

## A. SUMMARY

1. Musawah regularly submits Thematic Reports to the CEDAW Committee on concerns related to Muslim family laws, Muslim women's rights, and related matters. This briefing is drawn from Musawah's shadow report at the 69<sup>th</sup> CEDAW Session in February 2018. It incorporates substantive inputs by Saudi women's rights activists and lawyers and research from the International Human Rights Clinic at Harvard Law School.
2. ***This briefing examines Saudi Arabia's legal framework, laws, and practices that allow for de jure and de facto discrimination against women in the following areas: the male guardianship framework; women's consent to enter marriage; child marriage; divorce rights; polygamous and temporary marriages; and custody and guardianship of children. Musawah's website provides information on positive developments in Muslim family laws and practices in 31 countries.***
3. Arguments and tools exist within Muslim legal tradition that support egalitarian Muslim family laws and practices. Other Muslim-majority jurisdictions have enacted laws based on the principle of equality of marriage between spouses or have reformed laws to remove or reduce inequalities towards women. Annexe 1 contains Musawah's justifications for reform of discriminatory provisions in Muslim family laws.

## B. DISCRIMINATORY LEGISLATIVE FRAMEWORK

4. The Basic Law<sup>i</sup> of Saudi Arabia (often referred to as de facto Constitution) does not prohibit discrimination. There is also no comprehensive non-discrimination legislation to date to address this omission in the Basic Law, leaving no legal foundation for equality of the sexes within the legal system.
5. A number of current laws, including the Civil Status Code, Labour Code and Nationality Act, include provisions that discriminate against women. The guardianship framework, discussed below, renders a woman to be a perpetual legal minor and restricts her mobility and ability to access her rights.
6. Saudi Arabia is the only country in the Gulf region which does not have a codified personal status law. Family affairs are governed by judicial rulings on a case-by-case basis, where judges have wide discretion to interpret and apply Islamic rulings. Directives by state officials govern certain matters, such as marriage to foreigners.<sup>ii</sup> The wide discretion granted to judges creates uncertainty and discrepancies in court rulings, and women are often victims to individual judges' abuse of this discretion.<sup>iii</sup>
7. While we acknowledge the recent positive initiative to compile and publish a compendium of judicial decisions, with a section that the State refers to as 'the Personal Status Code',<sup>iv</sup> **it is important to note that the publication of judicial decisions alone does not resolve the issue of lack of clarity and certainty of rules governing personal status matters, especially in the absence of a system of binding precedent of judicial decisions.**

## C. KEY ISSUES AND CONCERNS

### I. Male Guardianship System

8. The male guardianship system places a woman in the position of a legal minor, regardless of her age. A woman remains under the guardianship of her father until marriage, when her husband becomes her guardian.<sup>v</sup> If a woman is divorced or if a guardian passes away, a new male guardian is appointed. Guardianship may revert to a woman's younger brother or son.<sup>vi</sup>
9. The husband is considered the legal head of the household and is responsible for all civil status transactions related to his wife and family; a married woman is required to take residency in her husband's home.<sup>vii</sup> Only a man may register the birth of his children and obtain their official papers.<sup>viii</sup>
10. The guardianship system impacts a woman's ability to access her rights. Women may be denied opportunities to travel, work, study, access medical procedures, obtain a passport and national identity card, sign contracts to buy or rent property, etc.<sup>ix</sup> A woman can be prevented from leaving her home without permission; courts regularly uphold a guardian's 'right to obedience'.<sup>x</sup>

11. The government has recently taken steps towards easing guardianship restrictions, but reforms are limited, not entirely transparent, and provide no penalties for offences.<sup>xi</sup>

**12. The HRC should urge the State party to abolish the male guardianship system for adult women, and specifically:**

- Introduce comprehensive legislation to prohibit gender-based discrimination, particularly regarding education, employment, and access to government and private services/programmes, and codify penalties for offences.
- Amend the Civil Status Code to remove all discriminatory provisions.
- Codify regulations to permit women to obtain identification cards, passports, and scholarships to study abroad and travel without a guardian's permission.
- Ensure that women have the right to choose their residence and that 'disobedience' is not used to subject women to arbitrary detention.
- Codify a Personal Status Law that ensures equal rights and responsibilities in marriage, taking into consideration laws of other Muslim-majority jurisdictions, such as Algeria, Turkey and Morocco, which have family laws based on equality of marriage between spouses.
- Develop a standard marriage contract and list of conditions that can be included in the contract to protect rights during and after marriage.

