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For Equality in the Muslim Family

To: The Office of the High Commissioner for Human Rights
Fr: Musawah, Global Movement for Equality and Justice in the Muslim Family
Re: Report to be written pursuant to HRC Resolution A/HRC/RES/24/23 on child, early and forced marriage
Date: 13 December 2013

Pursuant to [HRC resolution A/HRC/RES/24/23](#), Musawah, the global movement for equality and justice in the Muslim family, hereby submits its contribution to the OHCHR report in preparation for the panel discussion preventing and eliminating child, early and forced marriage, to take place at the twenty-sixth session of the Human Rights Council. We recognise that many submissions will focus on policies and strategies addressing the social, economic, psychological, and physical harm caused by child marriage. The Musawah contribution addresses the particular problematic of child marriage in Muslim contexts, and the urgent need to challenge the ways in which governments invoke outdated but contested interpretations of Islamic laws to justify this practice or to justify why change is not possible.

Musawah believes it is important for treaty bodies, and other UN bodies entrusted with overseeing compliance with fundamental international legal obligations, to understand and address the ways in which governments use religion to justify reservations and non-compliance with treaty obligations. We further believe it is imperative to provide space within the UN system to answer, challenge and debate in an open and transparent manner the instrumental use of religion and culture to justify continued discrimination against women and children.

Musawah firmly believes that engaging directly with these issues, by offering alternative rights-based approaches and arguments grounded in both international human rights principles and informed knowledge of religious and legal traditions, will help to build knowledge and expose States to the possibility and necessity of reform and of equality and justice within Muslim communities. We also believe it is important that the UN system challenges State Parties that argue that reform or compliance with treaty obligations is not possible because “the community is not ready for change”. We see this effort at laying the blame on the “community” as a pretext for the lack of political will and courage to take steps to advance human rights at the national level. Very often, there are already strong voices within “the community” that are demanding and working on the ground for change, but governments have chosen to legitimise and listen to only conservative voices resisting change because they serve the interest of those in authority. The internal voices for change, in challenging the use of religion to justify discrimination, must be heard in the UN system to counter the ways governments resort to the omnipotent “word of God” to justify why they cannot reform laws and policies that violate human rights principles.

Such an open engagement within the UN system is critical to women's rights activists living in Muslim contexts, as they seek globally to democratise the process of knowledge production in Islam; to have their voices and concerns reflected in religious-based arguments and laws; to rethink the pre-modern conceptions of justice that inform contemporary Muslim family laws; and to bring these laws into line with contemporary notions of justice – with their inherent assumption of gender equality. This engagement not only enables them to bridge the divide between Islam and human rights, but also can facilitate change in community-level practices and beliefs.

This Musawah submission is structured as follows: The first section lays out common arguments that are often used to challenge setting the minimum age of marriage at 18. The second section outlines Musawah's responses to such arguments and sets out reasons why setting a minimum age of marriage at 18 can be justified in a way that is consistent with Islamic principles, universal human rights principles, constitutional guarantees of equality, and lived realities and needs of girls, boys, women and men today.

It is clear that these religious justifications presented by Governments as beyond reproach are in fact debatable, and that many Muslims have been debating them. In many Muslim countries, legal reform indeed has taken place to ban the practice of child marriage. This section ends with a list of OIC member countries that have reformed their laws to set the minimum age of marriage at 18.

I. Potential challenges in setting 18 as the minimum age of marriage in Muslim contexts

A campaign to reduce the practice of child marriage and promote 18 as the minimum age of marriage often has to deal with conservative Muslim arguments. Among the common arguments used against setting a minimum age of marriage are:

- ❖ Setting the minimum age of marriage at 18 is 'un-Islamic' because it goes against the practice of the Prophet Muhammad, who married Aishah when she was six years old, and consummated the marriage when she reached puberty at the age of nine. Muslims must follow the *Sunnah* (practice) of the Prophet; any effort to outlaw child marriage goes against the teachings of Islam.
- ❖ Sex outside of marriage is forbidden in Islam. Since humans develop sexual urges at puberty, early marriage is the Islamic solution to deal with natural sexual desire. Marriage should be allowed when a girl reaches puberty (*bulugh*) in the belief that when a girl menstruates, she is sexually mature and is therefore ready for marriage.
- ❖ Men and women are created to be attracted to one another. For Muslims living in societies where there is no or little gender segregation and where they are continually exposed to sexual promiscuity in the media and the larger society, early marriage ensures that sex happens only within marriage.

