

DOMESTIC CONTRACTS

Muslim and Canadian Family Laws



RESOURCE 1 OF 6



Canadian Council of Muslim Women (CCMW)
Le conseil canadien des femmes musulmanes (CCFM)



The Law
Foundation
of Ontario



This document is one in a series of six and should be read in conjunction with the others.

Titles in the series:

- 1) Domestic Contracts
- 2) Marriage
- 3) Divorce
- 4) Custody and Child Support
- 5) Family Property and Spousal Support
- 6) Inheritance

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Introduction



The Canadian Council of Muslim Women (CCMW) has published a series of documents to help Canadian Muslim women make informed choices pertaining to family law in Canada.

These documents provide comparative information about Canadian and Muslim family laws, particularly as they pertain to women's rights. We hope the documents will be of assistance to, among others, Muslim women, professionals working with Muslim women in the family court system, students who would like to know more about the topic and community-based services that assist women.

The material in this document is based on *Muslim and Canadian Family Laws: A Comparative Primer*, published by CCMW and updated in 2019. Any errors that appear in the documents are the sole responsibility of CCMW.

Those interested in finding out about the sources and validity of Muslim laws and legal opinions referred to in the documents should consult *Muslim and Canadian Family Laws: A Comparative Primer*, a meticulously referenced publication. Laws in a public legal system are in a constant state of flux as they are changed to adapt to the times. You are encouraged to verify that the information contained in the documents about Canadian laws is current.

Both the documents and the *Primer* are intended to provide information only and should not be considered a substitute for legal advice.

For legal advice, please consult a lawyer specializing in family law.

Muslim Law



Sharia and the Sources of Law

Muslims have developed an elaborate legal tradition over many centuries since the revelation of the Quran to Prophet Muhammad and the formation of the first Muslim communities in the seventh century CE. This legal tradition has divine revelation as its fundamental source. Divine revelation to humanity is represented in the Quran, the Arabic text reflecting the word of God revealed to Prophet Muhammad by Archangel Gabriel, and the Sunna, reflected in records that indicate what the Prophet said, did, or refrained from doing or saying. Besides the Quran and the Sunna of the Prophet, other sources of law in the Sunni tradition include the consensus of the community and analogical reasoning. In the Shi'i tradition, the pronouncements of the Imams – the leaders of the Muslim community from among the male descendants of the Prophet – are also considered authoritative.

Although, both in Western and Muslim discourses, it is common to use *sharia* interchangeably with Muslim law, *sharia* is a much broader term. Literally, the term means the path to the source of water. In the legal tradition, it refers to the ideal of living in an ordered community according to divine justice. By contrast, *fiqh* denotes the concrete jurist-made rulings that constitute the body of Muslim substantive laws. It is noteworthy that the Muslim legal system developed over 1,400 years, in different parts of the world, with diverse cultures, which also influenced the development of particular doctrines. Throughout this history, the Muslim legal tradition was always open to incorporating local customs as well as predominant administrative practices in neighboring and prior civilizations. In modern times, this has manifested in some borrowing from Western legal systems in the context of modern Muslim-majority nation-states.

The Laws and the Role of Interpretation

While the Quran and the Sunna of the Prophet contain some injunctions on how to act in a number of circumstances, virtually all of the substantive body of Muslim laws was developed by self-governing scholars over the course of many centuries. The body of practical rules developed by the scholars over the centuries came to be known as *fiqh*, which literally means knowledge. Whereas the Quran includes some verses (some clearer than others) that contain rules pertaining to family laws, and many spiritual provisions indicating the equality of all believers regardless of gender, virtually all of Muslim family laws were part of the jurist-made *fiqh*.

The important thing to remember about *fiqh* is that it is probabilistic (*zanni*). It is the best guess of the community of jurists at any given point in time, and does not claim for itself any sort of objective truth or identity with divine will.

Much can be written about the legal institutions and practices but for our purposes of understanding the applicability of Muslim family laws in Canada, it is sufficient to acknowledge the variations found within these laws, that is in *fiqh*.

