

# MARRIAGE

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## Muslim and Canadian Family Laws



RESOURCE 2 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.

# Marriage



## INTRODUCTION

### MUSLIM LAW

Marriage in the Quran is understood as a union between a man and a woman. The foundation and most important principle of this union is peaceful companionship and tranquility. This idea can be found in several places in the Quran, most notably verse 30:21: "And of His signs is that He created for you from yourselves mates that you may find tranquility in them; and He placed between your affection and mercy. Indeed, in that are signs for a people who give thought." As this verse makes clear, the primary purpose of marriage is the maintenance of a relationship built on courtesy (*mawadda*) and sympathy (*rahma*).

In classical substantive Muslim law (*fiqh*), marriage was understood as a civil contract between the bride and groom. Whereas the contract is formed, like any other contract, through exchange of offer and acceptance between the two parties, the contract of

### CANADIAN LAW

In Canada, the federal government, through the *Marriage (Prohibited Degrees) Act*, regulates who can marry whom. The administration of marriage falls within the jurisdiction of provincial governments. This means that each province can set its own rules for how marriages take place. In Ontario, the relevant legislation is the *Marriage Act*.

## INTRODUCTION (continued)

### MUSLIM LAW

marriage was also understood by the classical jurists as a central social institution of tremendous importance and far-reaching effects on such socially critical issues as procreation, lineage, inheritance, and the preservation of social peace.

The exchange of offer and acceptance, the main condition of marriage, can be done orally by the bride and groom, or their designated representatives of legal guardians. A written contract is not strictly necessary in the classical tradition. Besides mutual consent, the contract of marriage has two other important conditions: there must be a dower (*mahr*, or *sadaq*), representing a gift to the bride, and the marriage cannot be secret. A secret marriage, in Muslim law, is considered null and void.

### CANADIAN LAW

## WHO CAN GET MARRIED?

### MUSLIM LAW

In general, any two Muslims of opposite genders can get married if there are no obstacles to their marriage and they meet the formal requirements for a valid marriage contract. In classical doctrine, Muslim men are also allowed to marry a Christian or Jewish woman. Traditional doctrine rejects marriage between a Muslim and an unbeliever. In the classical tradition, scholars required a certain degree of “compatibility” between the bride and groom. This typically meant a certain equivalence in social, cultural, and financial status. This requirement has generally been left out of modern laws of Muslim states, given the difficulty of determining compatibility in a modern, urban, inter-connected world. Still, many religious scholars today will view compatibility (in the sense of proximity in values) as a desirable feature in marriage. Divorce is permissible but discouraged in Muslim law. Remarrying after a valid divorce is allowed.

### CANADIAN LAW

Any two unmarried adults may marry, with a few restrictions as outlined below. Any individual who has previously been married can remarry in Ontario if the previous marriage has been dissolved in a manner recognized under provincial law. Same-sex marriages are legal.



## WHO CANNOT MARRY?

### MUSLIM LAW

There are three main reasons for which marriage between two people may be prohibited: through blood, marriage, or breastfeeding. Blood relatives whom a man may not marry are specifically enumerated in the Quran: the mother and all female ancestors, the daughter and all female descendants, sisters and half-sisters, aunts of either side, and nieces. Women a man cannot marry because of other marriage relations include: mothers-in-law, daughters-in-law, step mothers, and step sisters. It is also prohibited to marry two sisters, or a woman and her aunt, simultaneously.

The same types of prohibition in relation to in-laws arise in the case of milk kinship, whereby the breastfeeding woman is considered to be a mother for marriage purposes. There is no prohibition against marriage among first cousins.

Classical schools of law allowed a man to marry up to four women at a time, and a woman only one man at any given moment.

### CANADIAN LAW

The *Marriage (Prohibited Degrees) Act* specifies that a person cannot marry someone to whom he or she is related by blood or adoption. For example, full, half and adoptive siblings cannot marry. Parent-child and grandparent - grandchild marriage is also prohibited. Marriage between first cousins is generally taboo but not illegal in most of North America.

## MINIMUM AGE FOR MARRIAGE

### MUSLIM LAW

Under traditional laws, there are no formal age limitations on the time in which the contract can be formed. Most classical scholars granted fathers the right to promise their minor children who are under nine in marriage. This right, however, is specific to the father alone. Any other guardian is not allowed to promise a minor in marriage, unless he or she specifically empowers them to do so.

Consummation of the marriage, however, cannot take place until both parties have reached puberty and are physically and mentally prepared to bear the responsibilities of a family. Most countries where Muslim personal-status law is applied have introduced a minimum age for marriage.

A vast majority of those countries have set the minimum age at 18 for both women and men.

### CANADIAN LAW

Under Ontario's *Marriage Act*, any two people who are at least 18 years of age may marry. If either party is between 16 and 18 years of age, the couple may marry with the written consent of both sets of parents. Regulations on the legal marrying age may vary from province to province.