## II. Women's Consent to Enter into Marriage

13. Consent of both the bride and groom are required for marriage, but a woman must also have consent of her male guardian, regardless of her age.

14. A woman who cannot secure her guardian's consent may file a case for *adhl* (unreasonably withholding permission). But Saudi judges regularly accept many grounds as valid objections, making it difficult for women to win *adhl* cases. In many instances, women can be punished for disobedience if they resort to court.<sup>xii</sup>

15. A woman's guardian may bring a case objecting to a marriage, even after consummation and birth of children, such as 'tribal' or economic incompatibility.<sup>xiii</sup> These cases are subject to judges' discretion, regardless of the wife's opinion.<sup>xiv</sup>

16. Male guardianship renders women vulnerable to forced marriage.<sup>xv</sup> Once a forced marriage is conducted, it is difficult to annul due to an extremely high burden of proof regarding absence of consent.<sup>xvi</sup> There is no legislation to criminalize forced marriages, nor is there a mechanism to sanction officers who conduct forced marriages.

17. Marriage to a foreigner – whether by a Saudi man or woman – requires special permission by the Ministry of Interior.<sup>xvii</sup> For women, this permission may only be issued if their guardians consent.<sup>xviii</sup>

**18. The HRC should urge the State party to:**

- Ensure women have an equal right to enter marriage without a guardian's permission; abolish the practice of forcible annulment of marriage.
- Codify a law to criminalize forced marriage and enforce punishments for individuals who plan, conduct, or fail to prevent forced marriages.
- Ensure that the evidentiary standard for making a legal claim for a coercive marriage is reasonable.
- Permit Saudi men and women to marry foreigners without government interference.
- Train and educate law enforcement officers, judges, and social workers to receive women's complaints and provide them with legal and social assistance.

## III. Child Marriage

19. Saudi Arabia acceded to the Convention on the Rights of the Child in 1996, yet does not have a legal minimum age for marriage.<sup>xix</sup> According to a media report, there were 5,622 marriages involving child brides under the age of 14 in Saudi Arabia in 2012.<sup>xx</sup>

20. Under the Law on Child Protection, marriage to a person below 18 must be approved by an advisory committee that examines each case individually.<sup>xxi</sup> But the standards to determine the minor's interests and welfare are unclear, and minors are often not interviewed.<sup>xxii</sup>

21. Saudi Arabia is apparently considering setting a marriage age of 16 for both sexes, and a majority of Shura Council members are said to support this proposal.<sup>xxiii</sup>

**22. The HRC should urge the State party to:**

- Codify and enforce 18 years of age as an absolute minimum age of marriage for both girls and boys, and remove all legal loopholes that allow for exceptions to this rule.
- Enact strict legislation to criminalize child marriage, ensure a mechanism is in place for raising complaints, and codify penalties for planning, conducting, and failing to prevent child marriage.
- Ensure that marriage contractors are educated and informed on the legislation.
- Put in place sanctions for marriage officers who violate legislation prohibiting child marriage.

## IV. Polygamous and Temporary (*Misyar*) Marriages

### **Polygamy**

23. Muslim men may marry up to four wives at one time with few restrictions. They are not required to seek a court's permission or inform existing wives of the new marriage. The only requirement is that the husband can support all his wives financially and declares he would treat them equally.<sup>xxiv</sup> A 2016 report found that over 500,000 Saudi men had more than one wife at a time.<sup>xxv</sup>

24. Saudi women have limited agency regarding consent: they cannot prevent husbands from taking additional wives or obtain a divorce upon learning of a subsequent marriage.<sup>xxvi</sup> It is uncommon for women to stipulate in the marriage contract that their husbands may not marry additional wives.<sup>xxvii</sup>

25. There are numerous arguments from within Islam that monogamy should be the standard form of marriage and the pre-Islamic practice of polygamy should be permitted only in exceptional circumstances. Tunisia has prohibited polygamy on Islamic grounds, and other Muslim-majority countries such as Algeria and Indonesia restrict polygamy by requiring court approval and consent from existing wives.