These are common arguments put forth by many conservative clerics, Islamist activists and even government officials opposed to attempts to set or raise the minimum age of marriage in many Muslim contexts. These arguments are then used by governments to justify reservations to treaty provisions and failure to implement international legal

obligations that respect the rights of girls and women to choose if, when and whom to marry.

These arguments in fact lack rationality and logic; although they are expressed in prescriptive religious terms and appeal to supposed universal human proclivities, they are all based on outdated patriarchal and cultural prejudices and practices, and seek merely to keep existing unequal gender systems and power relations intact.

In spite of evidence documenting the impact of child marriage on the health and well-being of girls, and the fact that it violates many of their fundamental rights, efforts at law reform in many Muslim contexts have failed because those in religious authority have disguised and expressed in religious terms the cultural roots of these practices. And in the face of arguments made in the name of Islam, many governments have not displayed the political will needed to challenge these outdated arguments rooted more in culture and tradition, and push for what is right and just for society, especially for women and children.

For example, for several years, Yemen has tried to pass new laws to end child marriage. Even when a bill was passed by Parliament, conservative MPs insisted that the bill be referred to the *Shari'ah* Legislative Committee, which then declared that "setting an age of marriage contradicted the Qur'an, *Sunnah*, the Constitution, and the interest of the child." Subsequently a *fatwa* was issued which stated that defining an age for marriage is contrary to *Shari'ah*.¹ To this day, Yemen does not have a minimum age of marriage in its family law.

In Indonesia, efforts to amend the Marriage Laws, which would result in the setting of a minimum marriage age at 18 for both women and men, and the elimination of some stereotyped roles within marriage, have failed, even when initiated by the government.

At the 52nd CEDAW Session in July 2012, the government of Indonesia candidly acknowledged the difficulties it faced in dealing with "narrow religious interpretations", which have resulted in the failure of several efforts at reform of the discriminatory Marriage Laws.

In India recently, it was reported that prominent Muslim organisations in the state of Kerala decided to approach the Supreme Court to exclude Muslim women from the law prescribing minimum marital age. According to these organisations, the present Prohibition of Child Marriage Act 2006, which prescribes 18 as women's legal marital age and 21 for men, violates Muslims' fundamental right to practise their religion.

That child marriage is a violation of not just human rights principles, but also of Islamic juristic principles is clear. What is needed is the political will and courage of governments that still hold back in doing what is right for the girl child because of fears of political backlash. It is important that the OHCHR and other UN bodies recognize that resistance to reform discriminatory Muslim family laws, including the age of marriage, often stems from reasons beyond ostensible religious grounds. Culture and religion are plural and contested. Therefore the obstacles are not "culture" or "religion" per se, but perspectives that privilege particular interpretations based on political interests and power relations of the moment. The answer is not to ignore religion, but to build, support and expand the space for an alternative rights-based discourse to grow

and become the new normative to support the calls for reform towards equality and justice, and state compliance with treaty obligations.

Musawah believes that the international system has a role to play in providing an overarching umbrella for a more informed and critical discourse to emerge at the international level, in order to delegitimise the ways that certain religious and cultural beliefs and arguments are used to justify discrimination against women and girls and to address the lack of political will shown by governments in the face of resistance made in the name of religion.

II. Musawah response in favor of setting 18 as the minimum age of marriage in Muslim contexts

In the face of such persistent challenges in the name of Islam, Musawah would like to make the following arguments and recommendations to advance a rights-based understanding of Islam to support the call for reform. We hope that the OHCHR and its treaty bodies will play a significant role in promoting the possibilities for reform in Muslim contexts, and encouraging governments to fully comply with their treaty obligations.

