

INHERITANCE

Muslim and Canadian Family Laws



RESOURCE 6 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**

For more information

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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.

Inheritance



INTRODUCTION

MUSLIM LAW

Muslim laws of inheritance are among the few areas of law that are addressed by relatively detailed Quranic provisions (see verses 7 to 12 of Surat al-Nisa'). Perhaps one of the most striking features of Muslim inheritance regimes is the relatively limited role of bequests, which is limited by law to a maximum of one third of the deceased's estate, following payments of all debt, including delayed dower (*mu'akhar al-sadaq*) and funeral expenses. After payments of debts and bequests, the estate is divided in shares of one half, one quarter, one eighth, two thirds, one third, and one sixth, among a group of specific blood and marriage relatives following detailed Quranic injunctions. In general, males will receive double the inheritance of females who are in the same category.

CANADIAN LAW

The manner in which people can determine what happens to their money, property and belongings after they die is governed in Ontario primarily by the *Succession Law Reform Act*.

Individuals are free to leave instructions, via a will, to have their property disposed of in any way they wish.

When one spouse dies and leaves a will, the surviving spouse has the right to take the property as specified in the will or to receive their entitlement under the *Family Law Act* (section 6).

CALCULATION OF INHERITANCE

MUSLIM LAW

CANADIAN LAW

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FEMALE HALF-SHARE RULE

MUSLIM LAW

The female half-share rule is established by verse Q.4: 11: "God instructs you concerning your children: for the male, what is equal to the share of two females." Because of this unequivocal injunction, this rule has been difficult to reverse in Muslim law. However, parents of daughters have generally found many ways to increase their daughters' shares, either through bequests or the establishment of a trust (*waqf*) and designating the daughters as beneficiaries. Another option is to divide a portion of the parents' property among the children while they are still alive. As stated above, the half-share rule only applies to males and females in the same category (i.e. sisters in relation to brothers), so the rule does not mean that a daughter will inherit half of an uncle or grandfather, for example.

Many explanations of the half-share rule were ventured throughout history. Some of them are historical: it has been historically the case that males

CANADIAN LAW

There is no such requirement in Canadian law.

FEMALE HALF-SHARE RULE (continued)

MUSLIM LAW

were the primary breadwinners and providers for their families, but that is no longer necessarily the case. Others argued that, like many other things, the Quran was attempting to reach an ideal of gender equality in a gradual manner, since in seventh century pre-Muslim Arabia women did not inherit at all. In all cases, it is understood that the Muslim inheritance system is deeply rooted in a reformist attitude towards the tribal practices that were predominant before Islam, such as withholding inheritance from daughters, distant relatives, and generally the more vulnerable. The intricate system of inheritance was designed to ensure that those who control the estate do not get to dispose of it as they please in an arbitrary manner.

In modern Muslim-majority states, most continue to apply the female half-share rule, although some, like Tunisia, have begun to adopt an egalitarian regime.

CANADIAN LAW

WHO MAY NOT INHERIT

MUSLIM LAW

Non-Muslims do not receive inheritance in Islam. The same goes for stepchildren. Since Muslim law does not recognize adoption, any children that are cared for by the deceased who are not biological descendants can only inherit through bequests.

CANADIAN LAW

Anyone may be specified in a will to inherit all or part of an individual's property.

Since adoption is legal under Canadian law, adopted children are considered as dependents and can also inherit, nor is there any legal distinction between children born inside or outside marriage.



VALIDITY OF THE WILL

MUSLIM LAW

A will is not required, but is valid within the limits of one third of the estate.

CANADIAN LAW

To be valid, a will must be in writing and be signed by two witnesses. The exception to this rule is a will written entirely by the testator in their own handwriting, which does not require any witnesses. A will is revoked if the testator gets married or divorced, writes a new will or gives written instructions to revoke the will.

International wills are recognized by Canada if they are properly executed e.g., in writing and witnessed.

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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