doc. CEDAW/C/NGA/7-8 (2016), p.61, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/004/06/PDF/N1600406.pdf?OpenElement>.

14 Girls not Brides, *Nigeria*: <https://www.girlsnotbrides.org/child-marriage/nigeria/>.

15 Nigeria State Party report, U.N. Doc. CEDAW/C/NGA/7-8 (2016), Table 2.1; C. Okafor, *Failings of Child Rights Law*, March 2017: <https://www.pressreader.com/nigeria/thisday/20170310/282080571636307>.

A 2016 announcement by the Minister of Women Affairs and Social Development, Aisha Alhassan, reported that nearly 65% of children below 18 years were forced into marriage in the Northern region.¹⁶

Federal Law also appears to implicitly acknowledge a difference in the age of marriage for men and women. While the Nigerian Constitution provides that “full age” for both sexes is 18 years (for the purpose of citizenship), it also considers any woman who is married to be of “full age”.¹⁷ This provision has been viewed by some as “covertly endorsing child marriage and implying that the age of adulthood for girls is different from that of boys”.¹⁸

The differential treatment in the ages of women and men is also seen in the Criminal Code, which states that “a male person under the age of twelve years is presumed to be incapable of having carnal knowledge”, but makes no similar provision for girls.¹⁹

2. Consent to marriage

No consent to marriage is required for girls or boys who are under the age of 18 years, and a father has the right to conclude a marriage of his child against the child’s will.²⁰ Regardless of her age, a woman requires the consent of a marital guardian *wali* to enter into marriage based on *Maliki fiqh*.²¹ The *wali* must be her father or a male relative.²² Case law prohibits forced marriage of adults, although in practice, even adult women’s consent is frequently not sought.²³

Forced marriage is most prevalent among girls who have not been to school or reached puberty.²⁴ With the exception of those in Jigawa State, registration is not required for marriages and divorces under Islamic law (though the Government has announced that it is in the process of reforming registration requirements).

Case studies

- ✎ In a much-publicised incident, a former governor of Zamfara married a 13/14-year-old girl. While many claimed that he had violated the Child Rights Act, he claimed that the Child Rights Act did not apply in Zamfara. He was not prosecuted.²⁵
- ✎ In 2010, the High Court of Sokoto threw out a case in which a 26-year-old woman claimed that her father had forced her to marry Zamfara State Senator Sahabi when he knew she was engaged to another man. The court stated that it could not intervene and that it was a matter for an Islamic court.²⁶
- ✎ In *Karimatu Yakubu v Alhaji Paiko*, a 19-year-old woman applied for an annulment of her marriage on the grounds that her father had concluded the marriage without her consent. Initially, the Sharia Court of Appeal upheld the marriage, claiming that under the *Maliki* school, her father had power over her marriage because she had been a virgin (ie: not previously married). However, when the case was appealed, the decision was reversed on the grounds that her father had dissuaded her from marrying one suitor and then asked her to pick between two others. As such, he had given her independence to choose and had therefore not exercised his power of *ijbar* (forced marriage).²⁷

3. Polygamy

The Penal Code of the Northern states of Nigeria bans polygamy (s.370).²⁸ However, several individual northern Nigerian states have adopted their own Sharia-based penal codes which do not include this prohibition. In states under Islamic law, Muslim men are permitted to have as many as four wives at one time without condition.²⁹ There is no legal requirement for the man to seek the permission of the court or the consent

16 Premium Times Nigeria, *Worried about prevalence of child marriage in Northern Nigeria, Government moves to stop practice*, 29 November 2016: <https://www.premiumtimesng.com/news/top-news/216659-worried-prevalence-child-marriage-northern-nigeria-government-moves-stop-practice.html>.

17 Nigerian Constitution 1999, s.29(4).

18 E. J. Otiwe-Igbuzor, *Voices for Change, Analysis of the Structural and Systemic Causes of Gender Inequality in Nigeria*, (p. 11), 2014:

<http://www.v4c-nigeria.com/wp-content/uploads/2014/09/Study-3-Analysis-of-Structural-Systemic-Causes-of-Gender-inequality-in-Nig.pdf>.

19 Criminal Code, s.30: <http://www.nigeria-law.org/Criminal%20Code%20ActPartII.htm#Chapter%201>.

20 Op. cit. at fn 11, p.77; see also Islamic Law Marriage of Nigeria: <http://www.onlinenigeria.com/marriages-in-nigeria/Islamic-Law-Marriage/>; see also P. Ostien & A. Dekker, op. cit. at fn 5, p.587; Immigration and Refugee Board of Canada, *Forced marriage under Islamic law*, 2006: http://www.ecoi.net/local/link/44538/262352_de.html.

21 A. L. Haruna & A. I. Magashi, *Human Rights approach to reproductive health in Islam: Appraising Women’s Rights to Husband and Family Planning*, *Journal of Islamic Law Review*, 11:1, (pp. 6-7), 2015.

22 Op. cit. at fn 11, p.76.

23 Op. Cit. at fn 12 p.112.

24 Immigration and Refugee Board of Canada, *Requests for Information on Nigeria*, (2006) available at: https://www.justice.gc.ca/sites/default/files/eoir/legacy/2013/12/18/NGA100418_E.pdf.

25 Refworld, *Nigeria: Prevalence of Forced Marriage*, 2016: <http://www.refworld.org/docid/50b4ab202.html>; see also *Former Governor of Zamfara State Married a 13-year-old girl*: http://www.gistmania.com/talk/topic_35988.0.html.

26 BBC News, *Nigeria Court Rejects ‘Forced Marriage’ Case*, 22 October 2010: <https://www.bbc.com/news/world-africa-11607532>.

27 Dr. M. Tawfiq, *A Handbook on Sharia Implementation in Northern Nigeria: Women and Children’s Rights Focus*, 2005.

28 Penal Code (Northern States) Federal Provisions Act, s.370: <http://www.refworld.org/pdfid/49997ade1a.pdf>.

29 Op. cit. at fn 5, p.587; see also P. Fournier et al, op. cit. at fn 12 p.112.

of his existing wife or wives to enter into a polygamous marriage, nor does the man need to demonstrate financial capacity to maintain multiple wives and families.³⁰

According to Nigeria's 2013 Demographic and Health Survey, 33% of marriages in Nigeria are polygamous. The survey also found that women in the Northern states were more likely to report having co-wives than women in Nigeria's Southern states.³¹ According to civil society reports and academic research,³² some Muslim communities encourage polygamy, almost to the point of mandating the practice. The unequal treatment of wives is the prevailing norm in a polygamous marriage.