### **Temporary (*Misyar*) Marriages**

26. *Misyar* marriages, where a wife waives her rights to maintenance, accommodation, and cohabitation, are legal and common.<sup>xxviii</sup> A 2006 *fatwa* (non-binding but authoritative legal opinion/interpretation of a qualified Islamic jurist or mufti) permits *misyar* marriages, provided the bride's guardian and two witnesses are present and the contract is concluded on mutually agreed-upon and binding conditions.<sup>xxix</sup>

27. Divorced mothers sometimes enter into *misyar* marriages driven by the need for a man to administer their affairs.<sup>xxx</sup> These marriages offer a solution to divorced mothers losing custody upon remarriage because they are often unregistered and undocumented. But women in unregistered marriages risk abandonment, exploitation, or inability to prove paternity of their children.<sup>xxxi</sup>

**28. The HRC should urge the State party to:**

- Abolish or severely restrict the practice of polygamy to minimize harm and injustice, including requiring the written consent of existing wives.
- Introduce polygamy as a ground of judicial divorce and codify provisions to ensure that a woman has recourse if the husband enters into subsequent marriages without her consent.
- Provide a model, standard marriage contract with options for the couple to prohibit polygamy and for a wife to explicitly enunciate a monogamous marriage.
- Ensure mechanisms for a wife to raise complaints of harm that occurs as a result of a polygamous marriage and obtain financial resources or protection of her rights.
- Put in place mechanisms to remedy the underlying causes of *misyar* marriages.
- Enforce women's rights in all marriages regardless of their type, including the right to financial maintenance, residency, and recognition of children.

## V. Divorce Rights

29. Women and men in Saudi Arabia do not have equal rights to divorce. A man may divorce his wife unilaterally, with no restrictions, by pronouncing *talaq*. A woman, however, may only obtain divorce in two ways: (1) through the court (*faskh*), based on a limited number of grounds that prove harm<sup>xxxii</sup>; or through a redemptive divorce (*khul'*), in which she must pay the husband a mutually-agreed sum in exchange for the final divorce. In the absence of a husband's agreement, *faskh* and *khul'* court proceedings can often be lengthy, costly, and subject to a judge's discretion.<sup>xxxiii</sup>

30. While the Civil Status Code makes it mandatory to register a divorce within two months of its occurrence,<sup>xxxiv</sup> the deadline for divorce registration is often ignored, and a woman may not learn about the divorce until much later.<sup>xxxv</sup> In addition, only a man – the husband or a male relative – may register a divorce.<sup>xxxvi</sup>
31. There is no legal concept of matrimonial assets, and women often forfeit their financial rights in order to avoid lengthy disputes or delays in obtaining a divorce. In 2008, Saudi women launched a campaign highlighting injustices in the divorce system, but the issue remains unaddressed.<sup>xxxvii</sup>
32. Legislation in other Muslim-majority countries points toward reform. In Tunisia and Turkey, all divorces must go through the courts, and divorce through unilateral repudiation (*talaq*) is not recognized. The grounds for divorce are equally available to both spouses. In Algeria, Mauritania, and Morocco, *talaq* can only be effectuated through the courts or under judicial supervision.

### **33. The HRC should urge the State party to:**

- Abolish the husband's right to unilateral divorce.
- Ensure that men and women have equal access to divorce rights.
- Require both husband and wife to be present at the time of divorce and sign divorce papers.
- Codify specific grounds for judicial divorce, including discord, incompatibility, emotional or sexual abuse, and polygamy as acceptable grounds.
- Codify reasonable standards of proof in divorce proceedings.
- Codify guidelines for *khul'* to ensure it is expediently granted and the sum is reasonable and considers the wife's financial situation.
- Codify guidelines for financial support after a divorce; enforce payments in order to protect women's and children's rights.

## **VI. Custody (*Hadanah*) and Guardianship (*Wilayah*) of Children**

34. Women do not enjoy equal rights to custody and guardianship of their children. Generally, a mother has priority in custody of her children until a daughter turns seven and a son turns nine. Thereafter, custody of daughters is transferred to the father; sons are given the choice between parents.<sup>xxxviii</sup>
35. However, decisions regarding custody vary according to judges' personal views, and are not always based on the best interests of the child. Cases are often subject to long delays. Many women fear losing their children if they file for a divorce. This leads women to stay in harmful marriages or enter unregistered *misyar* marriages.<sup>xxxix</sup>
36. A father has priority right over guardianship of children, with guardianship passing to male relatives in case of his death. The mother may request guardianship, but such requests are rarely granted.<sup>xl</sup> According to 2014 and 2015 Supreme Judicial Council directives, divorced women with custody can obtain documents and conduct government business for their children.
37. However, regardless of custody, the male guardian determines the children's place of residence and ability to travel.<sup>xli</sup> A woman is not allowed to open a bank account in the name of her children except with the father's consent, nor conduct any transaction on her child's behalf even if she makes the deposit.<sup>xlii</sup>

