

musawah

For Equality in the Family

**THEMATIC REPORT ON MUSLIM FAMILY LAW AND
MUSLIM WOMEN'S RIGHTS IN
Mauritius**

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A. INTRODUCTION

Musawah, the global movement for equality and justice in the Muslim family, submits this Thematic Report on concerns related to women's legal equality, personal status, and relevant matters for consideration by the CEDAW Committee in its review of the Government of Mauritius, reporting before the 71st Session of the CEDAW Committee in October 2018.

This is the CEDAW Committee's fourth engagement with Mauritius, which acceded to CEDAW in 1984. Mauritius has a general reservation to CEDAW as follows: "*The Government of Mauritius does not consider itself bound by paragraph 1 of article 29 of the Convention, in pursuance of paragraph 2 of article 29.*"¹ Article 29 provides that any dispute between two parties that is submitted to arbitration may be further referred to the International Court of Justice if the parties cannot agree on an arbitration organization within six months.

Summary of actions since last CEDAW review:

Mauritius has taken some positive steps towards addressing issues of discrimination against women since the last CEDAW review in October 2011. The government has worked to reduce gender stereotyping and improve male engagement through Ministry of Gender Equality, Child Development and Family Welfare (MGECDFW) programming.² The creation of the National Steering Committee on Gender Mainstreaming and the establishment of Gender Cells at ministries demonstrate the government's commitment to working towards the elimination of gender inequality.³

Purpose of this report:

This report examines Mauritius' legal framework and practices that enforce *de jure* and *de facto* discrimination against Muslim women, and in particular the lack of a codified legal framework for recognizing and protecting rights in the context of religious marriages. In addressing the absence of a legal framework to protect rights within a religious marriage, the report discusses marriage registration, polygamy, divorce, survival rights, custody, and children's rights. This report also highlights the issue of child marriages.

Musawah intends for the research, analysis, and recommendations in this report to:

- (1) highlight key concerns and identify gaps in the State Party report and the State Party's response to the list of issues, as they pertain to Muslim women; and
- (2) propose recommendations that address issues affecting Muslim women and girls in Mauritius, in the short-term and medium to long-term.

We hope that the CEDAW Committee will utilize this report as a key resource during its constructive engagement with the State Party. In particular, we hope the Committee will use the recommendations to identify follow-up issues in its Concluding Observations.

The report was drafted by a joint team of Musawah, the International Human Rights Clinic at Harvard Law School, with support from the Islamic Legal Studies Program: Law and Social Change at Harvard Law School, and Mauritian family law specialist, Narghis Bundhun, who provided substantive inputs and insights on the historical context and contemporary lived realities of Mauritian Muslim women.

¹ *Meeting of the States parties to CEDAW, Fifteenth meeting*, CEDAW/SP/2008/2 (May 19, 2008), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhstbmWmFDYcaOksHHZM6lzuJF5Ewr2V7KXKRuTxMrMOR3q1vtbf81GFI7PYXdLr%2fq7NPaDLub2Y2fgu94DGai4UjtI5Wdpdbr9tMxjkQveuZ>.

² Mauritius, *Consideration of reports submitted by States parties under article 18 of the Convention of the Convention pursuant to the simplified reporting procedure, Eighth periodic report of States parties due in 2018: Advance Unedited Version*, CEDAW/C/MUS/8 8, 32 (June 20, 2018), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsgOTxO5cLIZOCwAvhyns%2byL8fAY7O92ZQtiH9RA6EGbSy%2bsrXG%2fq2OXahaJisa5ew4srT%2ba%2bgsM6tQe215pt01t9gXghORfz4IEwJRJEmS90> (hereinafter Mauritius State Report 2018), *responding to recommendations from prior Committee observations*, in CEDAW/C/MUS/CO/6-7 (Nov. 8, 2011), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsgOTxO5cLIZOCwAvhyns%2byLZgaUi0NEBSqXNVveXvAKZod%2b0wk8ioFgRIn0isjCSw3i061xkUEoRyOp5F8FfuBmipT1rN8iUvjZEfklzRqUfl4eX%2fLc0pYBvZ01NfHA%3d%3d>.

³ Mauritius State Report 2018

B. BACKGROUND

The Republic of Mauritius is an island nation of 1.3 million people with diverse ethnic origins and a tolerant, pluralistic society.⁴ Mauritius became a French colony in 1715 and then a British colony in 1810. Mauritius gained independence in 1968 and is now a democracy with the third highest GDP per capita in Africa.⁵ The population has sizeable immigrant populations from China, Madagascar, and India.⁶ While Hinduism and Christianity are the dominant religions, 17.3% of the population is Muslim, the majority of whom are Sunni.⁷

Reflective of its pluralistic culture Mauritius has a long history of respecting and accommodating its different minority groups. An illustrative example is the Indian Marriage Act of 1912, which recognized religious marriages that occurred in India prior to the spouses' arriving in Mauritius. Today, adherents of different religions often celebrate a mix of different religious holidays together.⁸ Nonetheless, there are increasing tensions between religious groups due to a perception of a lack of representation of non-Hindus in government.⁹

In terms of advancing women's equality, while Mauritius has made strides in key equality indicators such as reducing maternal mortality¹⁰ and increasing girls' enrollment in school,¹¹ discrimination against women persists in many areas of life.¹² Social norms are strongly gendered, and women have trouble accessing positions of power in both employment and political life.¹³ Within the family, women are still largely seen as subordinate to men and are more likely to be victims of domestic violence, with reports of domestic violence on the rise.¹⁴

⁴ Central Intelligence Agency, *The World Factbook: Mauritius* (2018),

<https://www.cia.gov/library/publications/the-world-factbook/geos/mp.html>.