Main Schools of Muslim Law

Today, there are four extant Sunni schools of law—Hanafi, Shafi'i, Maliki, and Hanbali—and one main Shi'i school, the Ja'fari. Schools of law are best understood as legal traditions. They are constituted of communities of jurists who are united by specific approaches to the law, and often have a certain number of core opinions on any particular question of law. This reliance on school of law or *madhhab* meant that Muslim law is deeply pluralistic. On any given legal question, there is a range of opinions advanced by the different schools, as well as a variation of positions offered by the majority and minority scholars within each school.

Legal Authority in Islam

It is a common saying that there is no church in Islam. This means that the Muslim community has long believed that there is no central authority that possesses the right to formulate legal and ethical doctrines for everyone else. Whereas Muslims commonly follow the opinions of the jurists, this is predicated on the assumption that those jurists are learned and wise, and not because of any inherent obligation to follow authority. Muslim women are under no obligation to follow the legal opinion of any particular school of law, let alone any specific jurists, in matters pertaining to family law. In fact, being free to choose among the variety of opinions offered by the schools of law, a concept referred to as *takhayyur*, has always been a central feature of *sharia* as a system of justice.

Reformists vs Traditionalists

The formulation of the vast body of laws known as *fiqh* was the product of many centuries of stable Muslim communities living under the *sharia*. However, in modern times, the social institutions of the *sharia* have been replaced in most of the Muslim-majority countries with modern legal institutions. This transformation led to much speculation over the fate of Muslim laws and their place in the modern world. Some Muslim reformists called for a return to a pure understanding of the Quran and the Sunna of the Prophet, without being necessarily bound by the classical *fiqh*, which was produced in a time and circumstances different from ours. Other reformists argued that we must look for the deeper “spirit” of the *sharia*: the spirit of equality, justice, and prosperity, without focusing too much on the substantive rules of *fiqh*. Yet another trend of thought argues that we should preserve the *fiqh* tradition but still find ways to make it evolve and adapt to modern conditions.

Canadian Muslim Communities

Canadian Muslim communities are relatively new and diverse. They are in the process of developing institutions and defining their position as a minority in a non-Muslim society. Fragmentation into many groups with different backgrounds and practices precludes the development of a generally recognized ethic to which everyone can refer. We thus have a fluid situation in which a very wide range of views about Islam and its laws is being articulated and debated.

Muslim Laws in Canada

Relying on Muslim laws may be more perilous in Canada than in most Muslim-majority countries. In Muslim-majority countries, there are defined laws laid down by governments, and it is therefore possible to have a good idea of what rules will be applied to a particular case. In Canada, however, one may be faced with unfamiliar standards and rules.

If you are thinking of having your affairs regulated in any way by Muslim laws, it would be wise to enquire beforehand about the kind of law involved. Will it be some version of the reformed law or the traditional law of one school or another?

You may be able to judge what kind of approach will be used by asking specific questions. For example, with regard to divorce: Do the persons with whom you are dealing consider the quick triple divorce valid? Do they believe that a woman has a right to support by her husband even after the three-month waiting period, and if so, for how long? With regard to inheritance, you might ask: Will my daughter have to share her part of the family inheritance with her uncles? You can use these documents to come up with such questions and also compare the answers you get with those found in Canadian law.

It is important to bear in mind that classical Muslims legal doctrines are not identical with the positive laws of modern Muslim-majority states, even when those states to claim to apply Muslim family laws. Actions taken according to either Muslim law or the law of a Muslim-majority state may have implications in the Canadian legal context on the terms and according to the categories established by Canadian family laws. It is important to not assume that an act such as a marriage or divorce taken within one system will be irrelevant in another, or that, conversely, they will be regarded in the same way. These documents are designed to help you understand some of those differences, but it is extremely important to consult with an expert in Canadian family law to fully understand your rights and duties under Canadian laws.