4. Divorce

There are four main ways in which Muslims can seek divorce in Nigeria:³³

- Unilateral repudiation of the marriage *talaq*: this can only be initiated by the husband unless he has delegated this right to his wife. The wife does not need to return the *mahr* (payment made by the groom to the wife at the time of marriage).
- Divorce by mutual consent of the husband and wife *mubarat*: this is usually initiated by the wife and decided by a court. However, if both husband and wife consent, they can agree to it between themselves or with their guardians *walis*. Whether the wife needs to return the *mahr* depends on the agreement of the parties.
- Divorce following the payment of compensation by the wife to her husband *khul'*: this is initiated by the court. The wife need not give a reason for wanting the divorce. Where there is dispute over the compensation amount, the sum will be decided by the court.
- Court-decided divorce *tafriq* or *fasakh*: this is usually initiated by the wife on the grounds of violation of marriage terms and arbitrated by the court. Valid grounds for divorce include:
 - i. the husband's failure to provide maintenance;
 - ii. "defect" on the part of husband or wife;

- iii. prolonged absence of a spouse;
- iv. injury or discord between wife and husband;
- v. failure to provide sexual satisfaction; and
- vi. refusal of the husband to enable the wife to undertake her religious obligations.

If the court grants a divorce for any of these reasons, the wife does not have to make any payment to the husband or reimburse the *mahr*.

Registration of Muslim divorces is not mandatory except in Jigawa State (under s.14(1) of the Marriages (Expenses Control) Law) where district and village leaders are required to maintain a divorce register.³⁴

According to information gathered by the Immigration and Refugee Board of Canada and civil society reports, *talaq* divorce is the most common form of Muslim divorce in Nigeria. Due to its informality, it can be abused by husbands to the detriment of wives. Women often resort to *khul'* divorce even where they may have good grounds to seek a court-decided divorce. This may be due to a lack of awareness that in the case of a court-decided divorce, women do not have to pay compensation to their husbands, or because of lengthy delays in judicial hearings. The lengthy process and costly procedure of seeking divorce places women in a highly vulnerable position.³⁵

5. Inheritance

Traditional beliefs combined with provisions of Sharia law contribute to a situation in Nigeria in which women have some of the world's worst inheritance rights. While it is optional for Muslims to follow the Federal Wills Act, providing more equitable distribution to female family members, there is a strong belief that making a will is not permissible in Islam,³⁶ despite provisions in Islamic law addressing inheritance rights.

Under the Nigerian Constitution 1999, because Sharia law is classified as "personal law", the applicability of Sharia to a Muslim estate is optional if the Muslim expressly chooses to make a will under the Wills Act and exclude Islamic law.³⁷ In practice, daughters and

30 I.K.E. Oraegbunam, *Sharia Criminal Law, Islam and Democracy in Nigeria Today*, *New Journal of African Studies*, (p. 105), 2011: <https://www.ajol.info/index.php/og/article/viewFile/71768/60724>; P. Fournier et al, op. cit. at fn 12, p.112; A. M. Imam, M. Fijabi & H. Akilu-Atta, *Women's Rights in Muslim Laws: A Resource Document*, BAOBAB, (p.42), 2005.

31 National Population Commission of Nigeria and ICF International, *Nigeria Demographic and Health Survey 2013*, Tables 4.2.1, p.55: <http://dhsprogram.com/pubs/pdf/FR293/FR293.pdf>.

32 I. K. E. Oraegbunam & B. O. S. Udezo, *Women's Rights in Matrimonial Jurisprudence under Islamic Family Law in Nigeria: A Need for Reform*, *Journal of Religion and Human Relations*, 1:4, 2012.

33 Baobab For Women's Human Rights Legal Literacy Series, *Divorce: The Dissolution of a Marriage in Muslim Personal Law in Nigeria*, BAOBAB Legal Literacy leaflet No. 2 available at: <http://www.nigerianlawguru.com/articles/family%20law/DIVORCE%20-%20THE%20DISSOLUTION%20OF%20A%20MARRIAGE%20IN%20MUSLIM%20PERSONAL%20LAWS%20IN%20NIGERIA.pdf>.

34 Op. cit. at fn 11, pp.78-79.

35 Immigration and Refugee Board of Canada, *Nigeria: Divorce Laws and Practices among Muslims*, 7 November 2012: https://www.ecoi.net/local_link/232040/340619_en.html; BAOBAB, op. cit. at fn 34, p.5; E. J. Olive-Igbuzor, *Analysis of the Structural and Systemic Causes of Gender Inequality in Nigeria, Voices for Change*, (p. 13), 2014:

<http://www.v4c-nigeria.com/wp-content/uploads/2014/09/Study-3-Analysis-of-Structural-Systemic-Causes-of-Gender-inequality-in-Nig.pdf>; Centre for Islamic Legal Studies, Ahmadu Bello University, *Promoting Women's Rights Through Sharia in Northern Nigeria*, (pp. 18-21), 2005: http://www.ungei.org/srgrp/files/dfid_promoting_womens_rights.pdf

36 Op. cit. at fn 12, pp.113-114.

37 Op. cit. at fn 28.

particularly wives are frequently deprived of their inheritance rights, especially in terms of land and property. In some communities, including some Muslim communities, women are also considered part of a man's property to be inherited by male relatives upon the death of their husbands.³⁸

Case Study

In *Yunusa v Adesubokan*, a Muslim father chose to make a will under the Wills Act 1873. One of his sons (who was left much less than his other siblings) issued court proceedings, arguing that the will was contrary to *Maliki* jurisprudence. The Supreme Court held that any person, Muslim or not, may make a will under the Wills Act 1873 and dispose of their estate under that Act in any manner they choose.³⁹

A. Violence against women in the family

The Penal Code applicable in Nigeria's Northern states, the Criminal Code applicable in all Southern states, and the Sharia Penal Codes applicable in some Northern states all contain general prohibitions on violence against the person which are applicable to domestic violence, including rape, sexual assault, assault, battery and abduction with the intention of forcing a woman to marry or rape.⁴⁰

However, s.55(1)(d) of the Penal Code and similar provisions in the Sharia Penal Codes applicable in the Northern states make exemptions for violence against wives. S.55(1)(d) provides, "Nothing is an offence which does not amount to the infliction of grievous hurt upon any person and which is done [...] by a husband for the purpose of correcting his wife."⁴¹ Marital rape is not specifically criminalised in Nigeria.

Following a decade of advocacy by women's groups (see below) the Violence Against Persons (Prohibition) Act was enacted in 2015. The Act criminalises a wide range of acts of domestic violence defined as "any act perpetrated on any person in a domestic relationship where such act causes harm or may cause imminent harm to the safety, health or wellbeing of any person", including:

- ~ Spousal battery (s.19).
- ~ Female circumcision or genital mutilation (s.6).
- ~ Forceful ejection of a spouse from home (s.9).
- ~ Forced financial dependence or economic abuse (s.12).
- ~ Harmful traditional widowhood practices (s.15).
- ~ Abandonment of a spouse and/or children (s.16).
- ~ Harmful traditional practices (s.20).
- ~ Harmful use of chemical substance on another (s.21).
- ~ Forced isolation and separation from family and friends (s.13).
- ~ Depriving persons of their liberty (s.10).
- ~ Incest (s.25).

However, s.47 of the Act provides that the law applies only to the Federal Capital Territory of Abuja.⁴² 13 out of 36 states in Nigeria have passed similar limiting legislation, circumscribing the efficacy of the legislation in combating violence against women across the country.