⁵ Central Intelligence Agency, *The World Factbook: Mauritius* (2018); Index Mundi, *Country Comparison: GDP Per Capita* (2018), <https://www.indexmundi.com/g/r.aspx?v=67>.

⁶ Central Intelligence Agency, *The World Factbook: Mauritius* (2018)

⁷ Culture Atlas, *Mauritian Culture* (2018), <https://culturalatlas.sbs.com.au/mauritian-culture/religion-b4e24c51-e7ed-4604-9e2a-a9fd624bd30b>.

⁸ *Id.*

⁹ United States Department of State, *Mauritius 2014 International Religious Freedom Report 3* (2014), <https://www.state.gov/documents/organization/238452.pdf>.

¹⁰ WHO, UNICEF, UNFPA, World Bank Group, and United Nations Population Division Maternal Mortality Estimation Inter-Agency Group, *Maternal mortality in 1990-2015: Mauritius*, 1 (2016), http://www.who.int/gho/maternal_health/countries/mus.pdf. *But note*, the maternal mortality rate reached its lowest point in 2005 at 39 deaths per live birth, and the rate has since increased to 53 deaths per live birth in 2015. This is still below the 81 deaths per live birth rate recorded in 1990.

¹¹ UNESCO Institute of Statistics, *Mauritius* (2018), <http://uis.unesco.org/country/MU>; Government of Mauritius, *Education Statistics: 2017 22* (2017), http://statsmauritius.govmu.org/English/Publications/Documents/EI1337/Edu_Yr17.pdf. *But see* Elizabeth M. King and Rebecca Winthrop, *Today's Challenges for Girls' Education*, Brookings Institution, xxii (2015), <https://www.brookings.edu/wp-content/uploads/2016/07/Todays-Challenges-Girls-Educationv6.pdf>, *noting* that learning outcomes for girls in Mauritius are low.

¹² United Nations Development Programme, *Mauritius Human Development* (2018), <http://hdr.undp.org/en/countries/profiles/MUS>.

¹³ Gender Links, *Mauritius Women in Politics Factsheet* (2018), http://genderlinks.org.za/wp-content/uploads/imported/articles/attachments/13422_women_in_politics_factsheetmauritius.pdf; United Nations Development Programme, *Mauritius Human Development* (2018), *reporting* that women hold just 11.6% of seats in parliament; United Nations Public Administration Network, *Draft Gender Strategy for Local Government in Mauritius 1-2* (2007), <http://unpan1.un.org/intradoc/groups/public/documents/cpsi/unpan027219.pdf>.

¹⁴ Government of Mauritius, *Economic and Social Indicators on Gender Statistics*, 20 (2016), http://statsmauritius.govmu.org/English/Publications/Documents/EI1330/Gender_Stats_Yr2016.pdf. *See also* A.K. Agnihotri et al., *Domestic Violence Against Women – An International Concern with Reference to the Situation in Mauritius*, 16 TORTURE (2006), <https://irct.org/assets/uploads/Domestic%20violence%20against%20women.pdf>. *Note*, there is little data on domestic violence, *see, e.g.*, lack of data reported in UN Women, *Prevalence Data on Different Forms of Violence against Women* (2018), <http://evaw-global-database.unwomen.org/en/countries/africa/mauritius>.

Within this context, Muslim women are particularly disempowered. A major cause of the lack of rights protection and inequality for Muslim women is the absence of a clear legal framework that protects rights in the context of religious marriages.¹⁵

This report highlights this legal ambiguity and some key resulting inequalities, in addition to child marriage. These spheres of discrimination harm Muslim Mauritian women and in turn damage families, communities, and the society as a whole. We encourage the State Mauritius to leverage its robust framework of diversity and inclusion to promote equality for Muslim women and take concrete steps to ensure all women in Mauritius enjoy full legal protection and empowerment.

C. LEGAL FRAMEWORK

Overview of the Legal Framework

Mauritius is a sovereign democratic republic, and the Constitution establishes a separation of powers between the executive, legislative, and judicial branches of government.¹⁶ The Constitution is the supreme law of Mauritius.¹⁷ Chapter II of the Mauritian Constitution includes provisions that protect fundamental rights of Mauritian citizens. Article 16 of the Constitution guarantees protection from discrimination, including on the bases of sex and religion. However, an exemption in Article 16(4)(c) states that this provision does not apply to “personal status law, including adoption, marriage, divorce, burial and devolution of property on death.”¹⁸

The Mauritian Civil Code also sets out a framework of equality, but with exceptions and gaps. Key statutes that form the legal framework of women’s rights in Mauritius include the Local Government Act; the National Pensions Act; the Equal Opportunities Act; the Protection of Elderly Act; and the Civil Status Act, discussed in more detail in the next section.

In the Criminal Code, there are a number of provisions that impact the equality of women. Abortion is criminalized with just four exceptions, which were added in 2012.¹⁹ The Criminal Code also polices women’s sexual freedom through Article 250, which criminalizes sodomy regardless of consent. Rape is prohibited, but marital rape is not specifically criminalized.²⁰ The Protection from Domestic Violence Act provides special protections and higher penalties, but also fails to explicitly criminalize marital rape, though it is prosecutable under the Act.²¹ The Criminal Code also prohibits human trafficking and trafficking of children.²² The Child Protection Act prohibits abuse, including sexual, of children and is punishable under Article 230(1) of the Criminal Code.²³

¹⁵ Harvard International Human Rights Clinic, *Interview of Mauritian Family Law Specialist Narghis Bundhun* (Sept. 13, 2018).