## WHO CAN SOLEMNIZE A MARRIAGE?

### MUSLIM LAW

As mentioned above, marriage in Islam is a civil contract that can be formed like any other contract: through the exchange of offer and acceptance between the two consenting parties or their legitimate representatives, in the absence of legal barriers to concluding the contract. This offer and acceptance can be done orally, as there are no formal or ceremonial requirements. For the contract to have any effects in Canada, however, the marriage must be registered with Canadian provincial authorities, which is important for the recognition of legal rights under Canadian law.

In Canada, many imams or other recognized leaders are authorized by Canadian law to register the marriages they solemnize. Alternatively, a couple can also go through a separate civil ceremony to register the marriage.

### CANADIAN LAW

Marriage in Ontario can be solemnized by either a civil or a religious ceremony. In a civil marriage, the parties purchase a license from the municipal clerk, and the solemnization is performed by a judge, justice of the peace or any other person authorized to do so. Although there is no particular formula to be followed, certain statements must be made by each party and by the person solemnizing the marriage.

In a religious marriage, the ceremony is conducted by any individual who is “authorized to solemnize marriage” under the Minister of Consumer and Business Services. In Canada, most imams are authorized to solemnize and register marriages.

The person who solemnizes the union must register the marriage and complete a Statement of Marriage Form and file it with the Registrar General within two days of the event.

## REQUIREMENT OF A WITNESS

### MUSLIM LAW

All traditional Muslim scholars agree that marriage cannot be secret. This is a requirement that is said to follow from an injunction of the Prophet to “publicize marriage and beat the drums to celebrate it.” Any secret marriage (i.e. one that is known only by the married couple and their representatives), is void. Most Sunni scholars, moreover, view the presence of two morally upright Muslim witnesses as a formal requirement.

They disagree, however, on whether it is possible for a marriage to be kept a secret between the couple and the witnesses. Whereas Malikis consider this a secret marriage, and therefore null and void, Hanafis and Shafi’is consider the marriage valid as long as the formal requirement of two witnesses was fulfilled. Shi’i scholar also have differing opinions.

Some say that, while it is not necessary to have witnesses to a marriage contract, it is still recommended. Others agree with the majority that the presence of witnesses is a formal requirement.

### CANADIAN LAW

At least two adults must witness the solemnization, whether religious or civil.

## ROLE OF THE GUARDIAN

### MUSLIM LAW

A fundamental principle of classical Muslim family law is that no person should be married against their will. Whereas different schools of law set up different requirements, varying from obligatory to recommended, to conclude marriage through a guardian (*waliy*), this does not allow the guardian to marry their ward against their will. The only exception to this rule is in the case of a minor under nine who is given in marriage by their father, or, in the absence of the father, by their paternal grandfather. This is a very narrow exception to the rule, and limited by various considerations of benefit and the minor's welfare.

In nearly all cases, however, the rule is that a representative of any kind must ensure that the consent of both parties is given in clear terms. Once the bride and groom have clearly expressed their consent, the guardians may not withhold their consent without a good reason. Whereas all the classical schools agree that it is desirable for the bride to be

### CANADIAN LAW

Canadian law does not require guardianship except for children 16 to 18 years of age. If either party is between 16 and 18 years of age, the couple may marry with the written consent of both sets of parents.

## ROLE OF THE GUARDIAN (continued)

### MUSLIM LAW

represented by a male guardian in the conclusion of marriage, they disagree on whether such representation is a condition of validity. Only the Malikis held that all brides need to be represented by an adult male Muslim relative for the contract to be valid.

Some scholars believed that this rule only applies to previously unmarried women. The majority found that the requirement of a representative was desirable but not strictly obligatory. Shi'i scholars, by contrast, disagree on the power of a guardian in marrying off a virgin without her consent.

According to some, the power of the guardian ceases when she reaches puberty; others say that it continues.

### CANADIAN LAW

## TYPES OF MARRIAGE

### MUSLIM LAW

Sunni schools are unanimous in prohibiting temporary (i.e. *mut'ah*) marriage. This is thought to be an injunction that followed from a Prophetic report, but there is disagreement as to when and under what circumstances the Prophet prohibited such marriage. Some Shi'i scholars allowed *mut'ah* marriage, and required that a gift be made to the temporary wife.

Under such circumstances, the marriage does not result in inheritance rights between the two partners, but children of temporary marriages are considered legitimate.

Other types of marriage that have been unanimously prohibited include marriages in which the bride had been engaged (i.e. promised in marriage) to two men simultaneously, and cases in which two men promise in marriage to one another and two minor females are under their guardianship.

### CANADIAN LAW

Marriage in Canada must be registered in court by way of a civil or religious ceremony. Couples in common-law unions can contract to set out their rights and responsibilities through a cohabitation agreement. Same-sex marriage has been legal in Canada since 2005.