NATIONAL LEVEL REFORM EFFORTS

A. Civil society

On violence against women

In 2001, following a legislative advocacy workshop in Abuja on violence against women, the Legislative Advocacy Coalition Against Violence Against Women (LACVAW) was formed to push for a national bill prohibiting violence against women. The coalition comprised 50 national and international NGOs, women's rights advocates and individuals. Over the next decade, LACVAW formed partnerships and alliances with legislators, including women federal legislators, as well as the National Assembly Gender Technical Unit, National Human Rights Commission, Ministry of Women's Affairs and others. LACVAW's coalition building, advocacy and compelling research on prevalence of gender-based violence across Nigeria led to the enactment of the Violence Against Persons (Prohibition) Bill in 2008.⁴³

38 Op. cit. at fn 12, pp.113-114. See also E. J. Otiwe-Igbuzor, *Analysis of the Structural and Systemic Causes of Gender Inequality in Nigeria, Voices for Change*, (p. 16), 2014: BAOBAB, Women's Rights in Muslims Laws, p.77.

39 Op. cit. at fn 28.

40 Penal Code (Abuja), 1960, s.220-285, http://oceansbeyondpiracy.org/sites/default/files/Nigeria_Penal_Code_Act_1960.pdf; Criminal Code, 1916 s.300-372, <http://www.wipo.int/edocs/lexdocs/laws/en/ng/ng025en.pdf>; Olanweraju Olamide, Territorial Jurisdiction in Nigerian Criminal Law, *The Jet Lawyer*, 30 March 2016, <http://www.djellawyer.com/territorial-jurisdiction-nigerian-criminal-law/>; Philip Ostein, Sharia Implementation in Northern Nigeria, (Nigeria: Spectrum Book, Vol. III, 2007), (pp. 203, 209-216), 2007: http://www.sharia-in-africa.net/media/publications/sharia-implementation-in-northern-nigeria/vol_3_5_chapter_3_part_IV.pdf.

41 Philip Ostein and Albert Dekker, Sharia and National Law in Nigeria, in *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, ed. Jan Michiel Otto, Leiden, The Netherlands: Leiden University Press (p. 586-587), 2010: <https://openaccess.leidenuniv.nl/bitstream/handle/1887/21170/file221087.pdf?sequence=1>.

42 Violence Against the Persons (Prohibition) Act (2015), s.47, <http://www.refworld.org/docid/556d5eb14.html>.

43 A. Mahnaz et al. *Feminist Advocacy, Family Law and Violence against Women: International Perspectives*. Routledge, Taylor & Francis Group, 2019.

B. Government

According to Nigeria's 2016 State Party Report⁴⁴ to the CEDAW Committee, the Nigerian Law Reform Commission (NLRC) has been tasked with harmonising the laws regarding marriage and family relations and to redress existing "offensive" legal provisions. Two obvious offending provisions are s.55 of the Sharia Penal Code of Northern Nigeria, which permits spousal battery and the classification of sexual assault against female victims as a mere misdemeanour under s.360 of the Criminal Code.

Nigeria's State Party Report states that the NLRC has drafted a model Customary Law and Islamic Law Marriage/Divorce Registration law "which seeks to provide for the mandatory registration of all marriages contracted within the State has been developed and placed before the National Assembly for passage into law". The report states that "[d]ivorce under customary and Islamic laws will now follow due process and besides return of dowry, divorce paper will now be obtainable". The contents of this "model" law are unclear, as is the process undertaken by the Government to draft the model law and whether there is any intention to consult and engage with women's groups and affected individuals.

On violence against women and harmful practices

Since the early 2000s the Nigerian Government has made some movement towards introducing policies and undertaking legal reform to address violence against women. Nigeria adopted the National Policy on Women in 2000 and the National Gender Policy in 2006. The National Commission for Women was converted into the Ministry for Women's Affairs. A National Consultative Coordinating Committee was established, which included members from the Ministries of Women's Affairs in all 36 states as well as NGOs and women's rights groups. The main task of this Committee was to review progress on plans of action of the Ministry of Women's Affairs and formulate strategies on implementation.

Legislative reforms have included the enactment of the Cross River State Girl-Child Marriage and Female Circumcision (Prohibition) Law and the Ogun State Female Circumcision & Genital Mutilation (Prohibition) Law in 2000. In 2008, as noted above, following over a decade of civil society-led advocacy and lobbying, the Violence Against Persons (Prohibition) Bill was enacted by the Government.⁴⁵

On child marriage

A Technical Working Group for Ending Child Marriage was formed at the end of 2015. The Working Group is spearheaded by the Ministry of Women's Affairs and Social Development. It aims to develop a comprehensive strategy for ending child marriage in Nigeria, as well as to raise awareness, encourage behaviour change and ensure the monitoring and evaluation of laws and policies.⁴⁶

In November 2016, the Government launched a National Strategic Plan to End Child Marriage in Nigeria 2016–2021. The plan was a part of a coordination platform led by the Federal Ministry of Women's Affairs and Social Development and co-chaired by Save the Children. The plan highlights multi-sectoral, multifaceted activities needed to end child marriage in Nigeria and envisions the goal of ending child marriage in Nigeria by 2030. The African Union to End Child Marriage in Africa was also launched in November 2016 at the same forum in Abuja.

INTERNATIONAL OBLIGATIONS

Convention on the Elimination of All Forms of Discrimination against Women

Nigeria signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 23 April 1984, and ratified it on 13 June 1985, without any reservations. Nigeria was last reviewed during the 67th CEDAW Session in 2017. The CEDAW Committee gave the following recommendations relating to the reform of family law in its Concluding Observations:⁴⁷

- "22...c. Take effective measures to prohibit and eliminate child marriage, wife inheritance and polygamy;
- d. Conduct an impact assessment of the nationwide awareness campaign on the elimination of discriminatory stereotypes and harmful practices and regularly monitor and review the measures adopted to eliminate them.

⁴⁴ Nigeria State Party Report, U.N. Doc. CEDAW/C/NGA/7-8, 11 January 2016:

<https://documents-ddsny.un.org/doc/UNDOC/GEN/N16/004/06/PDF/N1600406.pdf?OpenElement>.

⁴⁵ Op. cit. at fn 43.

⁴⁶ Child marriages around the world: Nigeria: <http://www.girlsnobrides.org/child-marriage/nigeria/>.

⁴⁷ CEDAW Committee Concluding Observations on Nigeria (2017), CEDAW/C/NGA/CO/7-8.

46. The Committee recommends that the State party:
- Ensure that the draft model customary law and Islamic law marriages/divorce registration law complies with the provisions of the Convention and guarantee full legal capacity for all women with regard to marriage, custody and inheritance;
 - Ensure that the Child Rights Act of 2003 is applicable throughout the State party and eradicate child marriage through awareness-raising efforts and by prosecuting and punishing perpetrators and accomplices;
 - Repeal section 6 of the Criminal Code, as it legitimizes child marriage and rape by excluding the applicability of sections 218 and 357 of the Criminal Code, which protect girls under 13 years of age from forced sexual intercourse;
 - Review the legal regimes governing inheritance under customary law and Islamic personal law to ensure that women's inheritance rights are in line with the Convention and effectively enforced and that women are fully informed about the changes in the law;
 - Eradicate polygamy through the use of awareness-raising campaigns and education, which should, among other things, focus on the harmful effects of this practice and fully involve religious, traditional and local government leaders."