¹⁶ Constitution of the Republic of Mauritius, (Mar. 12, 1968, last updated March 2016), Chapter IV (Executive), Chapter V (Legislature), and Chapter VII (Judiciary), <http://mauritiusassembly.govmu.org/English/constitution/Pages/constitution2016.pdf>.

¹⁷ Constitution of the Republic of Mauritius, Chapter I, Article 2 (Mar. 12, 1968).

¹⁸ Gender Index, *Mauritius*, 1-2 (2018) <https://www.genderindex.org/wp-content/uploads/files/datasheets/MU.pdf>.

¹⁹ The Criminal Code (Amendment) Act, Art. 235(A) (2012), *noting* exceptions for the mother’s life; mother’s health including mental health; fetal defects impacting viability; and cases of rape, or for girls under 16, so long as termination occurs before the 14th week of pregnancy.

²⁰ Mauritian Criminal Code, Art. 249 (183) (“Rape, attempt upon chastity and illegal sexual intercourse Any person who is guilty of the crime of rape, shall be liable to penal servitude for a term which shall not be less than 5 years. [Amended 30/03].”).

²¹ However, the Protection from Domestic Violence Act, Art. 2 under the heading “domestic violence” (d) can be used to prosecute rape (Domestic violence includes “compelling the spouse or the other person by force or threat to engage in any conduct or act, sexual or otherwise, from which the spouse or the other person has the right to abstain;”).

²² Combatting of Trafficking in Persons Act (2009); The Child Protection Act (2005); Judicial Provisions Act (2008).

²³ The Child Protection Act, Art. 14 (1994).

Family Law and Civil Status Framework

The Civil Code is the primary legislation governing family matters in Mauritius. The Civil Code was enacted in 1808. Since achieving independence in 1968, the Government of Mauritius has amended the law several times, seeking to eliminate discrimination and ensure equality between both spouses.²⁴ In 1982, the government enacted the Civil Status Act, which currently governs family matters in the country.²⁵ There is thus a concurrent application of the Civil Code and the Civil Status Act.

One major gap in the family law framework of Mauritius is the ambiguous status of religious marriages. Though many laws reference “religious marriages”²⁶ as far back as 1912,²⁷ there has never been any codification of the rules applicable to these marriages, leaving parties without any substantive rights protection. While there are couples who enter religious marriages and subsequently conduct civil marriages to avail themselves of civil legal protections, this report focuses on the rights of women whose marriages were conducted only by means of religious ceremonies or rituals, referred to as “religious marriage” hereafter.

The Civil Status Act of 1982 guarantees rights for spouses in “religious marriages with civil effects,” which are religious marriages that have been registered with the Registrar of Civil Status prior to celebration of the marriage and are thus governed by the Civil Code.²⁸ Couples who do not register their religious marriage, or who do not wish for their marriage to be governed by the Civil Code for religious reasons, are not subject to any legal rights protection. The only exception occurred in the period between 1982-1987, when the government enacted temporary measures to require registration and provide basic rights for parties in religious marriages.²⁹ These measures are no longer in effect.

The Mauritian Court System

The judiciary in Mauritius is independent from other branches of government. The lower judiciary is comprised of district and intermediate courts, whereas the Supreme Court is the apex of the judicial system. The Mauritian Supreme Court has both original and appellate jurisdiction in both civil and criminal cases. As mentioned in the state report, Article 17 of the Constitution allows individuals to seek redress for violation of fundamental rights and freedoms at the Supreme Court.³⁰ The Court has several divisions; one of them is a family division comprised of two full-time judges. Twenty Judges sit on the Supreme Court. After the Mauritian Supreme Court, the last legal resort is the Judicial Committee of the Privy Council that sits in the UK.

The Family Division of the Supreme Court adjudicates all personal status claims, except for claims arising under the Protection from Domestic Violence Act and small alimony claims. The District Courts have exclusive jurisdiction to hear claims under the Protection from Domestic Violence Act and appeals are made to the Judges in Chambers. Judges do not receive training in religious law.

Lack of Codified Personal Status Law

While we acknowledge the past positive initiatives of the government to address the issue of a comprehensive personal status law, **to this day the issue is unresolved, leaving women in religious marriages without recognition or rights.**

In order to ensure effective, uniform, and equal access to justice, it is essential to codify provisions that ensure a woman’s equality within the marriage and guarantees her equal right to divorce, custody, guardianship of her children, and protection from spousal abuse. This report highlights key areas where women continue to face discrimination and denial to justice in matters of personal status.

²⁴ Harvard International Human Rights Clinic, *Interview with Mauritian Family Law Specialist Narghis Bundhun* (Oct. 9, 2018).

²⁵ Civil Status Act (1982).

²⁶ Social Aid Act, Art. 2 (1983); The Protection from Domestic Violence Act, Revised Laws of Mauritius, Art. 2 (1997); National Pension Act (1976).

²⁷ Ordinance 28 (1912).

²⁸ Civil Status Act Part IV, Arts. 25-31 (1982).

²⁹ Mauritian Civil Code, Title 5, Chapter 9 (added 1981, repealed 1987; not in effect). See Annex I.

³⁰ Mauritius State Party Report 2018 at ¶ 18.

