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MUSLIM & CANADIAN FAMILY LAWS: A COMPARATIVE PRIMER

L. Clarke & P. Cross

MUSLIM & CANADIAN
FAMILY LAWS:
A C O M P A R A T I V E P R I M E R

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PREFACE

This book provides comparative information about Canadian and Muslim laws relating to the family, particularly as they pertain to women's rights. We hope it will be of assistance to, among others, 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. Our primary goal, however, is to provide information to Muslim women. We want Muslim women to have access to information about the law so that they can make informed choices and decisions.

While no book could ever be exhaustive, we hope we have addressed the most significant areas of family law: marriage, divorce, property and spousal support, child custody and support, inheritance and domestic contracts. We have also examined related matters such as restraining orders, mediation and arbitration, and access to justice. The section on Canadian law in this book focuses on federal laws as well as the laws of Ontario. Laws of other Canadian provinces are generally very similar in content, although the names of the statutes vary from province to province.

Canadian law offers women many positive possibilities not offered by private law of any kind, including religious law, whether Muslim, Jewish or Christian. Laws are written by government, which is accountable to the public through the electoral process. Those laws are consistent across the country and apply in the same way to all who use them. They must conform with the *Charter of Rights and Freedoms*, which contains important protection for women's equality rights. Court proceedings are a matter of public record, and bad decisions can be appealed. People involved in court proceedings have the right to legal representation and may have access to legal aid if they cannot afford to pay their own lawyer. Of course, even all of these protections do not mean that every woman will be happy with the outcome of her case.

The information given in the following pages about Muslim law is not definitive. It should be viewed as a starting point only. As we have made clear in the introduction to that section, Muslim law is not a unitary, codified system, but an evolving body of thought with diverse rulings and applications. Muslims themselves have very different ideas about what the law is or ought to be and about how and to what extent it should apply in their lives. Some may also confuse local customs and practices with religion.

The *Primer* can help users to understand and deal with the positions of clients and adversaries in a general way, but it cannot predict or explain all claims exactly. Professionals are advised to spend time in conversation with their clients in order to discover their views and expectations of the law, and also, if possible, to ascertain the views of persons with whom their clients will be involved in legal proceedings. Offering clients this book may help them to examine and clarify their ideas.

Muslim women may discover in this *Primer* not only some of the disadvantages of Muslim law but also potential advantages such as a properly secured dower and domestic contract. We hope that women will read this book, inform themselves further and ask questions *before* marriage. Independent awareness, knowledge and debate are the best instruments for dealing with any set of laws.

This book is not a substitute for independent legal advice and representation. Any reader concerned about family law is urged to speak with a lawyer experienced in family law before making any decisions. Canadian law is current to the date of publication. Laws are in a constant state of flux, and if you are reading this book more than six months after the publication date, you are encouraged to verify that the information contained in it is current. Canadian custody law, in particular, is under review and likely to see significant change within the next year. More detailed information about family law, especially as it affects women, can be found on the website of the Ontario Women's Justice Network at www.owjn.org.

ACKNOWLEDGEMENTS

I would like to thank those who helped me with the Muslim part of this *Primer*, though they remain anonymous. Many women, members of the Canadian Council of Muslim Women and others, told me about their concerns and contributed their own stories. I could not have selected relevant material from the law without their help. I would especially like to thank Sister X, who gave me much insight into the lives of women living by Muslim law in Canada. A group of CCMW readers and students from my courses “Women and Religion: Islam” and “Issues in Islamic Law” pointed out gaps and helped me to simplify and shorten the sections on Muslim law. Several imams consented to interviews and a *sharia* court judge working in the Arab world reviewed the entire manuscript for errors. Any errors that remain are my responsibility alone.

Gratitude is due to Alia Hogben, Nuzhat Jafri, Eman Ahmed and other members guiding the CCMW who exercised patience as my Muslim law project turned into a longer process than expected.

L. Clarke

The success of a project like this rests with many people. In particular, I learned a great deal about Islamic beliefs and traditions and the realities of Muslim women from both Lynda Clarke and Alia Hogben of the Canadian Council of Muslim Women. I greatly appreciate their patience and generosity in sharing their vast knowledge with me.

I especially want to acknowledge the many women who have left abusive relationships and were willing to share their experiences in dealing with the legal system. Without their stories and information, my descriptions of Canadian family law would have neither integrity or reality.

P. Cross

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1 INTRODUCTION TO MUSLIM FAMILY LAWS

1.1 WOMEN IN THE QURAN AND SAYINGS OF THE PROPHET

The Quran regards women as spiritually equal to men, even taking care to specifically include women in passages dealing with spiritual duties and rewards...

The Quran is considered by Muslims to be entirely the Word of God, sent down to His prophet Muhammad through the angel Gabriel. The Quran regards women as spiritually equal to men, even taking care to specifically include women in passages dealing with spiritual duties and rewards, for example as in chapter 33, verse 35: “God has prepared great forgiveness and reward for both men and women who surrender to Him, for both men and women who believe, for both men and women who obey...” Good and kind relations between husbands and wives are also highlighted in the Quran.

Records of the sayings and doings of the Prophet, called *hadith*, or “anecdotes,” are a kind of secondary scripture. The sayings of the Prophet considered by Muslims to be the most authentic maintain the same respect for women’s spirituality and male-female relations. For example, men are promised a special reward for bringing up daughters (e.g., Tirmidhí, Sunan, *K. al-birr wa-al-silah, má já’a fí al-nafaqah ‘ala al-banát*¹) and urged to properly maintain their families (e.g., Bukhárí, *K. al-nafaqát, fadl al-nafaqah ‘ala al-abl*²).

The moral tone of the Quran and *hadith* helps to guide Muslims in their views and actions. Most Muslims believe that their religion, if correctly understood and applied, is favourable toward women. There is much evidence that the Prophet Muhammad (or God through the Quran, according to the beliefs of Muslims) intended to raise the position of women. For instance, the Quran strongly reproaches parents who are unhappy at the birth of a female child (16:58-59), condemns female infanticide (81:8-9) and guarantees a right to inheritance for wives and other females who had previously been excluded in the old Arabian tribal system.

1.2 THE ROLE OF INTERPRETATION: A BACKGROUND FOR NON-MUSLIMS

...there is wide disagreement among Muslims concerning both the correct approach to the law and the position of women within it.

Islam, like Judaism, is a law-based religion. The law of God is known as *sharia*, which means “way.” Although Muslims in the West are not formally ruled by Muslim law, many aim to understand its spirit or letter and apply it in their lives.

However, there is wide disagreement among Muslims concerning both the correct approach to the law and the position of women within it. Canadian professionals who find themselves dealing with aspects of

¹ *Book of Piety*, chapter on maintenance of daughters.

² *Book on [standards of] Maintenance*, chapter on the virtue of maintaining one’s family.

