



musawah

For Equality in the Muslim Family

Submission to the High Commissioner for Human Rights on Protection of the Family 28 October 2015

In consideration of the High Commissioner's report to the Human Rights Council on the protection of the family and the contribution of families in realizing the right to an adequate standard of living pursuant to HRC Resolution 29/22, Musawah emphasises that ***the most effective way to protect the institution of the family and ensure an adequate standard of living for all family members is to respect, protect, and fulfill the rights of all individuals within all families in all their diverse forms.***

Musawah calls for equality and justice for women, men, and children within Muslim families and the broader Muslim community (*ummah*). Equality within families is the foundation for equality in society; families should be safe and happy spaces, equally empowering for all.

Families in all of their multiple and diverse forms serve as basic units through which individuals support and care for one another, one generation to the next. In many cases, however, families can be oppressive, perpetuating injustice, inequality, and even abuse. Such attitudes and practices have negative effects on all of family members, thus affecting their well-being, standard of living, and quality of life. This can be the case within Muslim family laws and practices that often continue to be informed by pre-modern interpretations of the *Shari'ah* as developed through *fiqh* (jurisprudence).

But discriminatory laws and practices, even those justified in the name of religion, **can** be changed using a holistic framework that recognizes religious teachings, universal human rights standards, constitutional guarantees of equality and non-discrimination, and the lived realities of women and men today. This can promote the realization of human rights for individuals, stability within the family and for family units, and greater economic benefits for family members.



Musawah urges the High Commissioner for Human Rights to consider two main points in developing his report:

(1) Many laws, policies, and practices related to families in Muslim contexts are discriminatory and unjust, and need to be changed.

Most Muslim family laws and practices are based on an assumption that men are, and should be, in charge of women. This assumption is encapsulated in two legal concepts that place women under male authority. One is *qiwamah*, which entails a set of fixed rights and obligations in marriage: husbands have a duty to protect and provide maintenance for their wives; wives, in turn, must be obedient or submissive to their husbands. The other, *wilayah*, refers to the right and duty of male family members to exercise guardianship over their dependent wards (female or male).

Qiwamah and *wilayah* in the sense of male authority over women are not Qur'anic concepts, but were developed through a process of human interpretation of sacred texts based on the cultural norms and understandings of specific jurists in particular times and places.

The centuries-old *fiqh* framework persists in contemporary family laws and practices in most Muslim-majority countries. The core concepts of *qiwamah* and *wilayah* have also led to societal norms that enshrine male superiority and female inferiority within and beyond the family, and thus further contribute to discrimination against women. They directly or indirectly justify many restrictions, discriminations, and injustices against women, including:

- Women often do not gain any legal rights from financial contributions to their families or their caregiving work in the family.
- Working women in some contexts do not enjoy the same benefits as their male co-workers because of an assumption that they are under the financial support of their husbands or fathers.
- Male guardians can sometimes contract marriages for minor wards, and young women may be coerced into marrying at an early age, which can affect their mental and physical health, education, and general well-being.
- Spousal violence against women is often not prohibited outright. Some laws implicitly or explicitly recognise the husband's right to 'discipline' a disobedient wife as long it is not 'severe' or 'harmful' to the wife.
- Rape and sexual violence within marriage are not criminalised because marital sex is considered a husband's right and a wife's duty.
- The practice of polygamy is often unjust to wives and children both financially and emotionally.
- Wives who are ruled to be in a state of *nushuz* (disobedience) can lose their right to maintenance during the marriage and right to claim for arrears in unpaid maintenance after the breakdown of the marriage.
- *Nushuz* can be grounds for male-initiated divorce, which results in women losing the legal right to post-divorce financial dues (e.g., waiting period maintenance (*'iddah*) and the deferred portion of the dower (*mahr*)).
- Married women sometimes cannot leave home or travel without their husbands' permission. In some cases, women are not able to study, work, obtain travel documents, or travel outside the country without permission.
- Mothers are often given physical custody (*hadanah*) of their children, but cannot hold guardianship (*wilayah*), so they need the guardians' consent for medical treatment, obtaining identity documents, travel, enrolment in or transfer to new schools, etc.
- Many women cannot exercise their right to manage their own property out of real or coerced deference to male family members or as a result of negotiated arrangements with the family.
- Women in some contexts are barred from holding certain positions (e.g. judgeships), are prohibited to drive, or are subject to other restrictions under the logic of male guardianship and women's diminished legal capacity.

The gendered rights and obligations created by these two concepts can result in injustice for all family members. Women's basic citizenship rights are diminished, contravening the constitutional guarantees of equal citizenship adopted by almost all modern states. Husbands and fathers can suffer from anxiety when they are unable to undertake the role of the provider/guardian, which can contribute to marital conflicts. All of these negatively affect children and harm the well-being of the entire family.

This model of male authority and female submission contradicts contemporary notions of justice and human rights norms, and cannot be justified on religious grounds. In addition, it is inefficient and unworkable given present day economic and social realities. Many men are unable or unwilling to protect and provide for their families. Women often serve as the protectors of their families, provide essential income for their families, and contribute through unpaid labour.

- ***Protecting the family requires acknowledging, examining, and addressing the structural and institutional inequality, discrimination, and abuses within family laws and practices that persist until today.***

(2) Discriminatory laws, even if based on religion or culture, can be changed to ensure equality and justice for all individuals within the family.

Concepts like *qiwamah* and *wilayah*, developed centuries ago in vastly different times and circumstances, no longer respond to the needs, experiences, and values of Muslim women and men today. But the idea of changing laws and practice that are rooted in religion or culture is often met with resistance. In the case of Muslim family laws, however, there are a variety of theories and methods within Islamic jurisprudence that can be used towards reform:

- a. There is a distinction between *Shari'ah*, the revealed way, and *fiqh*, or human interpretation of the *Shari'ah*. Much of what is deemed to be 'Islamic law' today is *fiqh* and not divine law, and therefore is human, fallible and changeable.
 - b. Muslim jurists have always considered legal rulings related to marriage and family as social and contractual matters (*mu'amalat*), rather than spiritual or devotional matters (*ibadat*). As such these rulings have always been open to consideration and change.
 - c. Diversity of opinion has always been accepted and celebrated in Islamic jurisprudence, which is why there are multiple schools of law. The fact that different Muslim countries have different Muslim laws demonstrates that there is no unified, monolithic 'divine' law. We must recognise that contemporary codified laws are not God-given, but were adopted by humans serving in legislatures or committees, and can therefore be changed by humans to be more just and equal.
 - d. Laws or amendments introduced in the name of *Shari'ah* and Islam should reflect the Islamic values of equality, justice, love, compassion, and mutual respect for all individuals and among all human beings, which correspond with contemporary human rights principles.
- ***It is vital to consider the possibilities for achieving equality and justice within family laws and practices, and to advise Governments that such reform is both necessary and possible.***



To truly protect the family as an institution, and to ensure that all family members are able to contribute to ensuring the well-being and an adequate standard of living for their families, we must ensure equality and justice within families in their multiple forms. The obligation of States to protect and support the family includes an obligation to address injustices, discrimination, and all forms of abuse that occur within the family.

We urge the High Commissioner, the Human Rights Council, governments, political leaders, international institutions, religious leaders, and our sisters and brothers to work together to uphold these principles:

- Equality, non-discrimination, justice, and dignity as the basis of all human relations;
- Full and equal citizenship for every individual; and
- Marriage and family relations based on principles of equality and justice.

These principles can lead to laws, policies, and practices that prioritise families in all their diversity as places of security, harmony, support, and personal growth for all members.

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