D. KEY ISSUES AND REFORM

1. LACK OF LEGAL FRAMEWORK

ARTICLES. 1, 13, 15, 16

CRITICAL INFORMATION

Mauritian women in religious marriages do not have adequate legal protections. One of the most significant barriers to eliminating discrimination against women in Mauritius is the lack of rights—or even a clear understanding of what rights do exist—for women in religious marriages. Religious marriage previously encompassed Hindu marriage as well, but today, it is largely associated with Muslim traditions in Mauritius. Given the religious diversity and prevalence of religious marriages in Mauritius, this issue must be addressed by the Mauritian government. It is important to note that many religious marriages, including different sects of Islam and other religious and spiritual traditions, are practiced in Mauritius.

Chapter 9 Articles 228-2 to 228-10

Historically, Mauritius afforded some legal protections for religious marriage, without specifying a religion. From 1912 to 1981, the Indian Marriage Ordinance provided legal recognition of Hindu and Muslim religious marriages.³¹ In 1981, the government enacted temporary measures through Title 5, Chapter 9 of the Mauritian Civil Code.³² These temporary measures provided some basic protections such as requiring registration of religious marriages and rights of survival, but were nonetheless vague and left many substantive rights protections to be applied on a case-by-case basis, as interpreted by “religious authorities,” an undefined category who the Judge in Chambers may call as experts.³³ Chapter 9 is no longer considered law. Between 1987 and 1990 there was a period of explicit criminalization of religious marriage. The government has since failed to agree on whether to formally re-instate or codify Title 5, Chapter 9.

The following Chapter 9 Articles have been referred to in this report. For the full list of articles, please see Annex 1.

228-5: Providing rights of survival in case of death of one spouse (survival rights).

228-6: Recognizing children born from religious marriages.

228-8: Proof of the marriage will be registered with the Registrar General.

228-10: Conferring the above rights upon registration of the religious marriage.

Since 1987, Mauritian Muslim women in religious marriages have been left without clearly-defined rights, which has often meant they had no enforceable rights in court. The lack of recognized marriages or any accompanying rights impacts a range of personal status issues, including polygamy, rights of survival, divorce, recognition of children, and custody.

Despite several attempts to develop legal protections for the parties to religious marriages, there is currently no legal framework in place, and the government has not acted to address the issue. In the 2018 State Party Report to the CEDAW Committee, the government discussed the issue in only two sentences, stating that this status quo remains in place due to the inability of the “Commission to Study Muslim Personal Law” to reach consensus on the substance of rights for religious marriages. The government does not outline any plans for further action.

It is difficult to determine the number of women in religious marriages, as most of these marriages are not registered. Of the 1.3 million people in Mauritius, there are about 110,500 Muslim women. All of these women could potentially be impacted by the inequalities in the current uncodified system.

³¹ Ordinance 28 (1912).

³² See Annex 1, Mauritian Civil Code, Title 5, Chapter 9 (no longer in effect).

³³ *Id.* Art. 228-9.

Below are some of the key issues and challenges that women face as a result of the lack of a comprehensive personal status legal framework.

1.1. Non-registration of marriage

No Legal Framework → No Registration → No Rights

Registration of a marriage is a critical basic step in ensuring basic protections for women, but religious marriages have not been registered in Mauritius since 1987. While some religious marriages are registered—those under the Indian Marriage Act (1912-1982) and those registered through Article 228-8 of the Chapter 9 temporary measures (1982-1987)—religious marriages from 1987 onward are not formally registered. Registration is critical as it proves the existence of a marital relationship and provides a basis upon which married couples relate to each other and other parties.³⁴

Lack of registration is often a ground on which courts deny substantive claims. Without registration, wives can be considered voluntary “concubines” by civil courts, as happened in the 2017 Supreme Court of Mauritius case of *Lingel-Roy M J E M & Ors v. The State of Mauritius & Anor*. This case furthered the jurisprudence of denying rights to “concubines,” defined as women living with men without a legal relationship. The couple in this case had been civilly married and subsequently divorced, but continued to live together for nine years. When the man died due to negligence of doctors, the woman sought damages for wrongful death, as she and her children continued to be financially dependent on her ex-husband. The court notes that “concubines”, a category including wives of religious marriages, are not entitled to damages because their relationship is voluntary and not protected by law.³⁵ The judgment affirms precedent that “concubines” have no legal standing.³⁶ Such a finding sets the stage to deny substantive rights to spouses of religious marriages, who also do not have legal protection, including rights of survival.³⁷

Registering religious marriages alone does not solve the problem of inadequate rights protection for spouses, but it is an important first step to:

- 1) alert the couple to whether the other is already married;
- 2) establish the marital relationship, after which further rights can be granted;
- 3) create the possibility of regulating and establishing accountability for religious marriages, which is especially important to prevent child marriage, for example.

1.2. Polygamy

According to Mauritian advocates, polygamy is practiced within the Muslim community despite a legal prohibition of polygamy in the Mauritian Civil Code, which outlawed polygamy in 1981.³⁸ The **Section 257 of the Criminal Code provides as follows for anyone committing Bigamy: Any person who, being married, marries another person before the dissolution of the first marriage, shall be punished by penal servitude for a term not exceeding 20 years.**

According to Mauritian advocates, when a religious marriage is not registered, it is possible that a man may take additional wives, as practices such as polygamy remains undetected in some religious marriages. Other community members often condone these practices as well.

The State Party did not mention the practice of polygamy in its 2010 or 2018 reports. Polygamy was also not mentioned in Mauritius’ prior effort to regulate religious marriages under Title 5 Chapter 9, and it remains a controversial subject to this date.

³⁴ See Narghis Bundhun, *Le Mariage Religieux En Droit Mauricien*, Institute for Judicial and Legal Studies, Republic of Mauritius 49 (2016) 49.