Islam in their work may find these represented to them in very different ways. It would not be surprising to find two persons insisting on quite different “truths” concerning the same point of the law. In order to sort out claims and advise clients, it is necessary to understand the reasons behind these differences.

One reason for differences in the understanding of Muslim law stems from the workings of the law itself. Muslim law does not consist only of the word of God or sayings of the Prophet. It is a large body of work built up by many dedicated scholars through the centuries. Among these scholars, there are different understandings of what of the law is.

There are four Sunnite and several Shiite schools of law, and each has its own interpretations and rules. Even scholars within the same school may disagree on the exact details of the law. The system allows these disagreements.

Muslim law has also been redefined in the current legal systems of Muslim countries. State reforms are usually justified in terms of religion – for instance, through reinterpretation or by selecting the most progressive opinions from among the different schools and scholars. Reform has been underway for two centuries and continues today. As a result, there are a great many differences between the laws of Muslim nations.

The five main schools of Muslim Jurisprudence

The five schools are: Hanafite, Malikiite, Shafiite, Hanbalite and Shiite. The Hanafite school is the most widespread, covering much of the Indian Subcontinent and Middle East. The Malikites are predominant in North and West Africa. Indonesia is one centre of the Shafiite school. And Iran is the chief Shiite country in the world. The Hanbalite school is geographically the least widespread, but it has much appeal for “fundamentalists” and is part of the background of the Wahhabites established in Saudi Arabia.

1.2.1 Reformists vs traditionalists

In addition to differences due to the workings of the law and modern state reforms, individual Muslims have very different views of the nature of the law. Understanding this background can be very helpful when dealing with claims relating to Muslim law.

Reformists believe that the part of Muslim law treating social intercourse³ was meant to be constantly reinterpreted according to time and place, in order to facilitate the lives of Muslims and to continue to reflect basic values in different kinds of societies. A similar but more radical view holds that the rules of the traditional law (that is the law formed from the eighth century onward and applied until modern times) were the work of well-intentioned jurists who did not, however, fully realize the egalitarian intent of the Quran and the Prophet, making it necessary to completely rethink the system in modern times. In the view of this group, the developed Muslim law of the jurists and schools is not equal to Quranic law. (It is true that Muslim laws are often at variance with the spirit and even the letter of the Quran, as readers will see clearly in section 4, Divorce.)

Other Muslims regard the rules of the traditional law as fixed. (Since “fundamentalist” has negative connotations, such persons shall be referred to as “traditionalist,” a relatively neutral term.) Those

³ Muslim law also extensively covers rules relating to rituals such as prayers and pilgrimage. This part of the law has caused much less controversy, since it chiefly concerns the personal relations of believers with God and thus has limited social impact.

who hold such beliefs are likely to equate their understanding of law with *sharia*, the ideal “path” of life intended by God. In the view of traditionalists, the law is the timeless reflection of an ideal, divinely-ordained pattern of social relations, and any deficiency we see in Muslim society today is due to failure to follow the rules that would realize that pattern. If Muslims (it is believed) were to strive together to follow the law as closely and literally as possible, the ideal Islamic society would be re-created, with everything in its right place and the greatest possible justice and happiness for all. Women in particular would find themselves respected and protected as they comfortably fulfilled their natural roles.

Reformists, on the other hand, point out that the term usually used for law is *fiqh*, or “understanding,” indicating that it is a product of the human mind and therefore fallible. This fallible human understanding of God’s law, reformists believe, is meant to be constantly questioned and revised.

Traditionalism also emphasizes the concept of *ijmā*, or “consensus,” according to which rules and behaviours legitimately practised by the community over time are sanctioned and cannot be reversed. Groups that view Muslim law as fixed may declare Muslims who do not conform or submit to their definition of *sharia* as not true believers. For the traditionalists, each rule or norm is a necessary part of Islam, and any attempt to change the law must be resisted.

This is an elementary characterization of attitudes toward Muslim law. There are, of course, other approaches lying between the two poles.

1.2.2 Canadian Muslim communities

The Canadian Muslim communities are relatively new. Although small numbers of Muslims began dwelling in Canada at least a century and a half ago, Islam in Canada has experienced its greatest growth only in the past few decades. Canadian Muslims, including converts, are also very diverse, tracing their origins to dozens of nations across the globe.

A basic difficulty in dealing with Muslim laws in Canada is that it is not known exactly what any individual will claim them to be.

This new and diverse community is just now in the process of developing institutions and defining its 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. A basic difficulty in dealing with Muslim laws in Canada is that it is not known exactly what any individual will claim them to be.

In Muslim nations today, some version of Muslim law has been selected, reformed and codified, and the law is a matter of public record and debate. But there is no one standard among Muslims in Canada and other non-Muslim countries. Not only reformist ideas but also aspects of the original traditional law now out of use in most Muslim countries may be brought into play.

Revisiting the traditional law is a significant trend in communities in the West, as many Muslims believe that true religion lies in these texts.

The problem of different understandings and interpretations is complicated by the informality of religious authority in Islam.* A religious expert in Islam is not formally ordained but is known to the population through his (or her) learning and piety. In the West, this has resulted in persons of various backgrounds and education (including those in technical fields) putting themselves forward as religious and legal authorities. Many of these new Western experts are males of a somewhat conservative bent who aspire to the power conferred by authority in religion and the law. However, the free space opened for discussion in the West has also allowed some liberal thinkers, including women, to enter the conversation.

Canadian Muslims also disagree on the extent to which believers dwelling as a minority in a non-Muslim country need to be directed by Muslim law, if at all. Some insist that, in order to live a true Islamic life, the believer must scrupulously seek out and follow legal rulings while maintaining a conservative lifestyle. Others reject a legalistic approach and believe that they are instead called to realize the ethical content of their religion.

Canadian Muslims also disagree on the extent to which believers dwelling as a minority in a non-Muslim country need to be directed by Muslim law, if at all.

There also exists a view that Canadian law, since it advances ideals such as equality and the security of women and children, is not only valid for Muslims as citizens of the nation but is also according to Islam.

The question of how and to what extent the law should rule the lives of Western Muslims has not been very prominent until recently. Certainly the suggestion that believers living as a minority must in some way be formally governed by a law and system removed from the law of the larger society is a novel one for Muslims living in the West. The idea seems to be an echo of traditionalist (fundamentalist) demands in the Muslim world.

1.3 HOW TO USE THE *PRIMER*

1.3.1 Professionals

Muslim law, like other legal systems, devotes much attention to rules relating to women and the family. Muslims consider these to be central to their religion. In the legal systems of Muslim nations, the influence of religious norms remains most clear in family law. Conservative Muslims are very sensitive to change in this area because any movement on the part of women threatens the traditional social order.