- i. On the methodology of using the Prophet's practice as a model:** This raises the question of authority and methodology in deducing rules from sources of Islamic law, including the *Sunnah* (practices) of the Prophet. HOW do we select which practice of the Prophet should be turned into law and binding on all Muslims? WHO has the authority to select? And on WHAT basis is the selection made? This is a question of power and authority, not of religion.

The fact is that Aishah was the only young woman the Prophet married. All his other wives were widows or divorcees, and considered old in his time. His marriage to his first wife, Khadijah, during which time he remained monogamous, was the longest. So why is this not selected as the normative *Sunnah* that Muslims should follow?

In contemporary times, the Prophet's marriage to Khadijah represents a more egalitarian and just vision of marriage, a practice more relevant to our times and values. Why can't this be held up as the exemplary model of the Prophet's practice worthy of emulation today?

When governments explain before UN bodies that setting a minimum age of marriage is against Islam, their arguments, which take their legitimacy from a contested religious tradition, must be challenged.

- ii. On the Prophet's marriage to Aishah:** There are now studies that challenge the traditional version of Aishah's age at the time of her marriage to the Prophet. Two studies assert that it is more likely that Aishah was 19-years-old at the time of her marriage.ⁱⁱ Even if these new findings regarding Aishah's age of marriage are wrong or dismissed as apologetic, those who support child marriage on the basis of the practice of the Prophet need to be challenged regarding their methodology: Why is the Prophet's marriage to Aishah selected as the exemplary practice for Muslims to follow, while his marriage to Khadijah, a

widow 15 years older than him, and his marriages to other widows and divorcees, are all ignored as exemplary practices?

iii. On the distinction between puberty and age of marriage: In Islamic legal terminology, *baligh* refers to a person who has reached maturity or puberty. For a girl, *bulugh* (puberty) is attained when she begins menstruating or when she reaches a certain age (which varies from 9 to 13 in different schools of law); for boys, it is when they first have a nocturnal emission (a dream of a sexual nature resulting in discharge), or reach 15 lunar years in age. In all traditional schools of law it was considered that once a girl menstruates she reaches sexual maturity and can be married off.

But at the same time, in all schools of law, to acquire legal capacity and to be able to enter contracts, a person must, in addition to *bulugh*, to attain a separate condition called *rushd*, or the intellectual maturity to handle one's own property and affairs, which some *ulama* consider must be reached before a girl can be married. This ruling is derived through a process of analogy (*qiyas*). Reference is made to the Qur'anic verse *Surah an-Nisa' 4:6* which orders the guardians of orphans to hold back their inheritance until they become fit to marry and are of "sound judgment" to manage their own property.ⁱⁱⁱ It follows that fitness to marry corresponds to civil and legal capacity to make sound judgment. In other words, *bulugh* (i.e. reaching physical capacity for procreation) without *rushd* (i.e. reaching intellectual and emotional maturity) does not create the legal capacity for marriage. In many Muslim countries, the age of *rushd* varies between 18 and 21, which means that before that age, girls and boys are legally treated as minors, without the legal capacity to enter contracts or control their property.

iv. On the Islamic legal principle of "no harm" (la dharar). The principle of "avoiding harm" means that, if an action results in both good and harm, it is preferable first to avoid the harm. If the benefit is much greater than the harm, then the action can be applied. This means that when evidence today shows the great harm and injustice done to the girl child forced into early marriage, the juristic principle of "no harm" takes precedence over the attainment of some benefit that the practice of child marriage might bring to the individual and to society. This "no harm" principle alone is strong enough to justify why child marriage should be prohibited.

v. On concepts from Islamic legal theory that allow for reform: [The Musawah Framework for Action](#) outlines several basic concepts in Islamic legal theory which allow for reform and a trajectory towards equality and justice:^{iv}

❖ The distinction between *Shari'ah*, the revealed way, and *fiqh*, the science of Islamic jurisprudence. Much of what is deemed to be 'Islamic law' today – including *bulugh* as the only requirement for marriage – is part of *fiqh* tradition; it is not divine law, and therefore is human, fallible and changeable.^v Family laws and practices in today's Muslim countries and communities, including the age of marriage, are based on theories and concepts that were developed by medieval/classical jurists (*fuqaha*) in vastly different historical, social and economic contexts. In interpreting the Qur'an and the *Sunnah*, classical jurists were guided by the social and political realities of their age and a set of

assumptions about law, society and gender that reflected the state of knowledge, normative values and patriarchal institutions of their time.