³⁵ *Lingel-Roy M J E M & Ors v. The State of Mauritius & Anor* 7-8, (Supreme Court of Mauritius 2017), 2017 SCJ 411.

³⁶ *Lingel-Roy M J E M & Ors v. The State of Mauritius & Anor* 13, 19, (Supreme Court of Mauritius 2017), 2017 SCJ 411.

³⁷ See, e.g., *Mrs. S. Jugessur & Ors v. J.C. Bestel & Ors*, (Supreme Court of Mauritius 2007), 2007 SCJ 106, denying survival rights to a widow because her religious marriage was not registered.

³⁸ “150. On ne peut contracter un second mariage avant la dissolution du premier. [Art. 150 inserted by s. 3 of Act 22 of 1981.]” One cannot contract in a second marriage before dissolving the first. Mauritian Civil Code, Chapter 5, Art. 150, translated by Harvard International Human Rights Clinic.

1.3. Lack of Survival Rights

Women in religious marriages in Mauritius often lack enforceable rights of survival. Without legal protection, women may not be entitled to collect inheritance, family benefits, or property after their husband's death. This violates CEDAW Article 13(a) on the right to collect family benefits. Similarly, children born to religious marriages may be left without legal recourse to collect their inheritance, benefits, or property.

Prior to 1982, religious marriages with civil effects conferred rights of survival, thus any religious marriages with civil effects that was conducted prior to 1982 enjoyed this enforceable right. Likewise, Chapter 9 (Article 228-5) included measures that guarantee rights of survival, which apply to religious marriages conducted between 1982 and 1987.³⁹ After 1987, this right was eliminated for women in religious marriages. Without any active legal provisions either to recognize religious marriages or provide for survival rights for couples in these marriages, women are legally regarded as voluntary "concubines," left without any rights to claim benefits from their deceased husbands.

This lack of survival rights has devastating effects on women who lose a spouse and are left in need of financial support. In the 2007 case of *Mrs. S. Jugessur & Ors v. J.C. Bestel & Ors*,⁴⁰ Mrs. Jugessur and her children sought to recover damages after her husband, their father, was killed in a traffic accident at work. Mrs. Jugessur and her husband had been religiously married for twenty years. While the judge awarded the children damages, he found that because Mrs. Shati never registered her marriage, she was not entitled to any material or moral damages. In this case, as in others,⁴¹ the wife of a religious marriage is considered a "concubine," a voluntary status, with no rights.

There are, however, mechanisms in Mauritius law that recognize survival rights for religious marriages. The National Pensions Act,⁴² Employment Rights Act,⁴³ and the Protection from Domestic Violence Act⁴⁴ as well as Social Aid Act⁴⁵ recognize religious marriages and accept affidavits as proof of marriage (as opposed to producing evidence of registration). Yet while these laws provide important protections for women, the limited rights of survival they provide are insufficient, and create further confusion with respect to the protections afforded to religious marriages in the current legal system.

1.4. Divorce rights

In the absence of legal protections, women in religious marriages are vulnerable to unilateral divorce by their husbands, and in turn have no legal recourse to petition a court for divorce or protect their rights after marriage is ended.

The aforementioned Chapter 9 (1982-1987) had addressed divorce rights by mandating that the husband must provide alimony or a compensatory allowance to the wife in the event that the marriage breaks down for reasons not attributable to the wife but did not grant a woman any specific rights to initiate a divorce.²¹ In addition, the Chapter 9 provision on divorce implied that the husband may not have to provide alimony or a compensatory allowance to the wife if the reason for the divorce is found to be attributable to her.

³⁹ Surviving partners may claim damages against those responsible for the accident which killed their spouse and may claim public or private pensions their spouse possessed, see Narghis Bundhun, *Le Mariage Religieux En Droit Mauricien*, Institute for Judicial and Legal Studies, Republic of Mauritius 49 (2016). See also Mauritian Civil Code, Title 5, Chapter 9, Art. 228-5 in Annex I.

⁴⁰ *Mrs. S. Jugessur & Ors v. J.C. Bestel & Ors*, 2007 MR 151.

⁴¹ See, e.g., *Vide Moutou v. Mauritius Government Railways* (1933 MR 102); *Naikoo v. Société Héritiers Bhogun* (1972 MR 66).

⁴² Narghis Bundhun, *Le Mariage Religieux En Droit Mauricien*, Institute for Judicial and Legal Studies, Republic of Mauritius 39, 49 (2016).

⁴³ *Id.* at 49.

⁴⁴ *Id.* at 49.

⁴⁵ Mauritius Social Aid Act, Art. 2 (1983).

1.5. Recognition of Children and Child Custody

Not only does the gap in legal protection for the rights of parties to religious marriages frequently harm women, it also has severe damaging consequences for the children born to these marriages. The lack of a legal framework for religious marriages deprives children from the right to be recognized under the law, and these children therefore lack standing to claim survivorship, inheritance, and other familial rights.

In the case *B.M.Wahedina v. IC Noormohamed*⁴⁶ the Court allowed a mother to establish paternity recognition for her son, born of a religious marriage. However, the Court ruled under Article 340 (4) of the Civil Code, which permits a judge to establish paternity when the parents have chosen to live together as concubines for the duration of the period of conception.⁴⁷ This logic again relegates women in religious marriage to second-tier status, denying women their lived experiences as wives.

There no clear legal framework for determining custody rights for children born to religious marriages. In the case of divorce, a child's parents are left without guidance on how to determine custody. The impact is wide-ranging, as roughly two-thirds of divorced couples in Mauritius have at least one child.⁴⁸ Both legal and physical guardianship flow from custody.