Where there is anxiety and conflict about the values and future of Islam, rules relating to women become the test of the law. These can be highly emotional issues for Muslims. There is no doubt that clients

* The case of Shiite Islam, the minority school of approximately fifteen percent of Muslims in the world, is somewhat different. Learned authority is clearer in Shiite than in the majority Sunnite Islam, as most Shiites recognize a few senior scholars holding the titles of ayatollah and “point of reference” (*marji*). It is consequently more difficult for local traditionalists to gain influence. Shiites also believe that the law is meant always to address new circumstances, and thus, to a degree, to change. However, the extent to which this view affects the conservatism of ayatollahs and Shiite communities varies.

who cite Muslim law will be doing so for their own strategic reasons, as in any legal contest. But the extent to which such representations are attached to profound values and a world view should not be underestimated. The information in the previous section should help readers to grasp that background.

The rest of the Muslim content of this book is designed to help readers navigate the difficult territory of Muslim law related to particular issues. The discussion is meant as a brief and general guide. With so many differences between the traditional schools, widely varying traditionalist and reformist interpretations, and different laws adopted by modern Muslim nations, it is not possible to give a comprehensive account.

Therefore, while the *Primer* can help users to understand and deal with the positions of clients and adversaries in a general way, it cannot predict or explain all claims exactly. You may hear views and discover laws and interpretations that are not covered in this book, and an expert or authority may disagree with some statements. Professionals are advised to spend time in conversation with their clients in order to discover their views and expectations of the law and also, if possible, to ascertain the views of persons with whom their clients will be involved. Offering clients this *Primer* may help them to examine and clarify their ideas.

1.3.2 Muslims

It is important for Muslim women to realize that they may be faced with some laws that conflict with their ideas about the justice of Islam.

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Muslims often hear the strong egalitarian voice of their religion and expect that all laws will have that spirit. Sometimes they think the reformed law of their home countries is original Muslim law that everyone uses and agrees on. Muslims may assume that women's rights in such areas as divorce and alimony are clearly affirmed by law when they are actually reformist ideas that many people strongly oppose.

Religious ethics may inspire couples and families to solve disputes “in a fitting manner (*ma'rūf*),” as the Quran says many times. It is also possible, however, that men will use advantages given to them by the law or what they think is the law to justify their actions. This, of course, is not particularly a Muslim situation but a human one. The strong emotions raised by marital conflict can bring out the worst in human beings.

Since Muslim law does pay attention to female rights and dignity, women can also use it to secure some advantages. But this requires much knowledge, skill and determination.

Relying on Muslim law may be more perilous in Canada than in most Muslim countries. Muslims in Muslim countries are ruled by defined laws laid down by their governments, so it is possible to have a good idea of what rules will be applied to one's case. In Canada, you may be unexpectedly faced with unfamiliar standards and rules, including rules of the traditional law that are no longer applied in most of the Muslim world.

The *Primer* cannot tell you exactly what rules people will try to apply to your situation. It does prepare you by giving an idea of some of the possibilities.

If you are thinking of having your affairs regulated in any way by Muslim laws, it would be wise to enquire well beforehand about the kind of law being proposed. 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 from 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 this *Primer* to come up with such questions, and you can also compare the answers you get with those from Canadian law.

1.3.3 Plan of the Primer

For each subject covered in this book, some background on the traditional law is provided, including a few variations. Although much of the traditional law no longer applies as it once did in the Muslim world, it does have great influence on state laws and social norms. It is also important to have information about the traditional law because this is the material Western Muslims are likely to focus on when they discuss *sharia*.

Discussion of the traditional laws is based on law books from all five schools. A key to these sources is given at the end of the *Primer*.

Some authorities giving legal opinions do not talk about a particular school. They speak about the “law” as if it were all one thing, with one set of rules applying to all Muslims. They may do this to avoid confusing their audience, to get greater authority by presenting one definite standard for everyone, or because they believe that this approach promotes unity among Muslims.

It is also true that many Muslims today are not very conscious of the various schools of law and the differences between them. They may not know which school they belong to, or they may prefer to think of themselves as “just Muslims” without any additional affiliation.

Legal authority

It is important that Muslim women keep in mind that legal authority in Islam does not belong to any one person or organization. According to Muslim legal theory, the believers themselves choose the persons they think to be the most knowledgeable and pious to give them advice about the law. And according to the Sunnites, this is counsel only, which can be rejected by a sincere conscience and mind. Believers can go to different authorities and ask again.

There can be significant differences between the views and legal opinions of different persons claiming authority in the Muslim community, including imams. No one is forced to follow any particular one.

The Sunnite tradition also says that learned women may give legal advice on an equal footing with men (e.g., al-Ghazálí, Mankhúl, *K. al-fatwá*, section on *Sífát al-mujtahidín*⁴). The permission for women to determine the law in Shiism is more restricted, but a few ayatollahs have recently said that women should have full legal authority.

Women are active participants in their religion and have the right to learn, challenge and lead.

⁴ Qualifications of *mujtahids*.

Nevertheless, presenting differences between the schools helps readers to see where supposedly uniform rules actually come from and what other kinds of rules might be applied. Muslims who are aware of differences in the law will have a greater sense of personal initiative and choice.

In a few instances, the principles underlying Muslim laws have been characterized so that the logic of the system may be better understood. The derivation of a rule is also sometimes explained, since religious people want to know the reasons behind the law and may actually need to know them in order to better argue their position. Examples of state laws in each section give an idea of typical reforms and the direction in which the law is moving in modern times. The ideas of many people, including community leaders, have been influenced by these reforms. Muslim laws have responded to social needs and changed to some extent.

...the law of Muslim nations, just like those of other legal systems, is always being revised...

Note, however, that the law of Muslim nations, just like those of other legal systems, is always being revised, and these examples do not necessarily represent the current legislation in the country mentioned.

Not much information about Shiite law is given in this *Primer*. This is because there is already a fairly clear way for Shiites to determine what the law is and what rulings will be applied to them. This matter requires a little explanation. The authoritative law for Shiites is not what is in traditional legal treatises. Instead, Shiites are guided by the rulings of a living ayatollah (called *marjî*) that each person has chosen as her or his guide. A Shiite who wants to know about a point of law refers to the treatise (called *Risâlah*) of the ayatollah she has chosen. If there is a question that is not covered, she asks the ayatollah or one of his local agents directly. Different ayatollahs can have different rules.

A woman who wants to know about a Shiite ruling could find it out and have some confidence that an informed local authority would follow it. Her main concern would be how the authority might exactly apply the rule or how he might decide between herself and another person if there were a dispute over facts.

Examples of Shiite rules, including a few rulings of living ayatollahs, are given because they help readers to appreciate the range of opinion in Muslim law. Shiite law generally follows the same pattern as Sunnite law, but with some significant differences for example, in inheritance. The living ayatollahs also sometimes take the law in a different direction than what is found in their traditional law books.