The information about Muslim laws in the following pages is not definitive. It should be viewed as a starting point only. For legal advice, please consult a lawyer specializing in family law.

Canadian Law



In Canada, the *Canadian Charter of Rights and Freedoms* specifically addresses equality rights of women. Canada is also a signatory of the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) and of the *International Covenant on Civil and Political Rights* (ICCPR). Both these documents provide equality-rights protection for women which take precedence over the right to religious freedom.

Case Law

Case law, or court decisions, further addresses the issue of women's rights. Public court decisions are required to conform with the *Canadian Charter of Rights and Freedoms*. Court decisions are a matter of public record and can be appealed to a higher court.

Family Law

Family matters are governed by a number of federal and provincial laws. Some matters relating to marriage, such as rules about who can marry whom, are a federal responsibility; others, such as the technical administration of marriage, are provincial. Divorce is regulated federally under the *Divorce Act*, which underwent substantial revisions in 2019, to come into effect in 2020. Provincial laws cover custody, access, child support, property division, spousal support, restraining orders and child protection. Inheritance is also a matter for provincial regulation.

The names of the statutes vary from province to province, but the general issues covered are the same, and the overall approach is similar, although there are regional differences. These laws exist to assist families and to provide minimum common standards across the country.

Access to Justice and Legal Aid

Everyone involved in a family-law matter can use the services of a lawyer to support and assist them. In an attempt to ensure that people without the financial ability to pay for their own lawyer can still be properly represented, the provinces have developed legal aid plans. For example, in Ontario, the legal aid plan is called Legal Aid Ontario (LAO). Ontario's model provides successful applicants with a certificate for coverage, and the person selects their own lawyer.

The financial criteria in Ontario are very limited. Eligibility is determined by a review of the person's income and expenses. LAO sets different financial criteria for victims of domestic violence to make it easier for them to qualify for assistance. LAO primarily covers representation for court-based matters. There is very little legal aid available in private dispute-resolution cases.

Private Dispute Resolution

Many people prefer to resolve the issues arising from the end of their relationship outside the court system. However, in situations where there is an unequal balance of power, private resolutions may not reflect either the legal rights or the interests of the person with less power.

Family-law disputes are privately resolved through either mediation, arbitration or collaborative law.

Ontario's *Arbitration Act* requires that all family law arbitration be conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction. Arbitration conducted under any other system of law, including religious law, is not considered "family arbitration" and is not enforceable in Ontario courts.

Differences between Arbitration and Mediation

Arbitration is quite different from mediation in that the arbitrator, after listening to what each party has to say, will announce a decision (much as a judge does) in the case. The parties are bound to accept this decision – in fact, they have agreed to this before beginning the process. In mediation, the mediator assists the two people come to an agreement about the issues that are in dispute. Both mediated settlements and arbitral awards can be enforced by the court.

The changes in arbitration law do not interfere with the right of individuals to go to elders and religious institutions for advice and counselling, but these processes will only be sanctioned by the state and be legally binding if the family law of Canada is used.

Safety Related Matters

Although these documents deal primarily with issues of family law, it is important for women to know that criminal law provides some protection from abusive spouses. Both restraining/protection orders and exclusive-possession orders are important legal steps women can take through family court to protect themselves from abusive partners, especially during the early days of separation, when risk of violence often increases. Application for a restraining order and/or for exclusive possession of the home can be made as part of a larger family court proceeding dealing with custody, access, support and/ or division of property or it can be made separately.

The Canadian Legal System

The Canadian legal system is a public legal system with laws and systems in place that are intended to ensure women's equality rights. Under this system, laws are open to public review and scrutiny and court decisions are a matter of public record. Moreover, the decisions can be appealed to higher courts. In Canada, anyone involved in court proceedings has the right to have a lawyer represent them. For those who cannot afford legal representation, government-funded legal aid is available. A public law system supports a consistent approach and some measure of equality and accountability. Even so, the public system of law is not perfect.