# BIGAMY AND POLYGAMY

## MUSLIM LAW

Traditional Muslim doctrine grants men the right to marry up to four women simultaneously. Women are only allowed to marry one man at a time. This was generally understood to follow from an interpretation of verse 3 of Surat al-Nisa': "And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those your right hand possesses. That is more suitable that you may not incline [to injustice]."

Classical doctrine established significant conditions on a polygamous husband aimed at ensuring fair treatment of all wives, including setting the man's financial ability to provide for all wives as a precondition to polygamy, and imposing an obligation on the husband to care for all wives equally, both in terms of financial support, time spent together, and affection.

Many modern interpretations of such verse have been advanced that argue that the Quran's purpose was in fact to gradually

## CANADIAN LAW

Bigamy and polygamy are prohibited under the federal *Criminal Code*. The people entering into a bigamous or polygamous marriage, as well as anyone who "celebrates, assists or is a party to such a rite, ceremony, contract" is liable to a maximum penalty of five years' imprisonment if they are charged and found guilty in court. Exceptions exist where a party has reasonable grounds to believe that his or her spouse is dead or where the other spouse has been continuously absent for at least seven years.

There have been very few prosecutions for bigamy or polygamy over the past century, although two religious leaders from the Fundamentalist Church of Jesus Christ of Latter Day Saints were convicted of polygamy in 2018. In a polygamous marriage, the legal status of the subsequent wife is ambiguous. If she entered into a polygamous marriage knowingly, then her marriage is valid only under religious law. She is without rights under civil law.



## BIGAMY AND POLYGAMY (continued)

### MUSLIM LAW

eliminate polygamy, in the same way it attempted to gradually eliminate slavery and wine-drinking. In all cases, it is important to note that polygamy is a criminal offence in Canada.

Spouses in a polygamous marriage run the risk of criminal prosecution, although this is rare, and may not enjoy all the protections afforded under Canadian family laws.

### CANADIAN LAW

However, she may be able to acquire some of her rights if she is able to prove she was unaware of her husband's existing marriage. If she entered into a polygamous marriage in a country that recognizes polygamy, she may have some rights for example, to support and a share of her spouse's property) under provincial family laws in Canada.

Further, a parent will have child support responsibilities regardless of whether they were married, in a polygamous relationship, lived common-law or never lived with the other parent of the child/ren.

Generally, though, women who consent to a polygamous marriage on the basis of religious or cultural beliefs are left in a very vulnerable position under Canadian law.

## RIGHTS AND DUTIES IN MARRIAGE

### MUSLIM LAW

There are a set of basic rights that follow from the conclusion of a valid marriage contract in Islam. As we saw, dower (*sadaq*) is due to the bride by the groom. Technically, dower is a condition of validity of marriage, rather than a duty under the contract, although often payment of part of the dower is deferred.

Classical Muslim scholars agree that the husband must support his wife financially, including providing a suitable place to live, sustenance, and clothing. The husband also provides for the children. The degree of financial support and exact amounts and goods provided varies according to the husband's means and what the wife had been habituated to prior to marriage. Some classical scholars also believed that a husband must provide domestic help to his wife upon request if she is not habituated to performing domestic chores, and if it is within the husband's means.

The wife's primary obligation under the marriage contract is to remain in her husband's domicile, and to provide companionship. All other alleged obligations are subject to much disagreement among the classical jurists.

### CANADIAN LAW

Marriage contracts are made under the *Family Law Act* and can include any number of stipulations defining the rights and duties of both spouses within the marriage. There are certain conditions, however, that are not enforceable, even if they are part of the marriage contract.

Section 52(1)(c) 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.

Moreover, provisions that make the rights of a party dependent upon remaining chaste are unenforceable.

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

## RIGHTS AND DUTIES IN MARRIAGE (continued)

### MUSLIM LAW

A majority of the jurists argued that the new mother is under a legal obligation to breastfeed her infant if she is physically capable of doing so, but other jurists held that there is no such obligation.

The majority of scholars viewed house chores as optional for the wife, and in fact maintained that the husband may be under an obligation to provide help under certain conditions. However, some have argued that, if offering domestic help is outside of the husband's means, and the wife is accustomed to domestic work, then it becomes incumbent upon her to help with housework.

The classical jurists viewed the distinct obligations of each spouse as reciprocal and interdependent. If a wife quits her house (i.e. leaves indefinitely, rather than simply goes out to visit her family), the husband is entitled to suspend financial support. Conversely, if a wife leaves her marital domicile while the husband is unable to support her financially or pay her dower, she is not considered in breach of the marriage contract (*nashiz*). It is important to note that withholding sexual intercourse is not considered disobedience (*nushuz*) under the classical doctrine.

### CANADIAN LAW

it has been signed, the courts cannot usually intervene and set it aside.

Under Canadian law, abuse of any kind within the marriage is illegal and can lead to criminal charges. There is no acceptance of disobedience (or discipline) of wives.

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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