Convention on the Rights of the Child

In 1991, Nigeria ratified the UN Convention on the Rights of the Child (CRC), which defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" and sets a minimum age of marriage of 18 years. Nigeria's last review before the CRC Committee was during the 54th CRC Session in 2010, when the CRC Committee recommended the following with regard to the issue of the minimum age of marriage:

"27. The Committee urges the State party to ensure that the definition of the child in legislation domesticating the Child Rights Act at state level is in full compliance with that of the Convention, including by amending the recently adopted Child Rights Laws in Akwa-Ibom and Jigawa states. To this end, the Committee urges the State party to intensify its ongoing dialogue with traditional and religious leaders and state authorities to enhance the understanding of the importance of conceptualizing persons under the age of 18 as children with special rights and needs guaranteed under the Convention. The State party is recommended to use the example of the recent polio eradication campaign in this respect."⁴⁸

Sustainable Development Goals

Nigeria has made commitments towards attaining the SDGs, including Goal 5 on gender equality and empowerment of women and girls. SDG Indicator 5.1.1 has already identified family law as one of the legal frameworks that must be reformed to accelerate progress to promote, enforce, and monitor gender equality. Nigeria has undertaken specific national and regional level commitments, especially on child marriage, in line with target 5.3. of the SDGs.

The 2018 World Economic Forum Gender Gap Report ranked Nigeria 133 out of 149 countries, evidencing continuation of a downward trend towards increased inequality. The reasons Nigeria has fallen several ranks may be partially due to newly available data which indicates higher levels of gender disparity than previously recognised, including gender gaps among legislators, senior officials and managers. The report noted that Nigeria has also experienced reversal of past progress on educational attainment and in healthy life expectancy.⁴⁹

48 CRC Committee Concluding Observations on Nigeria (2010), CRC/C/NGA/CO/3-4.

49 World Economic Forum, *Global Gender Gap Report 2018*, available at: http://www3.weforum.org/docs/WEF_GGGR_2018.pdf.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Nigeria is one of the founding State Parties of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol), which it ratified on 16 December 2004.

Article 5 of the Maputo Protocol on the "Elimination of Harmful Practices" states:

"States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards... [including the] prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them."⁵⁰

Article 6 on "Marriage" provides "(a) no marriage shall take place without the free and full consent of both parties", and "(b) the minimum age of marriage for women shall be 18 years",⁵¹ both of which seek to tackle the prevalence of child, early and forced marriage.

While the Maputo Protocol has not been domesticated into the Nigerian legal system, some of its provisions have been incorporated into both the Violence Against Persons (Prohibition) Act 2015 and the Gender and Equal Opportunities Bill (GEO).⁵² The Maputo Protocol has been creatively employed by Nigerian civil society and referenced in judicial decisions on the rights of women,⁵³ although its impact has been diluted by the limited implementation of the Violence Against Persons (Prohibition) Act 2015 and the Gender and Equal Opportunities Bill at the state level.⁵⁴

KEY BARRIERS AND CHALLENGES TO REFORM

- Family laws come under state jurisdiction and the Child Rights Act as well as the Violence Against Persons (Prohibition) Act 2015 require formal adoption by each individual state for them to apply.⁵⁵ Northern states have yet to adopt these laws. The legal framework of the country requires family law reform at both the federal level and in each individual state.
- Political instability and security issues are major concerns to women's rights activists. The institutional mechanisms currently in place are often not sufficiently strong or robust to act as effective platforms for meaningful human rights promotion and protection.
- The capacity of the Government is also limited and there is a tendency to trust in traditional and religious leaders rather than secular judges and courts.⁵⁶ As traditional and religious leadership is male-dominated and led, reform efforts intended to strengthen the rights of women are hindered.
- High levels of illiteracy and poverty and a lack of well-developed social and legal infrastructures mean that information about legal rights and human rights is limited and not uniform across communities. As a result, work on everyday access-to-justice issues often take priority over legal reform of family laws.

50 African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).

51 Ibid.

52 V.O Ayeni (ed.), *The impact of the African Charter and the Maputo Protocol in selected African states*, (pp. 183-202), Pretoria University Law Press, 2016, available at: <http://www.pulp.up.ac.za/edited-collections/the-impact-of-the-african-charter-and-the-maputo-protocol-in-selected-african-states>.

53 Ibid., p.194.

54 Ibid., p.202.

55 Constitution of Nigeria 1999, Second Schedule Part II, s.4; UNICEF, *Child rights Legislation in Nigeria*, Fact Sheet, (p. 2), 2011: https://www.unicef.org/nigeria/Child_rights_legislation_in_Nigeria.pdf.

56 J. A. Dada (2012) *Impediments to Human Rights Protection in Nigeria*, Annual Survey of International & Comparative Law, Vol. 18: Issue 1, Article 6 available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol18/iss1/6>.

RECOMMENDATIONS FOR REFORM OF MUSLIM FAMILY LAW IN NIGERIA

Recommendation 1

The Federal Government of Nigeria should take steps to ensure that Muslim women living under the jurisdiction of Islamic laws benefit equally from Constitutional equality and non-discrimination provisions under Articles 15(2) and 42.

Recommendation 2

Federal and State Governments should reform family-law related laws as follows:

- ✔ The Child Rights Act and the Violence Against Persons Prohibition Act should be adopted in the Northern states of Nigeria. The Government must encourage implementation of the Child Rights Act by all states or amend the Constitution to enforce it federally.
- ✔ A legal framework that recognises the equal rights and responsibilities of a husband and wife in marriage, and marriage as a partnership of equals, should be established across states that apply Muslim family laws.
- ✔ The minimum age of marriage should be made 18 years for all citizens regardless of ethnicity, religion or region of residence. No exception to the minimum age of marriage should be permitted. The Government should ensure mandatory secondary schooling for boys and girls up to the age of 18 years to discourage early marriage.
- ✔ The law should require mandatory registration of all marriages, including those under the jurisdiction of Islamic law.
- ✔ The Federal Government should ensure that Islamic law on marriage and divorce prohibits polygamy. Alternatively, the Government should put in place legal conditions to restrict the practice of polygamy and minimise harm and injustice to the existing wife and children, such as mandatory consent of wives and procedures to verify documents and evidence that proves financial capacity and just cause.

Recommendation 3

Federal and State Governments should strengthen support services, including special police units and access to legal, psycho-social and emergency support to ensure that early marriage cases are prevented and girls who are vulnerable to early marriage are able to obtain prompt and effective assistance.



South Africa

South Africa



CONTEXT

Muslims in the Republic of South Africa constitute 1.9% of the total population of 54.4 million, constituting one of the smallest minorities in the country.¹ Muslims came to South Africa in two distinct waves: the first were the Malays, also known as the “Cape Malays”, who came from the Indonesian Archipelago, and the second were Indian Muslims from the Indian Subcontinent.² The mix of forced and voluntary migration, with Malay and Indo-Pakistani cultures, elements of indigenous and African culture, and the history of African apartheid has created a unique South African Muslim identity.