Under the now-abolished Chapter 9 measures, one of the few substantive rights conferred was recognition for children from religious marriage as "legitimate" in Article 228-6, but the chapter makes no mention of custody rights.⁴⁹

ADDRESSING THE LACK OF CODIFIED SUBSTANTIVE RIGHTS

The last written substantive laws for religious marriages (Title 5, Chapter 9 of Mauritian Civil Code) provided for a few basic rights. But these laws had significant gaps and provided for broad deference to religious authorities, which if unregulated, could be discriminatory towards women. The laws in Chapter 9 do not provide specific rights for religious marriages or processes to gain rights. We do not, therefore, recommend codifying these as they were written in 1981.

The long-term security that legal rights can provide women is worth the uphill political battle of subjecting religious values "to public and judicial scrutiny."⁵⁰ This scrutiny holds religious communities accountable to Mauritian values of non-discrimination and freedom to practice religion. Proposed below are suggested short-term and medium to long-term recommendations for the CEDAW Committee to suggest to the state party.

We recommend the CEDAW Committee urge the State Party to:

SHORT-TERM

- **Immediately establish a registration system for religious marriages.** Registration would resolve the first barrier women face when they resort to courts, as they would now be in a recognized marriage. Recognition of religious marriages does not itself establish substantive rights, but recognition does allow more certainty when interacting with the legal system.
 - The centralized registration authority could be civil or religious, based on the State's data collection as to what would be the most effective.
 - For example, the existing Civil Registrar or Muslim Family Council could be empowered to oversee registration, a role they are already charged with in the Civil Status Act.

⁴⁶ B.M. Wahenia v. K.Noormohamed IPO "The Registrar of Civil Status" and the Ministère Public (Supreme Court of Mauritius 1998), 1998 SCJ 356.

⁴⁷ "340. La paternité hors mariage peut être judiciairement déclarée—. . . 4° Dans le cas où le père prétendu et la mère ont vécu en état de concubinage notoire pendant la période légale de la conception," Mauritian Civil Code, Title 7, Chapter 3, Art. 340 (4).

⁴⁸ Government of Mauritius, *Economic and Social Indicators on Gender Statistics*, 7 (2016), http://statsmauritius.govmu.org/English/Publications/Documents/EI1330/Gender_Stats_Yr2016.pdf.

⁴⁹ Mauritian Civil Code, Title 5, Chapter 9, Art. 228-6 (translated by Harvard International Human Rights Clinic).

⁵⁰ Ebrahim Moosa, *Muslim Family Law in South Africa: Paradoxes and Ironies in Muslim Family Law in Sub-Saharan African: Colonial Legacies and Post-colonial Challenges* (Shamil Jeppie et al., eds., 2010), 350.

SHORT-TERM contd...

- **As an interim measure** the government should also consider **re-instating Chapter 9 articles 228-5; 228-6; 228-8; and 228-10**, over the next year. This would:
 - Provide rights of survival in case of death of one spouse;
 - Recognize children born from religious marriages; and
 - Encourage registration of marriages with the Registrar General.
- Ensure all child custody matters for children in religious marriages are handled by civil courts, based on the best interest of the child;
- Ensure that all divorces for Muslim marriages follow civil divorce procedures, until a Muslim family law contains provisions for clear and equitable divorce measures; and
- Enforce existing laws banning polygamy.
 - A model standard marriage contract, including options for the couple to prohibit polygamy and for a wife to explicitly agree to a monogamous marriage, could help women understand their rights. Such a model contract could be provided by the Muslim Family Council at the time of registration.


MEDIUM TO LONG-TERM

1. Data collection on issues and challenges

- We recommend that the Mauritian government gather data on the nature and number of religious marriages and the current challenges facing people in such marriages. The process should include consulting community members, particularly the Muslim community, to understand the impact of legal gaps and determine how to best design substantive rights for Muslim marriages and divorces.
 - The Parliamentary Gender Caucus, a new body formed to study gender issues in 2017, could focus on the rights of women in religious marriages in an upcoming session. This body could gather information about what rights different religious communities want and what limitations would be difficult for them to agree to.
 - Information gathering is an important first step for creating a law that accurately reflects the will of religious communities in Mauritius, balanced with protections for Mauritian women. The government should also collect data to consult when creating new laws.

2. Process of consultation on codifying family law applicable to Muslims

- Next, the government should undertake a process of legal consultation to codify clear, protective laws in order to fully afford women in religious marriages protection of rights in all areas of marriage and family, including at the time of divorce.
 - Codifying clear substantive rights for religious marriages and divorces would be in line with the Mauritian Supreme Court's decision in *Bhewa & Anor v. Govt. of Mauritius* (Supreme Court of Mauritius 1990), which found that subjecting religious marriages to some protective provisions in civil marriage laws would not infringe on religious freedom guaranteed in the Mauritian Constitution. The Court held that banning polygamy and instituting other rights found in civil marriage laws are necessary steps to enact Mauritius' international obligations under the International Convention on Civil and Political Rights (ICCPR).
- Good and better practices in Muslim family laws globally should also be studied and considered by the State Party. Other countries with similarly diverse religious makeups and legacies of colonial legal systems do have a Muslim Personal Law (eg. Sri Lanka and South Africa).