Private rules, including religious laws, do not offer these same protections. They are not open to public review and scrutiny, and those who interpret them are not accountable to the public in any way. There is often no right of appeal from a bad decision made under a private regime. There is not necessarily a right to legal representation, and legal aid is seldom available.

For these reasons alone, a public system of family law is to be preferred over a private one.

Domestic Contracts



INTRODUCTION

MUSLIM LAW

In classical Muslim doctrine, marriage is a contract concluded between the bride and groom, sometimes through their guardians. The conclusion of a domestic contract that regulates some aspects of marriage in Muslim law is done through the addition of “conditions” (shurut) to the contract.

The fundamental guiding principle in Muslim law is that any contractual conditions mutually agreed upon among the parties are valid, provided that such conditions (a) are not in violation of clear divine injunctions; and (b) do not defeat the purpose of the contract itself.

Whereas all the classical schools agreed that the bride (and, less frequently, the groom) and her guardian are entitled to include some legitimate conditions in the marriage contract, they disagreed as to (a) the degree to which the husband is bound by such conditions; (b) which conditions are valid and which are not;

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In Canada, provincial legislation governs what kinds of private contracts individuals can make to set the terms of their relationship or the end of their relationship. In Ontario, cohabitation agreements, marriage contracts and separation agreements are all considered to be “domestic contracts” and are governed by Part IV of the Family Law Act (FLA).

Parties to a domestic contract can add any conditions they want. These can include conditions pertaining to ownership and division of property, support obligations, the right to direct the “education and moral training” of their children and many other matters.

INTRODUCTION (continued)

MUSLIM LAW

and (c) the consequences of including an invalid condition in the contract.

While most Hanbalis held that conditions included in the marriage contract and not otherwise invalid are obligatory upon the husband, some Malikis found that respecting these conditions is only recommended, whereas most Hanafis and Shafi'is said that husbands are under no obligation to satisfy any conditions other than those that follow from the marriage relationship by force of law, such as financial support.

Because most Muslim-majority states have now adopted modern legal systems in which mutually agreed contracts are binding, valid conditions included in marriage contracts will be enforceable in those legal systems.

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VALIDITY OF ADDED CONDITIONS

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Traditional scholars divided conditions (shurut) in a marriage contract into three categories with regards to their validity: those that are valid, those that are invalid but do not invalidate the marriage, and those that invalidate the marriage. In general, Hanbalis and segment of the Maliki school are more inclined to accept the validity of conditions that do not defeat the purpose of marriage, and to hold that those conditions are binding on the husband. Shafi'is and Hanafis tend to believe that conditions intrinsic to the contract of marriage are the ones that should be followed, without the need for added conditions.

Conditions that are commonly seen as valid include: the woman's right to work, financial support for her continued studies, and the right to remain in her town or country, and to live in a household of her own. Many scholars have also accepted a woman's right to demand that her husband not take another wife, and to stipulate that the marriage contract will be dissolved if he does so. Many have also validated conditions that provide a certain amount of time after the

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There are certain conditions which the courts will not uphold even if added to a marriage contract. Section 52 (1)(c) of the Family Law Act specifically excludes custody of and access to children from being governed by way of a marriage contract. Section 52 (2) states that any provision in a marriage contract limiting a spouse's rights to the matrimonial home is unenforceable. Also, under section 56, courts can disregard provisions that are not in the best interests of the child; are unreasonable with respect to child support; make the rights of a party dependent upon remaining chaste; or prevent remarriage of either party.

Also, upon application, a court may set aside a domestic contract or parts of the contract if a party failed to disclose significant assets, debts and liabilities; if a party did not understand the nature or consequences of the contract; or if the contract is not in accordance with the law. To be valid, a domestic contract must include a certificate or waiver of Independent Legal Advice to ensure that the person

VALIDITY OF ADDED CONDITIONS (continued)

MUSLIM LAW

conclusion of marriage before sexual relations can begin.

