

# DIVORCE

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## Muslim and Canadian Family Laws



**RESOURCE 3 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.

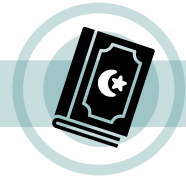
The material in this document is based on *Muslim and Canadian Family Laws: A Comparative Primer*, published by CCMW and updated in 2019. Any errors that appear in the documents are the sole responsibility of CCMW.

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.

# Divorce



## INTRODUCTION

### MUSLIM LAW

Marriage in Islam is considered a contract, and therefore, like any contract, it can be dissolved. There is no strict equivalent to “divorce” in traditional doctrine, but there is a number of methods through which marriage could be terminated. The most obvious route is through *talaq*, which is a right to unilateral repudiation that is granted to the husband. Although classical Muslim law grants the man the right to end the marriage unilaterally without reason, such repudiation is considered reprehensible (*makruh*), and classical doctrine placed several procedural and financial hurdles to make sure such a right is used as narrowly as possible.

For a marriage conducted according to Canadian law, none of the Muslim methods of dissolution will be recognized by Canadian law as a valid divorce.

### CANADIAN LAW

If two people are legally married, either one of them can apply for a divorce to end their marriage and resolve all related issues, such as custody and support. Unless a marriage is properly registered with the state, one cannot get a divorce. A woman in a polygamous relationship whose marriage is not registered cannot get a civil divorce, as she is not married under civil law.

## HOW DIVORCE HAPPENS

### MUSLIM LAW

*Talaq* or repudiation is the right given by Muslim law to the husband. The husband may repudiate his wife at any time without the need to give a reason. However, only men of sound mind who have reached the age of capacity may perform this right. Repudiation by a minor or someone who is mentally incapacitated is considered ineffective. *Talaq* can occur in the wife's absence, but she must be informed of it immediately. In general, no witness must be present for the *talaq* to be effective, although many Shi'i scholars hold that to be a condition of *talaq*.

Most jurists also invalidated repudiation by an intoxicated man, since intoxication makes it doubtful that the words were uttered intentionally and as a result of a sound mind. Some Malikis and Hanbalis, however, believed that *talaq* as a result of drunkenness is still valid. *Talaq* must also be expressed by the husband in clear and unequivocal terms to be effective. There was a disagreement among the jurists with regards to unequivocal

### CANADIAN LAW

Divorce cannot be dealt with by way of a domestic contract or a private agreement, nor can it be arbitrated. A couple married by Canadian law can be legally divorced only through the process outlined in the federal *Divorce Act*. Until this happens, the marriage is not over and the couple is still considered married under Canadian law.

People do not have to be Canadian citizens and their marriage does not have to have taken place in Canada for them to get divorced in Canada. To start a divorce in Ontario, at least one of them has to have lived in Ontario for the 12 months preceding the divorce application. However, if both people live outside Canada in a country that does not recognize Canadian marriage, they may be able to obtain a divorce under the *Civil Marriage Act*.

In order for either party to remarry under Canadian law, the couple must be legally divorced.

## HOW DIVORCE HAPPENS (continued)

### MUSLIM LAW

language, but given the seriousness of the matter, most believed that the language must clearly reflect the intention to end marriage for repudiation to take place.

The standard form of repudiation (*sunna*) must occur at a time when the woman is not menstruating. It is done through the husband's unequivocal oral expression of repudiation (*talaq*). This is the proper process of *talaq*, which is considered revocable (*raj'i*). After this expression is uttered, the wife should remain in her husband's home for a waiting period (*'idda*) consisting of three menstrual cycles. If *talaq* occurs during menstruation, most jurists would consider it valid, although not strictly proper (*sunna*), and a minority of jurists argued that the husband may be ordered to revoke such repudiation.

This standard (*sunna*) *talaq* is revocable in the sense that the married couple may simply resume their marital relations and thus the marriage would resume. However, only three 'revocable' repudiations may be effected in one marriage, following which the dissolution of marriage becomes final. It also becomes final if the *'idda* period elapses without resumption of marital relations.