### **38. The HRC should urge the State party to:**

- Clarify the rules and procedures for deciding custody cases; codify standards for granting custody based on the best interests of the child.
- Amend the Civil Status Law to grant equal right to guardianship of children and to grant full guardianship rights to the mother if she has been granted custody of the child.
- Ensure that the civil registration system treats women and men equally and that women heads of families are given full authority to exercise their roles.
- Train judges and court officials on new rules and procedures to ensure full and effective implementation and conduct workshops and campaigns to raise the awareness of women in particular of their rights following a divorce.



## END NOTES

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- <sup>iv</sup> Replies of Saudi Arabia to the List of Issues and Questions in Relation to the Combined Third and Fourth Periodic Reports of Saudi Arabia, November 7, 2017 (English Translation), p. 23
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- <sup>viii</sup> Civil Status Code, issued by Royal Order no. m/7 on 20/4/1407 (Hijri), with amendments, Ministry of Interior, [https://www.moi.gov.sa/wps/wcm/connect/c152dd004d4bb7bd8debdbdbed7ca8368/AR\\_civil\\_affairs\\_system.pdf?MOD=AJPERE&CACHEID=c152dd004d4bb7bd8debdbdbed7ca8368](https://www.moi.gov.sa/wps/wcm/connect/c152dd004d4bb7bd8debdbdbed7ca8368/AR_civil_affairs_system.pdf?MOD=AJPERE&CACHEID=c152dd004d4bb7bd8debdbdbed7ca8368), article 32
- <sup>ix</sup> Information received from Saudi advocates, January 2018
- <sup>x</sup> Human Rights Watch, *Boxed In: Women and Saudi Arabia's Male Guardianship System*, 2016, p. 26, [https://www.hrw.org/sites/default/files/report\\_pdf/saudiarabia0716web.pdf](https://www.hrw.org/sites/default/files/report_pdf/saudiarabia0716web.pdf).
- <sup>xi</sup> Royal Order no. 33222, issued 21/7/1438 (Hijri), <https://www.alarabiya.net/ar/saudi-today/2017/05/04/الملك-يسلمان-بوجه-مباثقة-الخدمات-الملك-للرأة-دون-موافقة-ولي-الأمر>.html; Information received from Saudi Advocates, February 2018; Human Rights Watch, *Boxed In: Women and Saudi Arabia's Male Guardianship System*, 2016, p. 19, [https://www.hrw.org/sites/default/files/report\\_pdf/saudiarabia0716web.pdf](https://www.hrw.org/sites/default/files/report_pdf/saudiarabia0716web.pdf)
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- <sup>xvii</sup> Procedure for a Saudi Woman to Apply to Marry a Foreign, Jeddah Governorate, [http://www.jed.gov.sa/\(X\(1\)S\(ltbg24ry5yhdo5gk2ejp2iw\)\)/Arabic/Pages/-طلبات-زواج-سعودي-من-أجنبي.aspx?AspxAutoDetectCookieSupport=1](http://www.jed.gov.sa/(X(1)S(ltbg24ry5yhdo5gk2ejp2iw))/Arabic/Pages/-طلبات-زواج-سعودي-من-أجنبي.aspx?AspxAutoDetectCookieSupport=1)
- <sup>xviii</sup> Information obtained from Saudi advocate, February 2018
- <sup>xix</sup> Saudi Arabia State party report to the Committee of the Rights of the Child, CRC/C/SAU/3-4, 2015, para. 72, <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx#sthash.cDNPOz37.dpuf>
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- <sup>xxvi</sup> Information obtained from Saudi advocate, January 2018
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- <sup>xlii</sup> Saudi Women for Reform, Saudi Arabia Shadow Report, Submission to the CEDAW Committee for the 40<sup>th</sup> Session, 2007, p. 3, [http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SAU/INT\\_CEDAW\\_NGO\\_SAU\\_40\\_10011\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SAU/INT_CEDAW_NGO_SAU_40_10011_E.pdf)