LEGAL FRAMEWORK

Constitution of the Republic of South Africa

Section 2 of the Constitution of the Republic of South Africa 1996 provides: “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” Section 39 of the Constitution states that when interpreting the Bill of Rights in the Constitution and when developing the common law or customary law, “every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”. Section 15 of the Bill of Rights protects freedom of religion, belief and opinion.

Section 9 sets out the equality provisions of the Bill of Rights. It provides:

- “9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection 3. National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection 3. is unfair unless it is established that the discrimination is fair.”

DOMESTIC LAWS

A. Marriage laws

There are a number of domestic laws governing civil marriages, civil unions and customary marriages, so there is no single law that governs the registration of marriages.³

All civil marriages fall under the jurisdiction of the Marriage Act 1961, which governs marriages between one man and one woman. According to the Act, any minister of religion, or any person holding a responsible position in any religious denomination or organisation, can be designated as a marriage officer for the purpose of solemnising marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion (ie: a religious marriage officer).

Muslim, Hindu and other religious marriages are only deemed legal under the Marriage Act if they comply with all the legal technical requirements of the Act (including the marriage formula and presence of witnesses). Customary marriages are governed by the Recognition of Customary Marriages Act 1998 (RCMA), the common law and norms of customary law.⁴

1. South Africa Department of Statistics, Statistical release P0318, *General Household Survey 2015*: <https://www.statssa.gov.za/publications/P0318/P03182015.pdf>.

2 E.C. Mandivenga, *The Cape Muslims and the Indian Muslims of South Africa: A Comparative Analysis*, Journal of Muslim Minority Affairs, 2000.

3 Freedom Of Religion South Africa (FOR SA), N. Badenhorst, FOR SA Legal Counsel, *Proposed Changes to Marriage Laws Underway*, 9 July 2019: <https://forsa.org.za/proposed-changes-to-marriage-laws-underway/>.

4 South African Shadow Report (Joint NGO Submission) on the Implementation of All Forms of Discrimination against Women, 2011 available at: https://www2.ohchr.org/english/bodies/cedaw/docs/ngos/joint_NGO_Report_for_the_session_SouthAfrica.pdf.

B. Muslim Family law

Key issues regarding Muslim family law

South Africa legally recognises three types of marriages: civil marriages, customary marriages⁵ and civil unions. Marriages conducted under Muslim rites are not legally recognised unless accompanied by another form of marriage ceremony which meets the requirements of the Marriage Act 1961. The lack of legal recognition of Muslim marriages means that Muslim women and children lack protections granted to those entering a civil marriage and suffer significant discrimination in multiple areas of marriage and family life, including widows who have difficulty inheriting from their husbands' estates when they are not recognised as surviving spouses. Without legal recognition of Muslim marriages, Muslim women face a piecemeal collection of protections through national legislation and court cases.

The issue has been raised before the Committee on the Elimination of All Forms of Discrimination against Women in 2011. A joint NGO submission reported: "The failure [to] recognise religious marriages means that all women married by religious rites do not enjoy the protections offered by civil marriages, such as claims to assets acquired during the relationship, spousal maintenance and protection from eviction."⁶ This disparity prevents women from being able to access their rights to "the full and equal enjoyment of all rights and freedoms" under the Constitution (see s.9(2) above).

1. Marriage

Under the Marriage Act 1961,⁷ a person under the age of majority – 18 years in South Africa – cannot marry without the consent of a parent or legal guardian. The minor may request consent from a Judge of the High Court if parental consent is unreasonably refused or there is sufficient evidence that the marriage is in the best interests of the minor. Even with parental consent, a boy under 18 years and a girl under 16 years cannot marry without the consent of the Minister of Home Affairs.

In South Africa, Muslim marriages that are conducted under religious rites leave women without the legal recognition that a civil marriage provides and denies them the protections guaranteed under civil law, including on dissolution of the marriage, such as spousal maintenance and widow's inheritance rights. One way to ensure State-guaranteed protections for Muslim women has been to simultaneously enter into a civil marriage. However, civil courts will reject civil marriage contracts that include religious clauses, such as maintenance for ex-wives and the consequences of polygyny,⁸ leaving women without any protection even if a couple conduct both a civil and a Muslim marriage. Muslim women report limitations on their ability to negotiate the terms of their marriage contracts.

Girls Not Brides estimates that 6% of girls in South Africa are married before the age of 18 and 1% are married before their 15th birthday based on data from 2003⁹, although information is limited and rates may be higher because customary marriages and other minority-religious marriages tend not to be registered.

2. Polygamy/Polygyny

Civil marriages in South Africa must be monogamous. While certain customary marriages do allow for polygamy under the Recognition of Customary Marriages Act, Muslim marriages are not included as customary marriages. In addition, if a man has a first civil marriage and enters into a second religious marriage, the second is invalidated by the common law. In South Africa, there is a distinction between using the terms "polygamy" and "polygyny" – since in the context of both Muslim family laws and African customary laws, the right to marry more than once is available only to men, the latter is more often used in public policy and judicial decisions.¹⁰

Muslim men in South Africa believe Sharia laws allow them to marry up to four wives simultaneously, without requiring either the knowledge or the consent of the current wife. Reportedly, many polygynous marriages are performed in secret, without the existing wife's knowledge,¹¹ and in spite of requirements for Muslim

5 The definition of a customary marriage is one that is negotiated, celebrated or concluded according to any of the systems of indigenous African customary law which exist in South Africa.

6 South African Shadow Report (Joint NGO Submission) on the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women, 2011:

[https://www2.ohchr.org/english/bodies/cedaw/docs/ngos/joint NGO Report for the session SouthAfrica.pdf](https://www2.ohchr.org/english/bodies/cedaw/docs/ngos/joint%20NGO%20Report%20for%20the%20session%20SouthAfrica.pdf).

7 Act No. 25 of 1961.

8 MPL Pilot Report, *Workshop of the Muslim Personal Law Network*, African Gender Institute, University of Cape Town, 2018.

9 Girls Not Brides, *South Africa*, accessed online: <https://www.girlsnotbrides.org/child-marriage/south-africa/>.

10 W. Amien, *A South African Case Study for the Recognition and Regulation of Muslim Family Law in a Minority Muslim Secular Context*, *International Journal of Law, Policy and The Family*, Volume 24, Issue 3, [pp. 361–396 at p.369], October 2010: <https://doi.org/10.1093/lawfam/eba012>.

11 *Ibid.*, p.391.

South Africa cont

Marriage Officers to enquire into the matter before officiating the further marriage.¹² South African NGOs have reported to the CEDAW Committee that polygyny is an issue on which the Government must act to discourage and/or prohibit.¹³

3. Divorce

Without legal recognition of Muslim marriages, Muslim women do not have access to civil courts to apply for dissolution of the marriage and may therefore become trapped in unwanted marriages. They may apply for divorce before a Sharia or religious court, which in the main will be adjudicated by male *Quazis* (religious judges).¹⁴ These courts are informal, formed to oversee and facilitate matters primarily relating to marriage and family life, including divorce. Depending on the court, its administration may be regulated by an *ulama* council of religious clerics or by the affiliated mosque, but the implementation of purportedly Sharia law and the enforcement of decisions is at the discretion of the individual judges. As a result, Muslim women are vulnerable to discriminatory practices on multiple grounds.