### CANADIAN LAW

Both the husband and wife have the right to initiate divorce, whether or not the other party approves.

Section 7.7(2) of the revised *Divorce Act* (section 9 of the current *Divorce Act*, which remains in effect until June 2020) requires lawyers to discuss the possibility of reconciliation with their clients and to inform them of services that might assist them in reconciling them with their spouses "unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so."

According to case law, reconciliation need not be discussed in situations of an extremely lengthy separation, a well-established subsequent relationship, children from a subsequent relationship or mental and physical cruelty.

Lawyers are also required to discuss with clients the advisability of negotiating matters that might be subject to a support or custody order. Lawyers must provide a statement certifying that they have had such discussions with their clients as part of their divorce application.



## HOW DIVORCE HAPPENS (continued)

### MUSLIM LAW

Once dissolution is final, the couple may not resume marital relations at the risk of committing adultery (*zina*). The marriage may not be concluded once again, unless the former wife marries another man, consummates the marriage, and then separates from him.

Marrying another man for the sole purpose of being allowed to return to the former husband is both illegal and reprehensible.

Besides the standard form of *talaq* mentioned above, many Sunni schools recognize the non-standard (*bid'a*) triple-*talaq*, whereby a husband repudiates his wife three times at once. Shi'i scholars largely dismiss the validity of such practice, and even within Sunni schools it is seen as a discouraged innovation. When such triple-*talaq* takes place, the marriage becomes instantly and irrevocably dissolved.

A man may repudiate his wife in person or through proxy (*wakil*). This ability to grant someone the authority to effect *talaq* may be used by women to obtain the right to terminate their own marriage through delegation from the

### CANADIAN LAW

The court, too, is meant to satisfy itself that reconciliation is not possible. If at any stage in the divorce proceeding, the court believes there is a possibility of reconciliation, it shall adjourn the proceeding and give the spouses an opportunity to reconcile.

Divorce will not be granted if the court is not satisfied that reasonable child-support arrangements have been made. Also, the court can withhold granting the divorce in cases where an applicant is involved in subverting the administration of justice through suppressing or fabricating evidence.

## HOW DIVORCE HAPPENS (continued)

### MUSLIM LAW

husband. This is a valid and common arrangement, and, according to many schools, is irreversible. Once a woman is delegated the right to dissolve the marriage on her husband's behalf, she can exercise that right at any time.

Besides the waiting period, revocability of *talaq*, and the irrevocability of a final dissolution, classical jurists have also designed the law in such a way as to make repudiation potentially financially onerous for the husband. Upon repudiation, the husband must pay all the delayed dower (*mu'akhar al-sadaq*) immediately, and will continue to provide child support and, in certain cases, marital support for up to two years.

Other ways in which a Muslim marriage contract ends include the wife-initiated *kh* proceeding, in which the wife requests a dissolution of marriage in exchange for releasing the man of his obligation to pay the delayed dower and other possible monetary concessions. This is considered a negotiated type of dissolution in the classical doctrine.

### CANADIAN LAW

## GROUNDS FOR DIVORCE

### MUSLIM LAW

Besides unilateral or delegated repudiation (*talaq*) and negotiated dissolution (*khul'*), traditional law also recognizes the woman's right to request a judicial termination of the contract, also referred to as separation (*tafriq*) or (*faskh*).

Unlike the man's right in *talaq*, a request for judicial separation can only be granted if the woman is able to provide sufficient grounds for the dissolution of marriage. This is typically achieved by showing that the husband has failed to fulfill his basic marital obligations, such as providing financially for his wife and children. Judicial separation can also be demanded by the wife if her husband has been missing for six months or more, or if he has not made himself sexually available for four months.

Besides disappearance or fundamental failure to fulfill marital obligations, most schools do not allow judicial separation for a wide variety of reasons. This could be understood through the notion that traditional judges in Islam see themselves primarily as mediators who attempt to

### CANADIAN LAW

The *Divorce Act* allows one ground for divorce— marriage breakdown. A marriage breaks down when the couple has been living separate and apart for at least one year, either spouse has committed adultery, or either spouse has treated the other with such physical or mental cruelty that it is no longer possible for them to live as husband and wife.