Just as the values and realities of their time guided the classical jurists, so should the values and realities of our time guide us in drafting laws and promoting practices that serve the best interest (*maslahah*) of the individual and society today. In short, Muslim family laws, including the age of marriage, are not divine. They are socially constructed and subject to change.

- ❖ The categorisation of legal rulings into *'ibadat* (devotional/spiritual acts) and *mu'amalat* (transactional/contractual acts). The laws regulating marriage and family come under the *mu'amalat* category, which regulate relations between humans, and therefore remain open to rational consideration and change.^{vi}
 - ❖ Diversity of opinion (*ikhtilaf*)^{vii} in the *fiqh* tradition has led to multiple schools of law, resulting in the huge variety and diversity of provisions in Muslim family laws today. There is no one unified, monolithic, divine Islamic law governing human relations. Within the context of the modern state, we must recognise and engage with this diversity of opinions to determine how best to serve the public interest (*maslahah*) and meet the demands of equality and justice.
 - ❖ Justice is inherent to the philosophy of law in Islam; thus laws or legal amendments introduced in the name of *Shari'ah* and Islam should reflect the values of equality, justice, love, compassion and mutual respect among all human beings.
- vi. **On rights-based practices in Muslim countries:** The fact that family laws that regulate human relations come under the category of *mu'amalat* means that they can change within the framework of Islamic principles in line with changed realities and contemporary notions of justice. Positive reforms in Muslim family laws and evolutions in practices provide support for this possibility of change. For instance, as the injustices of slavery became increasingly recognised and the conditions emerged for its abolition, laws and practices related to slavery were reconsidered and the classical *fiqh* rulings that permitted slavery became obsolete. Likewise, Muslim family laws and practices can and must evolve to reflect the justice of our times.

A great deal of research has been done to show the harmful effects of child marriage on girls and young women, families and society in general. The possibility and necessity for law reform to set a minimum age at 18 is strongly supported by evidence at all levels of the Musawah approach to reform: Islamic principles, human rights principles, constitutional guarantees of equality and non-discrimination and the lived realities of today.

The fact that change is possible in Muslim contexts can be clearly seen from the examples of rights-based laws from various OIC countries, which have set equal, and minimum age of marriage. They include:

- ❖ **Algeria:** Since the February 2005 reform, the minimum age of marriage is 19 for

both males and females. The judge can grant an exception on the grounds of benefit or necessity.

- ❖ **Bangladesh:** Under the Child Marriage Restraint Act (1929, amended in 1984), the minimum age is 18 for females and 21 for males; exceptions are not permitted.
- ❖ **Egypt:** The minimum age of marriage was raised from 16 to 18 in 2008.
- ❖ **Morocco:** Under the 2004 revision of the *Moudawana*, the minimum age is 18 for both males and females. A judge may grant an exception to the minimum age with the assistance of medical expertise or after having conducted a social enquiry.
- ❖ **Oman:** The minimum legal age of marriage is 18 for both males and females. Even though it is forbidden to register a marriage under the minimum legal age, custom still recognises marriages below the age of 18.
- ❖ **Sierra Leone:** The Registration of Customary Marriage and Divorce Act, which set the minimum marriage age at 18, was enacted in June 2007.
- ❖ **Turkey:** Under the 2001 amended Civil Code, the minimum age was raised from 15 to 18 for females. Under exceptional circumstances, the minimum age can be lowered to 16 with the court's permission.