For instance, women's rights activists reported that the Muslim Judicial Council, a non-profit body of Islamic clerics located around the country, usually only grant judicial dissolution of marriage (or *faskh*) to women if the husband fails to appear before the court. If he does appear and refuses to divorce, the woman is told to *sabr* (have patience) and try to reconcile regardless of whether she has valid grounds for divorce.¹⁵ As a result of these courts applying Sharia laws that generally favour men, Muslim women have found it difficult to obtain divorces and to receive the fair share of maintenance.¹⁶

The Sharia courts are often composed of men from the same community as the women seeking a divorce, where during the proceedings it may be necessary to share sensitive personal information. This creates additional barriers for Muslim women and denies them a safe space and fair recourse to divorce, discouraging women from reporting or seeking divorce, even in warranted or dangerous circumstances.

Even if a religious court decides in favour of the wife, those community courts lack the power to enforce their rulings. For example, if a woman is granted a maintenance settlement but her husband refuses to comply with the ruling, the religious court lacks the legal recourse to ensure she receives it.¹⁷ Meanwhile,

Muslim men who want a divorce may rely on *talaq*, or pronouncing divorce, which is socially acceptable (as is the practice of *hilala*) even though it has been renounced in other contexts as un-Islamic.

4. Inheritance

The lack of legal recognition of marriages conducted under only Muslim religious rites raises issues regarding the inheritance rights of a wife following the death of her husband. A widow is not recognised as her late husband's beneficiary, with consequences that range from the eviction of women from their homes to depriving women of their husbands' pensions. While there has not been any legislation enacted to address this disparity, the courts have removed some of the barriers to Muslim women accessing their rights in a number of precedent cases,¹⁸ though the protection provided is limited and piecemeal. More work remains to be done in order to cement these protections for Muslim women.

Precedent setting case law

- ☞ The case of *Ismail v Ismail*¹⁹ held that marriages solemnised under Islamic law do not share the same status as civil marriages because they are potentially polygamous and thus against South African public policy.
- ☞ In *Daniels v Campbell N.O. & Others*,²⁰ the Constitutional Court held that a Muslim woman married under Muslim religious rites had the right to inherit and to claim maintenance from a deceased spouse who had died intestate (without a will). The court noted that Muslim marriages were not recognised in South African law and concluded that this violated Section 9 of the Constitution. It held that partners to a monogamous Muslim marriage should be recognised as a "spouse" for the purposes of the Intestate Succession Act 81 1987, and as a "survivor" for the purposes of the Maintenance of Surviving Spouses Act 27 1990. The Muslim woman applicant was therefore entitled to inherit part of her dead husband's estate.
- ☞ In *Khan v Khan*,²¹ the court decided that husbands in Muslim marriages, regardless of whether the marriage is monogamous or polygynous, should provide maintenance to wives and children, as per the Maintenance Act 1998.

12 MPL Pilot Report, *Workshop of the Muslim Personal Law Network*, African Gender Institute, University of Cape Town, 2018.

13 South African Shadow Report (Joint NGO Submission) on the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women, 2011: https://www2.ohchr.org/english/bodies/cedaw/docs/ngos/Joint_NGO_Report_for_the_session_SouthAfrica.pdf

14 Ibid.

15 Ibid.

16 Women's Legal Centre, *The Recognition of Muslim Marriages*, Factsheet 2017 accessed at: http://wlce.co.za/wp-content/uploads/2017/08/WLC-MPL-factsheet_FINAL.pdf

17 Ibid.

18 S. Munath, *The Case For Recognition Of Muslim Marriages In South Africa*, OxHRH Blog, 12 October 2017 available at: <http://ohrh.law.ox.ac.uk/the-case-for-recognition-of-muslim-marriages-in-south-africa>

19 *Ismail v Ismail* 1983 (1) SA 1006 (A).

20 *Daniels v Campbell N.O. and Others* 2004 (5) SA 331 (CC).

21 *Khan v Khan* 2005 (2) SA 272.

✎ In *Hassam v Jacobs N.O. and Others*,²² the ambit of the judgment in *Daniels v Campbell N.O. and Others* was extended to polygamous Muslim marriages. A Muslim woman was prevented from inheriting from her late husband's estate because the executor of his estate refused to acknowledge her as a spouse. The woman had entered a Muslim marriage with her husband, who had subsequently married a second wife without the consent of the first wife. The man died intestate, with his death certificate showing no marriages.²³ The Constitutional Court held that, based on Section 9 of the Constitution, the applicant had been discriminated against on the grounds of religion, marital status and gender, and her right to equality had been violated.

C. Violence against women in the family

The prevalence of gender-based violence (GBV), which includes harmful cultural practices, remains high. The South African Demographic and Health Survey 2016 found that one in five women older than 18 years has experienced physical violence. Findings from the Victims of Crimes Survey 2018 also estimated that 138 per 100,000 were raped.²⁴

The Domestic Violence Act 1998 (DVA) and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 (SOA) provide extensive definitions of both physical and sexual violence and offer broad protections and harsh penalties for perpetrators. The SOA has been supported by the development of the National Policy Framework on the Management of Sexual Offences Matters in 2013.

The South African Integrated Programme of Action: Addressing violence against women and children (2013–2018)²⁵ (Programme of Action on VAW) has served as the government's action plan for addressing gender-based violence against women. South Africa is also developing the Draft Prohibition of Forced Marriages and Child Marriages Bill, which will provide greater protection from these harmful practices.²⁶

NATIONAL LEVEL REFORM EFFORTS

A. Civil society

Prior to 2016, efforts to redress injustices within the Muslim family were primarily pursued at the individual level. Following a roundtable on *Muslim Personal Law Reform* hosted by the University Kwa Zulu Natal Gender

and Religion Programme (with keynote speaker Zainah Anwar, Musawah's Executive Director), a nascent advocacy network, the *Muslim Personal Law Network* (MPL Network) emerged in 2016, demanding gender equal practices in Muslim personal law in South Africa. The MPL Network is a national network of diverse Muslim women activists, counsellors, attorneys and academics across South Africa. Their work brings together academic research, legal expertise and activism with lived experiences of Muslim personal law in South Africa. Dr Fatima Seedat, a member of the MPL Network, writes divorce (or *khula'*) pronouncements for women seeking divorce. She is currently the only known woman to write such pronouncements.

As an outcome of their third meeting in July 2019, the MPL Network is developing a submission in response to the Government's call for public comments on the new proposal by the Ministry of Home Affairs on the possible adoption of a single "Marriage Act", governing all marriages in South Africa. The deadline for comments was extended to August 2019.²⁷

On violence against women

On 1 August 2018, thousands of women, many of whom were GBV survivors, marched across the country under the banner of #TotalShutdown. The protests came shortly after national statistics in June 2018 revealed that the murder rate for women had increased by 117% between 2015 and 2016/17 and the number of women who experienced sexual offences had also jumped from 31,665 in 2015/16 to 70,813 in 2016/17, an increase of 53%.