Anything said here about the opinion of an ayatollah should be checked with him or his representative. Opinions given may also vary with the circumstances of the case.

Remarks are made in the *Primer* about the operation of Muslim family law in Canadian society where they are pertinent and useful. Apart from the little published material available on Muslim law in North America, conversations with Muslim women and women's advocates, interviews with religious leaders, internet discussions, and Canadian court cases have been relied on to estimate common problems with the law and possible advantages and strategies.

The real-life impact of Muslim law in the West is not very clear, since it is mostly a private matter. As more evidence and research becomes available, it will be possible to identify other advantageous or problematic features.

1.3.4 Further resources for professionals and Muslims

Law takes place in a context. We can read through the articles of the law governing a legal system, but we cannot know the real result of the law until we see how it plays out in the courts, in families and in society.

In North America, not only do we not know exactly what kind of Muslim law is being invoked, we also do not know, at this early point in the history of the community, what practical effect it has. There is almost no information on the operation of the law, whether through informal processes such as community customs and pastoral mediation or in interaction with state legal systems. Probably the best that can be done at present when dealing with Muslim law is to exercise caution and learn from experience.

We hope that more research will be done on the operation of Muslim laws in Canadian society. One obstacle to conducting research into the subject is that it concerns sensitive private affairs. The natural reluctance of anyone to reveal such affairs is likely to be increased by the rank prejudice that is habitually directed at Muslim communities.

There is extensive academic literature in Western languages on Muslim family laws in general, but persons with immediate, practical questions will need to invest much time and study to make any use of it. Consultation with academics could yield accurate and relatively objective information about points of the laws, but probably less about its operation and outcomes in Canadian society.

Muslim lawyers working in the secular system are often approached by clients who hope they will be able to take their religious standards into account. These lawyers may prove a valuable resource for understanding the typical concerns of Muslim clients and acceptable solutions to their problems.

If a matter comes up that is related to the legal system of a Muslim country, consultation with a lawyer actually practising in that country may help to clarify the case. Family laws are constantly changing, and the modern law encyclopedias and digests available in Canadian libraries cannot keep up with these changes or indicate the context of the law. Testimony about the laws in various Muslim countries by persons living in Canada may be out of date or influenced by personal views.

Professionals might also find it useful to consult leading community members. Learned and sympathetic authorities, both women and men, may be able to point out further useful details of the laws or give information about community standards. Muslim women's organizations and community services that include a Muslim clientele are good sources for learning about real-life problems encountered by women.

The websites of the various chief ayatollahs followed by Shiite believers provide a quick reference for their opinions, which determine current Shiite law. One can even ask questions through the sites in

English and French. Ayatollahs Sistani (www.sistani.org) and Fadlallah (www.bayynat.org) are usually quick to reply. Leading ayatollahs have local representatives in Canada called *wakil*, or “agents.”

Many imams have extensive pastoral experience and know their own communities well. They also sometimes deal with their constituents’ legal links to their home countries, for instance by registering marriages and divorces overseas and offering testimony in child custody and other cases. It is often women who ask mosque and community leaders to intervene on their behalf, and imams can play a vital pastoral role.

However, there is great variation in the training and approaches of persons claiming authority in the law. Liberal elements in the community, including women’s groups, strongly disagree with the views and actions of some. Women’s advocates report situations where husbands and others have enlisted persons with power in the community to use religion to coerce or manipulate women.

A list of basic published and internet references on Muslim law in Canada and North America can be found at the end of this *Primer* under Further Resources.

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2 DOMESTIC CONTRACTS

2.1 DOMESTIC CONTRACTS ARE MADE BY ADDING CONDITIONS

Some opinion in Muslim laws allow the spouses to insert conditions (*shurūt*) in the marriage contract. If a valid clause is violated, the marriage may be dissolved. This is most significant for the wife, since the husband can already freely divorce without any conditions.

Clauses inserted in a Muslim marriage contract are usually in favour of the woman. This can be a good opportunity to define the wife's rights. Adding clauses to the Muslim marriage contract has become a widespread practice approved by many jurists in all five legal schools.

However, the conditioned contract was not always so easily accepted in traditional law. Some schools and jurists were reluctant to add conditions for fear they might alter the basic nature of the marriage contract by trespassing on the rights of one or the other spouse. These authorities allowed very few conditions or none that were significant.

This point of view still exists in modern times. Part of the purpose of this section is to alert readers to the possibility that the conditions in their Muslim marriage contract might not be accepted by all Muslim authorities.

2.1.1 Conditions allowed by the Hanbalites

It is the traditional Hanbalite school that accepts conditions in a marriage contract most easily.

The Hanbalite jurist Ibn Qudámah says that conditions that confer some kind of benefit on the woman are allowed. Examples are conditions that the woman may stay in her own house or country, that she not have to travel with the man, and that he not marry anyone else (*lá yatazawwij 'alayhá*) or take a concubine.

These types of conditions, Ibn Qudámah insists, must be honoured by the husband, and “if he does not, she can get a divorce from the judge.” They are binding, he says, because they do not interfere with the basic requirements of marriage, just as if a woman asked for a larger dowry. Nor, he argues, do they violate the law by arbitrarily forbidding what it allows. The man is still free to do all that the law allows; it is only that the woman may from her side dissolve the marriage if he does certain things (VII, 448).

At least one opinion says that the bride can add a condition that the husband has to divorce his existing wife or give up the concubine. Ibn Qudámah reports this view, although he does not agree with it (VII, 448-9).

According to Ibn Qudámah, certain conditions are automatically invalid when a spouse tries to add them to a marriage contract, although the marriage itself will still be valid.

Examples of conditions that are automatically invalid are that a wife does not get a dowry or support, that the husband does not have full intercourse with her or that she spends more or less time with

him than other wives do. In each of these cases, the condition added by either of the spouses is invalid, but the marriage is valid. A condition in the marriage contract that the wife give the husband material support or that she give him anything at all would also be automatically invalid without cancelling the marriage.

These conditions are invalid, says Ibn Qudámah, because they take away rights before the contract is even concluded, and are therefore contrary to its intended effect. The marriage itself remains valid because the rejected conditions were a superfluous addition that does not affect the basic soundness of the contract (VII, 450).

If a woman agrees on a certain amount of support as part of the marriage contract, it is not binding and she can go back on the agreement, according to Ibn Qudámah (VII, 450-51). The purpose of this rule seems to be to prevent the man from limiting support to less than he should give.

2.1.2 The Hanafite, Maliki and Shafiite schools allow fewer conditions

The Hanafites, Malikites and Shafiites do not allow all the conditions favourable to women that the Hanbalites and Shiites do. These schools believe that such conditions violate the spirit of the contract by taking away the husband's rights.