 <p>Mandatory registration of marriage</p>	<p>POSITIVE DEVELOPMENTS IN MUSLIM FAMILY LAWS</p>	
<p>The official registration of Muslim marriages is mandatory in:</p>		
<p>Lebanon Malaysia Oman Pakistan Iraq Jordan</p>	<p>Algeria Bahrain Brunei Indonesia Qatar</p>	<p>Singapore Tunisia Turkey United Arab Emirates Palestine</p>

2. CHILD MARRIAGE

ARTICLES. 10, 12, 16

CRITICAL INFORMATION

Although Mauritius has taken important steps to empower women and protect children's rights in recent years, child marriage is an enduring challenge that requires further attention. The Civil Code of 1981 mandates a minimum marriage age of 18, but a child 16 years of age may marry with parental consent or approval from a judge who determines the marriage is in the best interest of the child.⁵¹

Religious marriages have no codified minimum age. This is a departure from the pervasive legal norm in Mauritian laws, which demonstrate a clear desire to protect children. For example, Article 249(4) of the Criminal Code criminalizes sex with a minor under 16, which is incompatible with the exception of under 16 marriage with parental consent or judicial approval.⁵² The Child Protection Act prohibits sexual harm of children, punishable under Article 230(1) of the Criminal Code. The Civil Code also prohibits marriage without consent.⁵³

Child marriage leads to serious consequences for girls in education, health, and social life. Specifically, child marriage limits women's access to education (CEDAW Art. 10), puts girls who become pregnant at young ages at risk for serious health complications (CEDAW Art. 12), and puts young women in vulnerable positions in their marriages to older men (CEDAW Art. 16).

These disastrous consequences were most recently demonstrated by the shocking death of 13-year-old Ruwaidah, who was not only married but also pregnant, in June 2018.⁵⁴ After Ruwaidah died of an epileptic attack, police discovered she had been married for nearly a year, after a *nikah* (Islamic marriage) ceremony with a 19-year-old man.

In 2014, there were 805 documented marriages of children aged between 15-19 in Mauritius.⁵⁵ The harm of child marriage falls disproportionately on girls. Girls who marry before 18 are more likely to suffer health complications in childbirth, including death;⁵⁶ end their education earlier than unmarried

⁵¹ Gender Index, *Mauritius*, 2 (2018) <https://www.genderindex.org/wp-content/uploads/files/datasheets/MU.pdf>.

⁵² Mauritius Criminal Code, Title 2, Chapter 1, Art. 249 (4).

⁵³ "149. Il n'y a pas de mariage lorsqu'il n'y a point de consentement.

[Art. 149 inserted by s. 3 of Act 22 of 1981.] There is no marriage when there is no instance of consent. Mauritian Civil Code, Chapter 5, art. 149, translated by Harvard International Human Rights Clinic.

⁵⁴ Lovina Sophie, *Goodlands: une mariée de 13 ans retrouvée morte, sa famille réclame une autopsie*, L'EXPRESS (June 20, 2018), <https://www.lexpress.mu/article/333780/goodlands-une-mariee-13-ans-retrouvee-morte-sa-famille-reclame-une-autopsie>.

⁵⁵ Fabrice Floch, *L'actu de la région: le mariage religieux de mineurs autorisé à Maurice!*, FRANCEINFO (June 22, 2018), <https://la1ere.francetvinfo.fr/reunion/actu-region-mariage-mineurs-autorises-maurice-601923.html>.

⁵⁶ Quentin Wodon, *Child Marriage and Education: Impacts, Costs, and Benefits*, Global Partnership for Education (June 29, 2019), <https://www.globalpartnership.org/blog/child-marriage-and-education-impacts-costs-and-benefits>.




girls,⁵⁷ have limited future earnings;⁵⁸ and have fewer social networks and safety nets due to increased isolation.⁵⁹ Despite these clear negative outcomes, the Government of Mauritius has failed to address this issue to date. A clear ban of child marriage—civil and religious—for girls under the age of 18 is a critical step in protecting children and reducing discrimination against girls in Mauritius.

RECOMMENDATIONS TO END CHILD MARRIAGE

We recommend the CEDAW Committee urge the State Party to:

- Eliminate the civil law exception for marriages at age 16 with parental or judicial consent;
- Pass legislation to establish a minimum age of marriage as 18 years for civil and religious marriages and criminalize child marriage by implementing penalties for anyone who conducts, witnesses or knowingly celebrates marriage of persons below 18 years;
- Establish stronger reporting mechanisms and support services for girls who are vulnerable to and affected by child marriage.

Other countries have taken similar steps to our recommendations to protect children.

CHILD MARRIAGE		POSITIVE DEVELOPMENTS IN MUSLIM FAMILY LAWS
<p>EGYPT</p> 	<p>The minimum age for marriage is 18 for both females and males.</p> <p>The registration of the marriage of a person below 18 is prohibited and penalised.</p>	
<p>PAKISTAN: SIND PROVINCE</p> 	<p>The minimum age for marriage is 18 for both females and males.</p> <p>The law criminalises and penalises the following: (i) males over 18 who contracts a child marriage; (ii) whoever performs, conducts or directs a child marriage; and (iii) parents or guardians who promote a child marriage, permit it to be solemnised or negligently fail to prevent it from being solemnised.</p>	
<p>KENYA</p> 	<p>The minimum age for marriage is 18 for both females and males, regardless of religion.</p> <p>Any person who marries or knowingly celebrates or witnesses the marriage of a person below 18 commits an offence and will be liable to a penalty (imprisonment, fine or both).</p>	

⁵⁷ International Women's Health Coalition, *The Facts on Child Marriage*, <https://iwhc.org/resources/facts-child-marriage/>.

⁵⁸ Quentin Wodon, *Child Marriage and Education: Impacts, Costs, and Benefits*, Global Partnership for Education (June 29, 2019), <https://www.globalpartnership.org/blog/child-marriage-and-education-impacts-costs-and-benefits>.