In response, the *President of South Africa hosted a National Presidential Summit on Gender-Based Violence and Femicide* in November 2018. A declaration from the summit was signed and launched by the President with key relevant non-governmental organisations (NGOs) in March 2019.²⁹ Subsequently the Government committed to the establishment of an Interim Steering Committee, led by the Presidency and in partnership with NGOs, including a multi-sectoral stakeholder council to address the issue of GBV and femicide, the development of a national strategic plan to eradicate GBV and femicide as well as reviewing the Government Programme of Action on VAW. However, the implementation of these commitments has stalled, despite pressure from civil society.³⁰

22 *Fatima Gabie Hassam v Johan Hermanus Jacobs N.O. and Others* (with the Muslim Youth Movement of South Africa and the Women's Legal Centre Trust as Amicus Curiae) CCT 83/08 [2009] ZACC 19.

23 E. Graham, *The clock is ticking for Muslim Marriages Bill to be passed*, 12 April 2019, Schoemanlaw Inc.: <https://www.schoemanlaw.co.za/the-clock-ticking-muslim-marriages-passed/>

24 Statistics South Africa, *South Africa Demographic and Health Survey 2016* available at: <https://dhsprogram.com/pubs/pdf/FR337/FR337.pdf>.

25 Available at: https://www.saferspaces.org.za/uploads/files/Violence_Against_Women_and_Children-Low_Resolution.pdf.

26 2019 *South Africa Voluntary National Review*, 24 July 2019, available at: https://sustainabledevelopment.un.org/content/documents/23402RSA_Voluntary_National_Review_Report_The_Final_24_July_2019.pdf.

27 South African Law Reform Commission, *Project 144 Single Marriage Statute Issue Paper 35*, Call for Comments, April 2019: <https://pmg.org.za/callforcomment/830/>.

28 D. Odufuwa, *Women in South Africa are marching against gender violence with #TotalShutdown protest*, CNN, 2 August 2018:

<https://edition.cnn.com/2018/08/01/africa/south-africa-women-protest/index.html>.

29 South African Government, *Gender-Based Violence and Femicide Declaration*, March 2018, available at: <https://www.gov.za/GBVdeclaration>.

30 P. Pilane & M. Zali, *Gender-Based Violence Summit fails to meet its own deadline*, Health E-News: <https://www.health.e-news.org.za/2019/04/18/gender-based-violence-summit-fails-to-meet-its-own-deadline/>.

B. Government

On recognition of Muslim marriages

On 21 January 2011, the Muslim Marriages Bill³¹ was published in the Government Gazette for public comment, laying out a framework for Muslim marriages (including requirements for a valid Muslim marriage; registration; equal status and capacity of spouses; divorce; custody of children; and inheritance rights). Since its introduction, the Bill has been much debated but has yet to be passed. According to the Minister of Justice, the Bill was widely opposed, with over 7,000 petitions objecting to the Bill and only 734 submissions supporting it. The main objections were that the Bill was “un-Islamic”.³²

Women’s rights groups have continued to push for reform and in *Women’s Legal Centre Trust v President of South Africa and others*,³³ the Cape High Court ordered the state to pass legislation that recognises Muslim marriages within 24 months (by August 2020). According to the judgment, “the state is obliged to respect, protect and promote the rights to dignity, equality, religion, the best interests of the child and access to courts by enacting legislation to recognise Sharia law marriages”.³⁴ The case has been appealed and the decision of the Supreme Court is awaited, as of July 2019.

The Muslim Marriages Bill, or any legislation that takes its place, will need to address the *de jure* practices that have previously facilitated discriminatory behaviours. Currently, the Muslim Marriages Bill includes draft provisions on:

- ☞ *Talaq*: the dissolution of a Muslim marriage, immediately or at a later stage, by a husband or his agent by using the word *Talaq* or a synonym or derivative in any language.
- ☞ *Fasakh*: a decree of dissolution of a marriage granted by a court, upon the application of a husband or wife, on any ground permitted by Islamic law including, in the case of a wife, one or more grounds such as disappearance, failure to maintain, imprisonment for a certain period, mental illness, cruelty.
- ☞ *Iddah*: the mandatory waiting period arising from the dissolution of the marriage by *Talaq*, *Faskh* or death during which period the wife may not remarry.

- ☞ *Khula*: the dissolution of the marriage bond at the instance of the wife, in terms of an agreement for the transfer of property or other permissible consideration between the spouses according to Islamic law.³⁵

In the interim, as noted above, where legislation has failed to address discrimination against Muslim women in South Africa, a growing body of case law has remedied some of the gaps, although this does not discharge the State’s constitutional duty under Article 9(4) of the Constitution to enact national legislation to prevent or prohibit unfair discrimination.

In light of the court’s decision in the *Women’s Legal Centre Trust*, the Cabinet issued an announcement on 25 July 2019 approving an amendment to the Recognition of Customary Marriages Act (RCMA), which will give women who entered into monogamous and polygamous *customary* marriages prior to 1998 equal rights to marital property.³⁶ As already noted, Muslim marriages are not governed by the RCMA.

Recently, the Ministry of Home Affairs has proposed the possible adoption of a single “Marriage Act”, governing all marriages entered into in South Africa. This could either take the form of a unified set of requirements (and possibly consequences) applying to all marriages, or a single Act with different chapters that reflect the current diverse set of legal requirements for and consequences of civil marriages, civil unions, customary marriages, Muslim and other religious marriages (ie: an omnibus or umbrella marriage Act).³⁷

On violence against women and harmful practices

According to the most recent South Africa State Party report to the CEDAW Committee,³⁸ South Africa has taken steps to address violence against women in line with the Government’s Strategic Plan 2014–2019. South Africa implemented the Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act No. 32 of 2007) through the establishment of the sexual offences courts and adopts an inter-sectoral approach on all matters related to sexual offenses. The Government has also adopted an inter-governmental approach in relation to the implementation of the South African Integrated Programme of Action Addressing Violence Against Women and Children (2013–2018), which provides a key platform for accelerating violence prevention

31 GN 37 of 2011, No. 33946.

32 *Women’s Legal Centre Trust v President of the Republic of South Africa and Others; Faro v Bingham N.O. and Others, Esau v Esau and Others* (22481/2014, 4466/2013, 13877/2015) [2018] ZAWCHC 109; [2018] 4 All SA 551 (WCC); 2018 (6) SA 598 (WCC), 31 August 2018: <http://www.saflii.org/za/cases/ZAWCHC/2018/109.html>.

33 *Ibid.*

34 *Ibid.*

35 Department of Justice and Constitutional Development, *Publication of Muslim Marriages Bill*, available at: <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/bills/110117/muslim-marriages-bill.pdf>.

36 C. Booysen & M. Maqhina, Independent Online (IOI), *Customary marriages bill a Step Closer*, 26 July 2019: <https://www.ioi.co.za/capetimes/news/customary-marriages-bill-a-step-closer-29866833>.