Al-Shafii says that a woman cannot specify that she will stay in her own house or not have to travel with her husband. She cannot add a condition that prevents her husband from taking another wife or concubine. According to al-Shafii, these are all part of the inherent rights of a husband, which cannot be taken away (V, 79-80).

Al-Shafii also says that a man cannot add a condition so that he does not pay the wife a dower or support her as he should. A husband cannot take away a wife's rights in marriage by adding conditions (V, 79-80).

A husband cannot take away a wife's rights in marriage by adding conditions.

While all such conditions are automatically invalid, they do not cancel the marriage contract.

However, the Malikites believe that a marriage contract to which a spouse has added invalid conditions will itself be invalid if consummation has not taken place.

2.1.3 Marriage conditions in Shiite law

The standard printed marriage contract issued in Iran includes a list of conditions that, if violated, will allow the wife to use a power of divorce that is also delegated to her in the contract. These include grounds for divorce originally found in Maliki law, such as cruelty, and the Hanbalite condition of not taking a second wife. Grounds for divorce that are already a normal part of Shiite law, such as non-support, insanity, dangerous disease and impotence are also listed.

The couple signs the part of the contract that delegates divorce, and then each of the conditions that triggers it. There is also a space for adding extra conditions at the option of the couple. A woman's freedom of movement – i.e., travel without the husband's permission – is a common addition.

Standard Iranian marriage contract

The standard printed marriage contract issued in Iran includes a list of conditions that, if violated, will allow the wife to use a power of divorce that is also delegated to her in the contract. These include grounds for divorce originally found in Malikite law, such as cruelty, and the Hanbalite condition of not taking a second wife. Grounds for divorce that are already a normal part of Shiite law, such as non-support, insanity, dangerous disease and impotence are also listed.

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Some modern Shiite authors assert that their traditional law originally allowed conditions to be added to a marriage contract, just like the Hanbalites. But this is not clear. The contemporary Lebanese scholar Maghniyah says that conditions such as the husband not taking another wife or the wife having complete freedom of movement are considered invalid in traditional Shiite law. He argues that such conditions are contrary to the spirit of the contract, although the marriage is still valid. The Shiite rule as reported by Maghniyah is therefore similar to that of the three Sunnite schools discussed in the previous section (*Encyclopedia* 403-4, 434-5). This is confirmed by Allámah al-Hillí, who adds that conditions that take away support and inheritance from the wife are also invalid, while the marriage continues (II, 34).

Shiites are guided by the rulings of their various living ayatollahs whose opinions may be somewhat different from the traditional law. Information from the traditional books is included here to alert Shiites to the possibility that their ayatollahs' views on marriage contract conditions may be different from what they had imagined. Just like Sunnites, they should ask about the law before assuming they have certain rights in it.

2.2 WILL MY DOMESTIC CONTRACT BE ACCEPTED BY A MUSLIM AUTHORITY?

By “Muslim authority,” we mean not only local imams and mosques but also other Muslim organizations and competent persons. If one authority acceptable to the couple does not allow certain clauses in a contract, another might agree.

As explained in the previous sections, few jurists in classical times allowed a woman to add conditions to the marriage contract that would allow her to apply for a divorce. With the exception of the Hanbalites, the jurists were reluctant to allow either spouse to add conditions that would significantly alter the contract by taking away rights.

Nevertheless, adding conditions to marriage contracts has become widely accepted in the Muslim world. This acceptance seems to have come partly from appreciation of the Hanbalite doctrine and the adoption of laws based on it by some Muslim states.

Many persons consider the negotiated contract a leading example of the rights given to women by Islam. Some mosques and organizations have drawn up their own contracts and encourage the couple to discuss their concerns. For an example from a Toronto Shiite mosque, visit www.jaffari.org/resources/alim.asp?id=11. According to an administrator at this mosque, couples wanting to add more conditions are encouraged to do so.

A negotiated contract may help the couple to talk openly about their concerns and expectations in marriage. Since the contract is seen as religiously legitimate, the couple might feel that bringing up even difficult matters is in harmony with the spirit of religious law and not a sign of mistrust or being “unromantic.”

A Muslim authority who accepts the growing practice of making conditioned marriage contracts might validate all or some of the conditions added to your contract. But this is not certain. Recent efforts in Egypt to draw up a standard marriage contract that would guarantee a range of rights to women on pain of divorce was opposed by many religious authorities there on the grounds that the conditions went against the spirit of the marriage contract and violated the *sharia*. The idea that a wife could prevent her husband from marrying another wife was particularly controversial.

A couple wanting to add conditions to the marriage contract might want to do so with the help of an authority who would also be a likely judge between them if conflict arose. In this way, the wife or husband would not be faced afterward with a situation in which the contract was not properly drafted, the witnesses did not agree on it, or one of the added conditions was declared invalid.

It might be more advantageous to a woman to have a right of divorce given to her directly through delegation (*tafwid*) rather than allowing it only if a condition is violated. A reason for divorce may come up that was not evident at the beginning of the marriage. Delegation also appears to be better founded in traditional Muslim law than added conditions, and would therefore be more difficult to contest. On the other hand, by delegating divorce rather than negotiating added clauses in the contract, the advantage of open and specific discussion before marriage may be lost. Delegation of divorce is discussed in section 4, Divorce, in the Muslim law part of this book.

Nikáhnámeh

There is a long tradition in the Indian Subcontinent of drawing up marriage contracts with added conditions. These are commonly known as *nikáhnámeh*, or “marriage documents.” Several different marriage documents from the Subcontinent are reproduced in *Talaq-i-Tafwíd: The Muslim Woman’s Contractual Access to Divorce: An Information Kit*, available at www.wluml.org/english/pubs/pdf/misc/talaq-i-tafwid-eng.pdf. Some of the conditions found here, such as cruelty, are derived from the grounds for divorce of the Malikite school. Others are the added conditions allowed by the Hanbalites, such as the wife’s freedom of movement & preventing the husband from taking another wife.

2.3 WILL MY DOMESTIC CONTRACT BE ENFORCEABLE IN CANADIAN LAW?

The Ontario legal system allows considerable freedom to individuals to make their own domestic contracts. For a full account of matters such as the limitations of a domestic contract, how it is enforced and the validity of contracts made outside Ontario, refer to section 2, Domestic Contracts, in the Canadian law part of this book.

As explained in section 3, Marriage, in the Muslim law part of the *Primer*, Canadian courts do not apply Muslim law. They will only enquire into it in order to throw light on matters that can be related to Canadian law. A domestic contract will have a better chance of having effect under the Ontario *Family Law Act* if it is properly drafted in the terms of the *Act*.