III. Feminist scholarship in Islam and legal reform

The rise of political Islam and Islamists' attempts to turn patriarchal interpretations of the *Shari'ah* into public policy have led to new forms of activism among Muslims. Today, scholars and activists work together to engage with the body of interpretive literature and legal tradition within Islam. By critically examining how we know what we know about women in the religious tradition, and by injecting women's experience of living Islam, their voices and concerns, new feminist knowledge in Islam is being produced. This has become a source of hope in the Muslim world that is paving the way for change in Muslim laws and practices. Many activists today are able, with knowledge and courage, to challenge from within the patriarchy that is institutionalized in the Muslim legal tradition.^{viii}

It is imperative that the OHCHR and the larger UN system recognizes this and makes space for the new voices and scholarship that are emerging from within the Muslim legal tradition. Governments that perpetuate patriarchy and discrimination against women and children through laws and practices that draw legitimacy from religion must be challenged in the international human rights system.

It is critical that UN bodies recognise there is already a "paradigm shift" in Muslim theological and jurisprudential scholarship, and that citizens living in Muslim contexts are challenging the hegemony of patriarchs and political Islamists in and outside government, and building public support on the possibility of reconciling the teachings of Islam with human rights, and women's rights in particular. Governments must show the political will and courage to recognise the change

that has taken place on the ground, and take the lead to end the disconnect between a legal framework that discriminates against women and the realities of today.

Hence, it is our hope that the Human Rights Council will take steps to courageously address the ways in which governments use religion and culture to justify the practice of child marriage. The Human Rights Council must urge governments to comply with their international legal obligations to undertake steps to establish a minimum age of marriage at 18 with no exemptions.

ENDNOTES

ⁱ See: <http://www.hrw.org/reports/2011/12/07/how-come-you-allow-little-girls-get-married>.

ⁱⁱ See Sisters in Islam website for resources on Child Marriage:
<http://www.sistersinislam.org.my/news.php?cat.41>.

ⁱⁱⁱ El Hajjami, Aicha, *The Religious Arguments in the Debate on the Reform of the Moroccan Family Code* in Z Mir Hosseini, K Vogt, L Larsen and C Moe (eds) *Gender and Equality in Muslim Family Law* (London, New York: IB Tauris, 2013) p. 87.

^{iv} For more detailed discussions and references, see the following chapters in *Wanted: Equality and Justice in the Muslim Family*, edited by Zainah Anwar, Musawah (2009): Ziba Mir-Hosseini, 'Towards Gender Equality: Muslim Family Laws and the *Shari'ah*'; Muhammad Khalid Masud, '*Ikhtilaf al-Fuqaha*: Diversity in *Fiqh* as a Social Construction'; and Khaled Abou El Fadl, 'The Human Rights Commitment in Modern Islam'. See: <http://www.musawah.org/wanted-equality-and-justice-muslim-family-english>. Also available online in Arabic and French.

^v In Islamic theology, *Shari'ah* (lit. the way, the path to a water source) is the sum total of religious values and principles as revealed to the Prophet Muhammad to direct human life. *Fiqh* (lit. understanding) is the process by which humans attempt to derive concrete legal rules from the two primary sources of Islamic thought and practice: the Qur'an and the *Sunnah* of the Prophet. As a concept, *Shari'ah* cannot be reduced to a set of laws—it is closer to ethics than law. It embodies ethical values and principles that guide humans in the direction of justice and correct conduct. Musawah Framework for Action.

^{vi} See Musawah, *CEDAW and Muslim Family Laws* (2011): <http://www.musawah.org/cedaw-and-muslim-family-laws-search-common-ground-0>.

^{vii} See Muhammad Khalid Masud: *Ikhtilaf al-Fuqaha*: Diversity in *Fiqh* as a Social Construction: <http://www.musawah.org/sites/default/files/Wanted-MKM-EN.pdf>.

^{viii} Mir-Hosseini, Ziba, *Justice, Equality and Muslim Family Laws* in Z Mir-Hosseini, K Vogt, L Larsen and C Moe (eds) *Gender and Equality in Muslim Family Law* (London, New York: IB Tauris, 2013) pp 26-27.