*Living separate and apart for at least one year:* For this ground to be valid, the spouses must have been living separate and apart for one year immediately prior to the divorce proceedings and should continue to do so when the proceedings end. While the separation must be physical, a couple can be considered to be physically separated even if they continue to live in the same house. There also needs to be a recognition that the marriage is over; this need only come from one of the spouses.

While the end of sexual intercourse is not a conclusive factor in determining whether the couple is living separate and apart, it is nonetheless taken into consideration.

Other factors to be considered are whether the spouses continue to communicate; whether they socialize together; whether others view them as a couple; whether they have separated their financial obligations and responsibilities; and how

## GROUNDS FOR DIVORCE (continued)

### MUSLIM LAW

reconcile differences, rather than mere formal enforcers of the law. The Maliki school, however, recognizes the wife's right to file for separation for harm (*darar*), such as in the case of domestic violence. Another ground for judicial separation for the Malikis is discord, or deep and irreversible disharmony among the married couple. It must be noted, however, that most traditional mediators will attempt to intervene to reconcile the marriage, possibly through the intervention of elders.

By contrast, many modern Muslim states have incorporated mechanisms for judicial dissolution of marriage either through *tafriq* or *khul'* that take into account different forms of abuse and irreparable disharmony.

### CANADIAN LAW

they share responsibility for the children.

During the one year of living separate and apart, couples undergoing an attempt to reconcile can resume living together for up to 90 days without interrupting the calculation of the one year.

*Adultery:* Where one spouse commits adultery, the other spouse may use this, with proof, as a ground for divorce. The spouse committing adultery cannot use it as the ground – only the other spouse. If the adultery happened many years before and was known to the applicant, who continued with the relationship regardless, it will be difficult to have adultery accepted as the basis of a divorce.

*Physical or mental cruelty:* For a divorce application to succeed on this ground, cruelty and its intolerability must be established. If a spouse was mentally or physically abusive to the other spouse before they married and continued that abuse after marriage, it would be difficult to use this ground because of the requirement that the cruelty be intolerable to continued cohabitation.

Where the grounds for divorce are either adultery or cruelty, there is no requirement that the parties live separate and apart for one year.

## FOLLOWING A DIVORCE

### MUSLIM LAW

Upon ordinary repudiation, the former husband must continue to provide for his wife throughout the waiting period. Once the dissolution is final, the man must immediately pay all delayed dower, which sometimes amounts to significant sums. The former husband must continue to provide child support, and may be required to pay marital support for a limited period. Since there is no concept of family property in Islam, property belonging to the wife remains hers, and property belonging to the husband remains his.

Division of property and other payments between the former spouses are an important part of divorce. Please see documents titled, "Custody and Child Support" and "Family Property and Spousal Support" for more information.

### CANADIAN LAW

The value of property acquired over the course of the marriage, as well as the matrimonial home even if it was bought before the marriage, is to be shared equally between the spouses upon marriage breakdown, regardless of whose name it is in and who paid for it.

When determining the amount of spousal support, the courts consider factors such as length of cohabitation; functions performed within the family unit by both partners; any agreements entered into by the partners; current and likely future assets and means of the parties; the dependent partner's capacity to contribute to their own support; and the parties' ages and physical and mental health.

## JURISDICTION

### MUSLIM LAW

As with all matters of family law, individuals are highly urged to carefully ascertain which jurisdictions recognize their marriage, and what laws are applicable. If a marriage is concluded according to the laws of a modern Muslim-majority state, termination has to be done according to the laws of the same state. Informal arrangements through religious figures, either in concluding or dissolving a marriage, may not be recognized under state laws if the proper process is not followed.

### CANADIAN LAW

Divorces granted outside Canada are recognized by Canadian courts. However, if a couple has been married under Canadian law and later divorces according to religious law, their divorce will not be valid and they would still be viewed as married under Canadian law.



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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