Since Canadian and Ontario law are not directly concerned with testing the validity of agreements in Muslim law, a couple could draw up their own domestic contract according to their own conscience and views of Islam, only to find the Canadian court will not enforce it. To ensure enforceability, the contract would have to meet the requirements of all domestic contracts as set out in the *Family Law Act*.

One of the advantages of entering a domestic contract into provincial law is that you can get it enforced as long as it is not contrary to Canadian law.

Having a Muslim domestic contract entered as a domestic contract under Ontario law may be advantageous. But it may also involve risks and possible disadvantages. One of the advantages of entering a domestic contract into provincial law is that you can get it enforced as long as it is not contrary to Canadian law. There is also some regulation of domestic contracts that would allow parts of it to be set aside if they turned out to disadvantage children or be unfair in some other way.

The disadvantage of entering a Muslim domestic contract (i.e., a marriage contract with additional clauses) into provincial law is that you might later decide that you had given away too much, or you might regret other things you had agreed to. It may then be difficult to get out of the contract, for if it complies with the requirements for a domestic contract under the *Family Law Act* and the other party seeks its enforcement, the courts will act to enforce it. This could be a great problem for Muslim women pressured by husbands and relatives into signing a contract. There is a risk of unknowingly giving away rights (for instance, to property) that one may have otherwise had through civil law, since provisions for domestic contracts under the Ontario *Family Law Act* allow the parties to give away some rights.

If you are thinking of entering your Muslim domestic contract under the *Family Law Act*, refer now to the Canadian part of this book, section 2, Domestic Contracts; you should also seek independent legal advice.

A Muslim woman who uses the *Family Law Act* to make a domestic contract should keep in mind that Muslim laws firmly oppose a woman giving away rights that are part of the basic Muslim marriage contract. These include the right to dower along with exclusive control over it and full and sufficient maintenance (living expenses).

The possibility of enforcing a *mahr* (marriage dower) in a Canadian court is discussed in the Canadian law part of this book in section 2, Domestic Contracts.

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3 MARRIAGE

The Quran and sayings of the Prophet emphasize affection and mutual support between husband and wife. For example, the Quran 30:21 says: “[God] created mates for you so that you might find tranquility in them, and He put between you love and mercy.” The Prophet, in his last sermon before he died, exhorted his listeners to “treat your wives well and be kind to them, for they are your partners and helpers.” In Quran 2:228, God also says: “Women have rights similar to those men have over them in fairness.”

These “rights” (*huqúq*) in marriage were finally understood in two senses. One is ethical, the rights of both spouses to be treated appropriately and affectionately. Ethical rights in marriage, including building a good relationship with one’s wife (*mu’ásharah*, as in Quran 4:19, “associate with them in a good way”), became popular topics of Islamic literature. Many law books discuss good and kind association between the spouses – especially on the part of the husband toward the wife – even though these are not strictly legal subjects.

“Rights” were also understood in a legal sense and became part of the legal framework of marriage. Each spouse has rights, which are also the duties (*huqúq ‘alá*) owed to the other. Therefore marriage is, legally speaking, a kind of exchange, a contract. This is the part of Muslim marriage treated in this section.

Non-Muslim readers should keep in mind that the legal rights and duties discussed in this *Primer* in a general way are only part of the Muslim conception of relations between the sexes.

Some Muslims in the present day seem to believe that marriage is *wájib*; that is, a necessary religious duty. While Islam strongly encourages marriage, most jurists from the various schools do not say that it is a necessary religious duty. Rather, it is “recommended” (*mustahabb*) for both men and women (Túsí 1: IV, 245-6). Some famous Muslim scholars – for instance, Ibn Taymiyah and al-Nawawí – did not marry.

While Islam strongly encourages marriage, most jurists from the various schools do not say that it is a necessary religious duty. Rather, it is “recommended” (mustahabb) for both men and women.

3.1 WHO MAY MARRY; INTER-RELIGIOUS MARRIAGE

There are extensive rules prohibiting marriage between persons related by blood and by marriage. The prohibitions are similar to those found in the West. However, marriage between cousins, now uncommon in the West and banned in some states of the U.S.A. (although not in Canada), is still quite common in some Muslim populations – for instance, in the Middle East. There is also a prohibition against marriage between persons who have been breast-fed by the same woman.

The issue here most relevant to the Canadian context is inter-religious marriage. A Muslim man may marry a Jewish or Christian woman (according to some Shiites, also a Zoroastrian) without her converting, since these groups are considered to be “people of the Book” possessing revelation sent

to them by God. Permission for such marriages is given in Quran 5:5: “The virtuous women of those who received the scriptures before you [are lawful for you] when you give them their marriage portions and live with them in honour.” Much (not all) Shiite opinion allows that a Muslim man may marry a non-Muslim woman only through the lesser *mutah* contract, described in section 3.13.1 below. It appears that this rule is not always followed.

Children are to follow the religion of the Muslim father. This is very important for most Muslims. Non-Muslim women marrying Muslim men might find their husband’s family and community very accepting of their marriage. However, some jurists say that even though mixed marriage is allowed, it should really take place only in exceptional circumstances. Some traditional and modern authorities also warn that mixed marriages are not ideal because, supposedly, they are liable to cause conflict between the couple and confusion in the children. A Muslim/non-Muslim couple might have to face these kinds of attitudes.

The traditional law says that a Muslim woman can marry only a Muslim. The issue of the marriage of Muslim women to non-Muslims can be an emotional one, partly because it raises fears that the children will also be non-Muslims.

It is also suggested that Quran 60:10, which says that “[Muslim] women are not lawful for unbelievers [kuffār],” would not apply to Jews and Christians at least, since they are actually believers in God.

Some Muslim women assert that the Quran does not explicitly prohibit the marriage of a Muslim woman and non-Muslim man, which implies permission. It is also suggested that Quran 60:10, which says that “[Muslim] women are not lawful for unbelievers [kuffār],” would not apply to Jews and Christians at least, since they are actually believers in God. Such views appear to be an attempt to deal with the present reality of affections and marriage between Muslim women and non-Muslim men in emigrant Muslim communities. They are not widely accepted by Muslims and not presently approved by the Muslim laws.

A woman who converts to Islam is not to remain married to her non-Muslim husband, according to traditional opinion. Converting away from Islam by either partner will result, according to Muslim law, in dissolution of the marriage due to apostasy.

The rule that Muslim women may not marry non-Muslim men has survived in the laws of many countries, even quite secular ones. One solution has been for mixed couples to marry outside the country. In Lebanon, foreign marriages of this kind can be registered when the couple returns to the country. In Egypt, the marriage of a Muslim woman with a non-Muslim man cannot be registered, even if they have gone through a civil marriage outside the country.

Despite the sensitivity of Muslims to the marriage of a Muslim woman with a non-Muslim man, these marriages do sometimes take place in the West. However, very few Muslim authorities will openly involve themselves in such a union. Even if someone does agree to officiate, it may be on the condition that the children be brought up as Muslims.