37 N. Badenhorst, FOR SA Legal Counsel, *Proposed Changes to Marriage Laws Underway*, 9 July 2019: <https://forisa.org.za/proposed-changes-to-marriage-laws-underway/>.

38 South Africa 5th State Party Report to the Committee on the Elimination of Discrimination against Women, CEDAW/C/ZAF/5, 9 May 2019: https://tinternet.ohchr.org/_layouts/15/Treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FZAF%2F5&lang=en.

and response efforts at all levels. The Programme of Action evolved out of the findings of the Inter-Ministerial Committee on the Root Causes of Violence Against Women and Children established by the Cabinet in May 2012.

INTERNATIONAL OBLIGATIONS

Convention on the Elimination of All Forms of Discrimination against Women

South Africa signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in January 1993 and ratified the Convention on 15 December 1995, without entering any reservations. South Africa ratified the Optional Protocol to CEDAW in October 2005. South Africa was last reviewed during the 48th CEDAW Session in 2011. In its Concluding Observations, the CEDAW Committee gave the following recommendations to South Africa in relation to the reform of family law:

“41. The Committee notes that the Constitutional Court of South Africa has held as discriminatory, and therefore unconstitutional, rules of customary laws on marriage and succession. The Committee also notes that as a result of these judgements, a reform of the Customary Law of Succession and Related Matters Amendment Bill, which seeks to abolish the customary law rule of male primogeniture, is currently under discussion. However, the Committee is concerned that other customary and religious laws and practices that discriminate against women in the field of marriage and family relations, such as polygamy, are being upheld by the State party’s preservation of a combination of civil, customary and religious marital regimes, and by the adoption of legislation such as the Customary Marriages Act.

42. The Committee recommends that the State party increase support for law reform, in line with its Constitutional principles, with regard to non-discrimination, and to comply with its international obligations through partnerships and collaboration with religious and community leaders, lawyers, judges, civil society organizations and women’s non-governmental organizations. To this end, the Committee urges the State party to:

a. Expedite discussion of the Customary Law of Succession and Related Amendment Bill, with the aim of adopting it; and

b. Prepare a unified family code in conformity with the Convention, in which unequal inheritance rights, property and land rights and polygamy are addressed, with the aim of abolishing them, including the option of civil provisions available for all women”.³⁹

Sustainable Development Goals

South Africa views the achievement of the Sustainable Development Goals (SDGs), to be in the country’s interest. A national coordinating mechanism has been established for national engagement and reporting on the 2030 Agenda; the African Union’s Agenda 2063; and the Southern African Development Community’s Regional Indicative Strategic Development Plan, in alignment with the National Development Plan (NDP). The NDP prioritises the elimination of poverty, reduction of inequality and growing an inclusive economy by 2030.⁴⁰

As part of its SDG agenda, South Africa has made commitments towards attaining gender equality and empowerment of women and girls under SDG 5. SDG Indicator 5.1.1 has identified family law as one of the legal frameworks that must be reformed to accelerate progress to promote, enforce, and monitor gender equality. While South Africa has not made any voluntary commitments in the area of family law reform, recent national developments signal potential progress. In its *Voluntary National Review 2019*, the Government recognised the need to “correct” national legislative and policy frameworks to achieve full equality for women. In particular, the prevalence of GBV is identified as a major challenge.⁴¹

Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa

South Africa ratified the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol) on 17 December 2004. At the time of ratification, South Africa made three reservations and two interpretative declarations to the Protocol, as follows:⁴²

39 Committee on the Elimination of Discrimination against Women, Concluding Observations of the Committee on the 2nd, 3rd and 4th periodic report of South Africa, CEDAW/C/ZAF/CO/4/, 5 April 2011: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fZAF%2fCO%2f4&lang=en.

40 South Africa *Voluntary National Review 2019*, 24 July 2019, available at: https://sustainabledevelopment.un.org/content/documents/23402RSA_Voluntary_National_Review_Report_The_Final_24_July_2019.pdf.

41 Ibid., pp.52-59.

42 Justice Lucy Asuagbor, *Status of Implementation of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, 15 April 2016: <https://reliefweb.int/report/world/status-implementation-protocol-african-charter-human-and-peoples-rights-rights-women>.

South Africa cont

Reservations

- Article 4(j): not applicable in the Republic of South Africa as the death penalty has been abolished.
- Article 6(d): South Africa does not consider itself bound by this Article that a marriage be recorded in writing and registered in accordance with national laws in order to be legally recognised.
- Article 6(h): South Africa enters a reservation on this Article, which subjugated the equal rights of men and women with respect to the nationality of their children to national legislation and national security interests, on the basis that it may remove inherent rights of citizenship and nationality from children.

Interpretative declarations

- Article 1(f): definition of “discrimination against women” in the Protocol has the same meaning and scope as provided for in and interpreted by the Constitution of South Africa from time to time.
- Article 31: The South African Bill of Rights shall not be interpreted to offer less favourable protection of human rights than the Protocol, which does not expressly provide for such limitations.

KEY BARRIERS AND CHALLENGES TO REFORM

- The high levels of illiteracy and poverty and developing social and legal infrastructures mean that information about laws and human rights is limited and not uniform across communities. As a result, national reform efforts relating to gender equality have prioritised work on socio-economic solutions over reform of family laws, especially since the push is coming from Muslims in a minority context.
- South Africa’s apartheid and colonial legacies continue to shape the socio-economic and political and cultural landscape, with inequality particularly visible along racial lines. Coupled with intersections with cultures and traditions, this inequality has the potential for the manner in which Islam is practiced in South Africa to divide into microcosms of diasporic Islam (Indian, Malay, etc.), as opposed to a unified local South African Islam more in line with larger South African values and the progressive Constitution.
- Within the Muslim communities in South Africa, the institutional set-up of traditional and religious leadership is male-dominated and male-led; therefore, reform efforts by Muslims women’s groups are directly challenged and hindered by conservative groups, especially if they deal with perceived “religious” or Islamic law.
- Increasingly vocal conservative resistance to substantive equality poses a direct challenge to translating the 23-year-old constitutional equality provisions into reality.

RECOMMENDATIONS FOR REFORM OF MUSLIM FAMILY LAW IN SOUTH AFRICA

Recommendation 1

The Government should ensure the Muslim Marriages Bill, or any legislation that takes its place, should address the de jure Muslim marriage practices that have resulted in multi-layered discrimination against Muslim women.

Recommendation 2

The Government should ensure the legal recognition of Muslim marriages within a legal framework that recognises the equal rights and responsibilities of a husband and wife in marriage and marriage as a partnership of equals. Muslim women’s groups should be consulted during this process and provide evidence of the lived realities of Muslim women.

Recommendation 3

The Government should introduce mandatory registration of Marriages, including religious marriages.

Recommendation 4

The Government should move away from piecemeal responses to addressing discrimination and violence against minority South African women and adopt a holistic approach.

ISBN 978-1-913173-08-1



9 781913 173081 >



**SISTERS
FOR CHANGE**

www.sistersforchange.org.uk

[@sisters_4change](https://twitter.com/sisters_4change)

research@sistersforchange.org.uk

MAKING JUSTICE WORK FOR WOMEN