Conditions that are commonly seen as invalid without invalidating the marriage contract are ones that are either illegal or incompatible with the purpose of marriage, such as a condition to withhold sex indefinitely, or to divorce an existing wife, or for the wife to live away from her husband's domicile. Conditions that invalidate the marriage altogether include term limits that render the marriage temporary, and any marriage that involves the intention of getting divorced.

A husband can also include conditions in a marriage contract, but such conditions cannot in any way contradict his basic obligations to support his wife and children financially. Therefore, conditions that attempt to shift the financial burden from man to the woman are invalid. Like their Sunni counterparts, Shi'i scholars believed that including shurut in a marriage contract is allowed, and, like the Hanbalis, widely argued that conditions that do not breach the law or the purpose of marriage should be enforced by both parties.

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understands the contract and is not agreeing under coercion.

Since agreements made under the Family Law Act allow parties to sign away their legal rights, it is important that women seek independent legal advice before signing a marriage contract. Even if conditions in the agreement are unfair, once it has been signed, the courts cannot intervene and set it aside.

JURISDICTION

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Like all matters relating to Muslim contracts under a modern state, the authority to enforce the contract will depend either on the parties, a designated arbitrator, or the state within which the parties live if the contract was drawn according to the rules and forms required by such state. In the absence of a centralized Muslim authority, it is upon the parties to identify a competent person or authority that can manage any disagreements that arise from the performance of such conditions.

Alternatively, the married couple should draw their conditions in a way that ensures their enforceability within their respective province.

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Part IV of the Family Law Act sets out how domestic contracts made outside Ontario are to be handled within Ontario. According to section 58, a domestic contract is valid in Ontario, regardless of where it was made, as long as it is in accordance with Ontario law. It must not, however, be “unconscionable.”

ENFORCEABILITY

MUSLIM LAW

The Ontario legal system allows considerable freedom to individuals to make their own domestic contracts. However, to ensure enforceability of a Muslim domestic contract, it should be drawn up according to the terms set out in the Family Law Act.

Anyone preparing a domestic contract should work with a lawyer who is knowledgeable about family law in their province to ensure the contract meets all the required elements under provincial law.

A Muslim woman who uses the Family Law Act to make a domestic contract should keep in mind that Muslim laws widely invalidate any condition that gives away a woman's natural rights under a marriage contract. Such natural rights include her right to full financial support by her husband, the right to her dower and her own financial independence, the right to travel to see her family, or perform religious duties.

None of those rights can be surrendered by the wife from the standpoint of Muslim law.

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Either party can approach the court to enforce a domestic contract. To be enforceable, a domestic contract must conform to the requirements contained in the Family Law Act.

Even if a condition in the contract is unfair – with the exception of certain invalid conditions mentioned above – the courts are bound to uphold the contract.

Courts should give great deference to a domestic contract and only intervene in extreme circumstances to set it aside. The Supreme Court of Canada has ruled that adults are free to sign away their legal rights and must assume responsibility when they do so, even if the consequences prove to be negative. All other courts are bound by this decision.

While this is a laudable principle in theory, it does not necessarily reflect the interests of vulnerable people – for example, women with abusive husbands, women who are newcomers to Canada and are unaware of their legal rights here or women who are coerced by their communities into signing private "agreements" without benefit of proper legal information and advice.

Canadian courts will enforce a mahr, if it has been properly prepared and meets the

ENFORCEABILITY (continued)

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standards of any other domestic contract, according to the relevant provincial/territorial legislation. Generally, it must be in writing, signed by the parties and witnessed. Full financial disclosure must be provided by each party to the other and there must be no duress or coercion.

The more specific and detailed about the amount, timing and circumstances in which the mahr is to be provided to the wife the better.

In Canada, the mahr does not replace spousal or child support and does not form part of the wife's family property.

NOTES

NOTES

We gratefully acknowledge the Law Foundation of Ontario for the financial support which made possible the updates to this document.

Some of the information on Muslim and Canadian family laws in the document is provided in a side-by-side format to allow for comparison. Sometimes there is no direct comparison available. These situations are noted as such.

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