

# FAMILY PROPERTY AND SPOUSAL SUPPORT

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**Muslim and Canadian Family Laws**



**RESOURCE 5 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
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- 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.

# Family Property and Spousal Support



## INTRODUCTION

### MUSLIM LAW

Traditional Muslim law does not recognize joint property or joint finances for the spouses. Each spouse retains their own separate patrimony before, during, and after marriage. It follows that the family domicile, which is to be provided by the husband, remains his property, unless it belonged to the wife prior to marriage, or was explicitly gifted to her thus leading to a transfer of ownership.

On the other hand, financial support of the wife and children is the husband's firm obligation, and indeed it is the primary obligation that follows from the marriage contract by force of law, without the need for any specific provision in the contract. Classical scholars have long debated the circumstances under which such obligation may be suspended, but in general such conditions remain very limited and rare exceptions to the general rule.

### CANADIAN LAW

*Family property:* In the case of marriage breakdown, division of property is governed by Ontario's *Family Law Act*. A woman has a legal right to an equal share of the property the family accumulated during the marriage, whether she contributed financially to it or not. Division of property can also be dealt with by way of a domestic contract (please refer to the document "Domestic Contracts").

*Spousal support:* This is the money paid by one spouse to the other for that person's support after the marriage has ended. For the purpose of spousal support, "spouses" are defined as people who are married to each other, or who have lived together continuously for at least three years or who have a child together. Enforcement of child-

## INTRODUCTION (continued)

### MUSLIM LAW

### CANADIAN LAW

support payments is given priority over spousal-support payments.

Canadian law does not have a position on the issue of spousal support during marriage, because marriage is seen as a partnership.

## PROPERTY DISTRIBUTION

### MUSLIM LAW

#### PROPERTY STAYS SEPARATE

Under classical Muslim law, marriage does not result in any joining of property or financial means. This could be understood in light of the fact that marriage was not seen as a union between financial equals. Under the classical doctrine, the man was the sole and absolute provider for the family. Marriage was seen as an arrangement whereby the woman would relocate from her father's to her husband's home, in exchange for a dowry and full financial support. Thus, the man's house remains his property, in addition to all things acquired by him for the marital home, even if such properties were used jointly by the spouses.

While this arrangement deprives the woman of any rights in property acquired for the family by her husband, she gains by retaining full rights to her own money and property, including her dowry, any gifts from the husband or her family, her inheritance, and any returns on investment, rent, among other income. The husband will not have any right to any portion of her wealth under the principle of division of legal patrimony.

### CANADIAN LAW

#### PROPERTY IS EQUALLY DISTRIBUTED

The basic principle underlying the division of family property is that marriage is a partnership and that all property accumulated during that partnership should be shared equally between the partners (spouses) regardless of who actually paid for it or in whose name it is registered. This is called equalization of net family property.

There are certain exceptions to this principle; for example, property acquired before the marriage, property acquired by gift or inheritance from a third party, proceeds of a life insurance policy, or property that the spouses have specified ownership of in a domestic contract. Importantly, the matrimonial home is also treated differently: the full value of the matrimonial home is to be shared equally between the spouses even if the home was bought by one spouse prior to the marriage.

Where spouses are unable to agree on the equalization of their family property, the court can order that one spouse pay the other an amount that would result in an equalization between the spouses. Ontario legislation also

## PROPERTY DISTRIBUTION (continued)

### MUSLIM LAW

#### PROPERTY STAYS SEPARATE

The issue of separate ownership of family property is often addressed through the inclusion of carefully drawn conditions (*shurut*) in modern marriage contracts. For example, in some cases, the bride will require the transfer of the family home to her ownership as part of the dower, or the future modification of dower to account for inflation.

### CANADIAN LAW

#### PROPERTY IS EQUALLY DISTRIBUTED

governs the division of property in polygamous marriages. A woman who was part of a polygamous marriage, if that marriage took place in a country that recognizes polygamy (i.e., not Canada), can rely on Ontario law with respect to the division of family property when that marriage ends, if she is resident in Ontario.

## **MATRIMONIAL HOME**

### MUSLIM LAW

The wife does not have claim over the matrimonial home unless it belonged to her before the marriage.

Although there is no division of property, the division of household goods is discussed in Muslim laws, albeit without any consensus. Opinions vary, and the results can range from the woman getting all the household goods to only “the clothes on her back.”

### CANADIAN LAW

The matrimonial home is the place where the spouses ordinarily lived during their relationship. Both spouses have an equal right to live in the matrimonial home unless one spouse has received an order for exclusive possession of it. Possession in no way affects ownership or the right to include the matrimonial home in the calculation for the purpose of equalization.



## SPOUSAL SUPPORT

### MUSLIM LAW

The husband owes his wife two main obligations: the dower (*mahr*, or *sadaq*), which is specified at the conclusion of the contract, and maintenance (*nafaqa*), which is due throughout the marriage.