⁵⁹ Julie Freccero and Audrey Whiting, *Toward an End to Child Marriage*, Save the Children and the Human Rights Center at the University of California, Berkeley, School of Law 8 (2018), https://www.girlsnotbrides.org/wp-content/uploads/2018/07/child_marriage_report_june20181.compressed.pdf.

**Mauritian Civil Code⁶⁰
Title 5, Chapter 9**

Religious Marriage

- 228-1: The measures in articles 228-2 to 228-10 apply only to religious marriages that do not have any civil effect.

These measures cease to be applicable once a religious marriage is followed by a civil marriage. When the articles 228-2 to 228-10 are not applicable or cease to be applicable as provided in paragraph 2, the marriage is exclusively governed by civil law and notably by the measures in the current title regarding civil marriage. However the civil law shall apply as from the date of the civil celebration, which follows a religious celebration and shall apply for the future.

- 228-2: Subject to the measures of articles 228-3 to 228-10, a religious marriage is not governed by civil law.
- 228-3: At the time of the celebration of a religious marriage, the intention expressed by each of the spouses to conform to the duties imposed by their religion, shall be in the nature of a contract that is binding towards their spouse, their descendants and their family.
- 228-4: The husband has the principal obligation to provide, according to his means, for the maintenance of the household and ensure the subsistence and housing of his wife according to the family's standard of living. He must provide for alimony or compensatory allowance to his wife, in the event that the latter is not responsible for the breakdown of the marriage.
- 228-5: The spouses can avail themselves of their religious marriage towards third parties and public authorities.

The surviving wife can, *inter alia*, claim damages against the person(s) responsible for the accident of which her spouse was victim or assert her rights to the widow's pension against a person or private organization as well as the relevant administrative services.

- 228-6: Notwithstanding any contrary measures, a child born from a religious marriage has the same rights as a legitimate child.
- 228-7: Notwithstanding the rights of heirs entitled to a reserved share, the spouses may, following a religious marriage, adapt the rights of succession to conform with the rules of succession of their religion.

The imperative measures of the current Code related to hereditary reserve and the disposable portion of the estate are fully applicable to donations made by living persons or through their testamentary will that are contrary to the succession rules of the religion of the donor or testator.

- 228-8: The proof of the celebration of a religious marriage is administered by the production of an extract of the act contained in one of the religious marriage registers kept by the Registrar-General in application of the Civil Status Act.

The establishment and proof of the filiation of a child born of a religious marriage is governed by the requirements of articles 312 to 330 of the present code.

- 228-9: Any dispute between spouses will fall under the jurisdiction of the Judge in Chambers.

They may, at the request of one of the parties, resort to religious authorities concerned by the marriage, who will act as experts. Additionally, the Judge in Chambers, at the request of one of the parties, must consult any commission of specialized Jurists that is set up to examine the rules of the religion at issue in the litigation.

⁶⁰ Unofficial translation from the original French by the International Human Rights Clinic at Harvard Law School, in consultation with Mauritian family law specialist Narghis Bundhun.

- 228-10: Subject to the condition that the registration formalities outlined by the Civil Status Act are accomplished, articles 228-1 to 228-9 apply to all religious marriages, including those that were celebrated prior to their promulgation.

Articles 228-1 to 228-9 will apply on the date of the celebration of the religious marriage held after their promulgation. They apply only after the registration of religious marriages celebrated prior to their promulgation and have effect only for the future.

ANNEX II: MUSAWAH VISION FOR THE FAMILY

Musawah asserts that in the twenty-first century, there cannot be justice without equality. Many provisions in Muslim family laws and informal community practices within Muslim contexts are based on definitions and interpretations by classical jurists, and are neither tenable in contemporary circumstances nor defensible on Islamic grounds. Not only do these family laws and practices fail to fulfill the *Shari'ah* requirements of justice, but they are being used to deny women rights and dignified choices in life. These elements lie at the root of marital disharmony and the breakdown of the family.

If the Muslim communities and the government of Mauritius were to decide on codification of a Muslim family law in the future, Musawah believes it is necessary for such a law to be based on the principles of equality and justice and guarantee equal partnership between Muslim spouses.

Musawah advocates for its four-pronged **Framework for Action** in developing such a Muslim family law, which incorporates: (1) diversity of Islamic jurisprudence and legal concepts (2) national laws and constitutional guarantees of equality, (3) contemporary lived realities, and (3) international human rights standards.

Musawah believes that Qur'anic principles and the richness of the Islamic juristic tradition enable us to formulate Muslim family laws today that are egalitarian and reflect the needs of contemporary societies.

Islamic teachings and universal human rights standards, including the CEDAW Convention, are fully compatible and are dynamic and constantly evolving, based on changing times and circumstances.

Inspired by the Qur'anic vision of justice and gender relations, Musawah contends that gender equality and non-discrimination can only be achieved with laws that transform power relations in the family and in society in the direction of just outcomes.

Furthermore, it is our hope that the CEDAW Committee will encourage Governments everywhere, and particularly those purporting to speak for and in the name of Islam and Muslim communities, to:

- Recognize the diversity of opinions, laws and practices in the Muslim world and the growing scholarship in Islam that recognizes equality and justice and the possibility and necessity for reform of Muslim family laws today.
- Promote human rights standards as intrinsic to the teachings of Islam, national guarantees of equality and non-discrimination, and the lived realities of men and women today.
- Encourage open and inclusive public debate regarding diversity of opinion and interpretations in Muslim laws and principles relating to family laws and practices.