Some authorities in other religions will perform inter-religious marriages – for instance, some Christian ministers and Jewish Reform rabbis. Religion does not matter in a Canadian civil marriage.

Religion does not matter in a Canadian civil marriage.

3.2 THE MARRIAGE CONTRACT CEREMONY

Although Muslim marriage is regarded as essentially a bond of affection and commitment, its legal form is that of a contract. The marriage contract follows the general model of Muslim contract law, but because marriage is so important, the conditions for it are more stringent than for other kinds of contracts.

The spouses conclude a contract as a sign of their agreement that the union is to be governed by the rules of Muslim law. The construing of marriage as a contract also indicates that it may be legally dissolved through divorce, again according to established rules.

According to at least one school of law and in the modern reformed law of many jurisdictions, the couple may add their own clauses to the standard contract. Such clauses are usually in favour of the woman. This matter is explained in the Muslim law part of this book in section 2, Domestic Contracts.

The family of the woman traditionally takes her side in negotiations connected with the marriage contract and divorce – for instance, in areas such as the marriage dower (*mahr*). A convert without the support of a Muslim family familiar with the law or the culture of the husband's ethnic group may be at some disadvantage here. It is especially important that converts seek information about law and customs and clarify the conditions of their marriage.

3.2.1 Offer of marriage and acceptance

It is customary and also recommended by Muslim laws that an initial marriage proposal (Arabic: *khitbah*) be made by the man or his family. But this is not a legal requirement. All that is actually required by the law to make a marriage is a ceremony of offer and acceptance by the bride and groom.

Muslim laws are very careful about the details of the ceremony of offer and acceptance. The jurists even discussed the kinds of words that could be taken to reliably indicate the intent of the bride and groom to marry. The concern was that the contract be well understood and based on the real intent and agreement of the parties so that difficulties would not arise afterwards.

Similarities between Muslim and Christian marriage procedures

There are certainly differences between Muslim and Christian marriage procedures, but the similarities are striking. Both involve the agreement or “giving away” of the bride by a male who is supposedly in charge of her (e.g., the father); witnesses, so that the marriage can be verified afterward; publicity, so that the marriage is publicly known and anyone who is aware that it is somehow wrong can object; and, finally, offer and acceptance using specific words in order to verify consent (“Do you take...?” and “I do.”).

3.2.2 Presence of the bride and groom at the ceremony

Most traditional opinions hold that all the legally required participants in the marriage be present together at the ceremony of offer and acceptance. The ceremony of offer and acceptance should be concluded in one session so that there is no misunderstanding caused by someone's absence or a lapse of time between the steps. However, this does not mean that the bride or groom is always present. For example, a marriage may be concluded by guardians in the absence of the bride or both the groom and bride. This is explained below.

The Hanafites also allow that the man may be absent if his proposal has been clearly communicated beforehand to the woman in written form. If the bride and/or groom are themselves legally competent to conclude a marriage, they may appoint agents (*wakil*) to act for them. It sometimes happens that a Muslim man will appoint an agent in the territory where the bride lives to take care of matters such as legal papers and then participate in the marriage ceremony by telephone.

3.2.3 Witnesses and not keeping the marriage secret

The presence of two witnesses at the contract ceremony is required. A saying of the Prophet is cited: "There is no marriage except with witnesses." The witnesses should be free to talk about the marriage, and the marriage should be announced. Witness is not valid if the witnesses are somehow expected to keep the marriage a secret from persons who normally would and should know about it.

One Hanafite jurist explains that marriage must not be kept secret because "anything connected with marriage that is forbidden is always kept secret, and anything licit is always done in the opposite way," i.e., openly without hiding anything (Sarakhsi: V, 31). That is to say, if the marriage is kept secret to any extent, there must be something wrong with it.

Just as in the West, the requirements that there be witnesses and that the marriage be made public helps to clearly establish the marriage, ensure that it is valid and guarantee the rights of the parties, especially the woman.

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The requirement of witnesses for marriage is very important in the Sunnite schools. A marriage that is not witnessed is legally invalid, and the couple must be separated permanently, without any chance to remarry. But if the couple had intercourse, they will not be liable to punishment for fornication (*zina*), the woman will get her *mahr* and any children will be legitimate. These rules are in accord with the principle of Muslim law that any degree of doubt or error attaching to culpable acts or to proof

of those acts turns away punishment. A desire to protect women from male deceit is also evident in the rule here concerning *mahr*.

The Malikites think that publicity of the marriage and bringing it into the open is more important than witnesses, and so they place more emphasis on that and allow witness to happen sometime afterward, as the marriage is publicly celebrated.

The majority legal opinion of the Shiite school does not consider witnesses absolutely necessary. One Shiite jurist goes so far as to say that “the presence of witnesses [is] not required for any kind of marriage; it is allowed for the spouses to marry in secret, and if they ask others to keep it secret, that does not void the marriage either” (al-Shahíd al-Thání: VII, 99). But Shiite scholars have differing opinions on these issues. Some say that while witness is not necessary, it is still recommended (e.g., Túsí 2: IV, 163). The practice of witnessing has become usual among Shiites, and the standard printed marriage contract issued in Iran by the government has a place for witnesses to sign.

Ayatollah Sistani says that the presence of witnesses is not necessary in the session in which the contract is concluded. But he also seems to disapprove of marriages that are deliberately kept secret for – instance, from the girl’s guardian.

3.3 REGISTRATION OF MUSLIM MARRIAGE IN CANADIAN LAW

In the past, it was not required that a marriage contract be written down. All that was required was an exchange of words clearly indicating offer and acceptance. In modern times, formal written marriage contracts, registration and certificates of divorce have become common. Most Muslim governments are determined to register marriage and divorce in order to gain some control over this key social institution and impose reforms.

When a marriage in a Muslim country takes place without government registration – for example, in an inaccessible rural area – some state legal systems will recognize the marriage when faced with its de facto existence in court. But others refuse to grant it legal recognition and rights.

In Canada, persons officially authorized to perform religious marriages register them with the provincial government, which issues the couple a civil licence. The procedure is described in the Canadian law part of this *Primer* in section 3, Marriage.

Many imams and other persons in Canada are authorized to officially register the Muslim marriages they perform. The authorized person submits the paperwork, and you receive the legal papers from the provincial government. Note that any certificate you may receive from an imam is not the official government document.

According to traditional law, any competent Muslim may conduct a wedding ceremony. In fact, if the witnesses and parties are competent in the procedure, no officiation is required at all. However, if a person authorized by

Female and non-Muslim witnesses to marriage

Only the Hanafite school allows two women to substitute for one of the male witnesses in marriage, as is allowed in the witnessing of other kinds of contracts. Majority Hanafite opinion allows non-Muslims, i.e., Jews and Christians, to serve as witnesses at a marriage with a Jewish or Christian bride (Sarakhsí: V, 33-34). This permission can also be found in Shiite books but apparently only because witness is not considered by them an absolute requirement in the first place (Túsí 2: IV, 163). Al-Shafii (V, 23) and the Hanbalites (Ibn Qudámah: VII, 337) do not allow non-Muslims to serve as witnesses, even when the bride is non-Muslim.