Classical scholars disagreed on when the payment of maintenance to the wife is due. A majority held that the *nafaqa* is due from the moment the marriage is concluded, and until it ends. Some scholars allowed for some exceptions to that rule. This includes the case of a minor bride who continues to live in her father's home after the contract is concluded. In that case, the husband may withhold payment of maintenance until she moves to his house.

In general, the payment of spousal support was seen by most scholars as the husband's most fundamental obligation, and refusal to pay had to be justified by a substantial neglect of her marital obligations by the wife. Since availability in the marital home is the wife's most basic obligation, deserting the

### CANADIAN LAW

Both the *Divorce Act* and the *Family Law Act* set out similar objectives for spousal support. These are to recognize economic advantages or disadvantages arising from the relationship or its breakdown, equally divide between the parties any financial consequences arising from the care of children, relieve economic hardship arising from the breakdown of the relationship, and promote the economic self-sufficiency of each partner within a reasonable period of time.

## SPOUSAL SUPPORT (continued)

### MUSLIM LAW

husband's home (i.e. *nushuz*) was seen as the main situation in which the payment of nafaqa could be justifiably suspended.

There is a misconception that, in Muslim family law, a wife must be "obedient" to deserve her financial support. This usually follows from a misunderstanding of the concept of *nushuz* as a lack of submission to the husband's wishes. That is far from the truth. What most classical jurists meant by "disobedience" (*nushuz*) was not an unquestioning submission to the husband's will, but rather the abandonment of the family home altogether. No significant classical school held that the husband may suspend maintenance if the wife does not fully submit to his will. In fact, it is a deeply held assumption in Muslim law that marital relations should be based on reciprocal understanding, rather than obedience of one spouse to another.

Therefore, all scholars agree that a wife is entitled to full support covering her livelihood, clothing, and in some cases domestic help, as long as

### CANADIAN LAW

## SPOUSAL SUPPORT (continued)

### MUSLIM LAW

she continues to reside in her matrimonial home. Some scholars even went as far as to argue that a wife who abandons her home is still entitled to support, but that is a marginal opinion.

### CANADIAN LAW



## HOW LONG AFTER THE MARRIAGE WILL SPOUSAL SUPPORT BE PAID?

### MUSLIM LAW

In general, spousal support is only due while the marriage is still in force. Upon divorce, the obligation ceases in most cases. However, a pregnant woman will receive support until delivery and, according to most jurists, for two periods thereafter. Verse 2: 241 provides that “reasonable provisions must be made for divorced women—a duty on those mindful [of God].” Fair provision in that verse was traditionally taken to mean a period of two years, but many modern interpreters argued that this can be extended until such time as the woman is remarried.

### CANADIAN LAW

Typically, in the case of a long-term traditional marriage where the woman has remained at home for all or most of the marriage to raise the children and maintain the household), spousal support will be ordered for a long period of time (or even permanently) at a high level. It is not uncommon for spousal-support payments to be made until the recipient spouse remarries. In a short-term marriage in which neither party’s ability to earn an income has been negatively affected, there may be no spousal support. Where one spouse (typically the woman) requires a period of time to re-establish herself in the workforce, there may be a short-term spousal-support order for a gradually decreasing amount of support.

## AMOUNT OF SPOUSAL SUPPORT

### MUSLIM LAW

There is no consensus among Muslim schools of law on the amount of spousal support. The Maliki jurists mostly believe that such amount cannot be specified by law, since it depends on a large number of conditions, such as each spouse's background and circumstances, economic conditions, the place and time in which payments are due, among other matters. The Hanafis and Shafi'is, by contrast, argued that the amount of support can be calculated based on the husband's wealth and income: the higher the income, the higher the amount of support.

There is a consensus, however, regarding the basic elements of such support: besides the domicile, the husband is responsible for the wife's daily necessities, such as food and other ordinary needs, as well as clothing. While these are defined as "necessities," that does not mean that the husband's obligation is limited to the bare minimum: a wealthy man could potentially be required to provide a substantial level of maintenance. Beyond those "necessities," there were disagreements among the schools. While the majority believed that a woman who is not well-versed in housework may require her husband to pay for domestic help, a minority believed that there is no such obligation according to Muslim law.

### CANADIAN LAW

When determining the amount of spousal support to be paid, the courts will take into consideration a number of factors: the length of the cohabitation and the functions performed by each partner during that time (e.g., child-rearing); agreements entered into by the partners (e.g., marriage or cohabitation agreements); the parties' current and likely future assets and means; the dependent partner's capacity to contribute to their own support; and the ages and physical and mental health of the parties.

The Federal government has established spousal-support guidelines to somewhat standardize the amount of spousal support awarded. Usually a spousal-support agreement or order will specify that support will stop on remarriage. Spousal support is tax deductible for the payer and declared as taxable income by the recipient.

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.

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

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