...if a person authorized by Canadian law registers the marriage or if the couple goes through a separate civil ceremony, they are entitled to the full rights and benefits of Canadian law.

Canadian law registers the marriage or if the couple goes through a separate civil ceremony, they are entitled to the full rights and benefits of Canadian law.

The union of a couple who has married in a Muslim ceremony but without civil recognition may be considered by Canadian law to be a “common-law marriage.” A common-law marriage gives you some rights. (For more information, refer to section 3, Marriage, under Canadian law). At the time this *Primer* was written, common-law marriage gave the partners different rights than a married couple in some areas. See the Canadian law part of this book, Domestic Contracts (section 2) and Spousal Support and Division of Property (section 6).

The record of Canadian cases suggests that the particular circumstances of a Muslim marriage will be taken into account by the courts only as they can be related to the concerns of Canadian law (e.g., whether a *mahr* can be considered to be part of a valid contract under Canadian law) or if they relate to the material facts of a case (e.g., the validity of a marriage abroad for immigration purposes). An argument put before a Canadian court based purely on Muslim law is unlikely to succeed. For example, in *Abdelrahim v El-Madhoun* [2004] O.J. No. 1091, the Ontario Superior Court of Justice rejected appeals for annulment of a duly registered civil marriage on the grounds that there was no Muslim marriage.

3.4 ENGAGEMENT AND ENDING A MARRIAGE BEFORE CONSUMMATION

Status of gifts if separation occurs during engagement period

Just as in Canadian law, if a person goes back on a promise to marry, he or she is not legally liable. The status of gifts given by the man during this time depends on the school of law. The Hanafites say that they are to be returned, while the Malikites allow the woman to keep them if she was not the one who ended the relationship. Some jurists say that whether the gifts are returned or not should follow the local custom.

If property was given to the woman as a part of the dower, or *mahr*, it must be returned, since dower is a part of actual marriage. Whether gifts are actually a part of the dower or not should be clarified, since this can affect what the woman has to give in a breakup before marriage or a negotiated (*khul*) divorce.

Although Muslim laws do not recognize a period of engagement as such, the time of agreement and planning between the formal proposal by the man and the conclusion of the actual contract resembles an engagement.

A man’s proposal of marriage is not legally required for marriage. A proposal is, however, recommended, and the jurists discuss rules applying to it. A woman should not, for instance, make or receive a marriage proposal while another is still pending. Note that any fault in following these rules does not make a person legally liable and does not affect the perfect validity of a marriage that follows.

Muslim couples sometimes formally conclude the contract in order to demonstrate their commitment but put off consummation to a later time. This is quite common. Putting off consummation may happen when the man and wife are unable to immediately establish a marital home, perhaps because they are living in different countries or completing their studies. Postponing the consummation does not affect the validity of the marriage, even though some legal effects do not come into force until consummation.

3.5 MARRIAGE HAS TO BE CONSUMMATED FOR IT TO TAKE FULL LEGAL EFFECT

A Muslim marriage does not take full legal effect until it is consummated – i.e., until the married couple has had sexual intercourse for the first time. Before consummation, some (but not all) rights of the partners are reduced. For instance, a wife divorced before consummation gets only half her *mahr*, or in case the *mahr* was not specified in the contract, a gift decided by the husband. Note, however, that Quran 2:237, which lays down the rule for half *mahr* in case of divorce before consummation, allows the woman to give it up, while also declaring that it is “nearer to true piety” for the husband in such a situation to pay all the *mahr*.

Note also that if the husband dies before consummation, the wife gets her full *mahr*, according to most opinions. Husband and wife inherit from each other, even if the marriage is not consummated.

It might be easier for a woman to get out of an unconsummated than a consummated marriage on an Islamic basis. If the man fails to pay the dower (*mahr*), that may be grounds for a judge to grant a woman divorce if she applies for it before consummation takes place. The wife in an unconsummated marriage has no waiting period before the divorce becomes final.

In a non-Muslim country, a judge (*hákim*) would mean an imam or any other competent authority.

3.6 RELEVANCE OF FORCED MARRIAGE AND CONSENT IN CANADA

In Canada, no person has legal power to marry off another without her or his consent, and a person who has reached the legal age to marry does not need the agreement of any relative. Forced marriage and family opposition can be overcome by refusing to marry or marrying in a Canadian civil marriage. You may also be able to find a religious authority who will agree with and help you. This religious authority does not have to be a leader of your family’s mosque or ethnic group.

We have included the issue of forced marriage in the *Primer* for several reasons. Pro Bono Law Ontario (PBLO) has recently completed research indicating that forced marriage does exist in Canada. The issue of consent of a guardian has also been included, as it may be important for some young people and families who wish to follow Muslim laws. Readers of this book may find that the traditional Muslim law and current laws of Muslim states give more autonomy to brides and grooms and less power to guardians than they had imagined. Forcing marriage is largely a cultural practice that is not sanctioned by Muslim laws.

Forced marriage in Britain

Britain, which has Muslim populations similar to Canada’s, is struggling with a significant problem of forced marriage, along with associated honour killings and sequestration of girls in foreign countries for marriage. Refer to the page of the recently formed “Joint Forced Marriage Unit” of the Home Office (www.homeoffice.gov.uk/comrace/race/forcedmarriage/index.html), as well as a valuable report by the Unit entitled “The Social Background of Arranged and Forced Marriage” (www.fco.gov.uk/Files/kfile/clureport.pdf).

It should be noted that there can be a difference between forced and arranged marriage. Some arranged marriages are desired by the persons being married. This is discussed in section 3.8, “Modern reforms and customs of forced marriages and consent.”

3.7 POWER OF THE GUARDIAN (*WALI*) OVER MARRIAGE

The issues of arranged marriage and consent involve the power of the guardian (*wali*). The guardian handles all kinds of affairs of both male and female wards, including contracting marriage.

The power of a guardian to contract marriage for a male child ceases as the child reaches puberty. Puberty is usually reckoned as beginning for both sexes at fifteen years of age, earlier if certain physical signs appear. If a marriage was contracted before puberty for a male, he may, of course, simply divorce. According to the Hanafites, he may also reject the marriage upon reaching puberty. These matters are not controversial and are dealt with rather quickly in the law books.

The guardian has more legal power over females in marriage matters. The extent of this power was somewhat controversial, because it involved conflict between a feeling that females needed to be protected and guided in making a good match, and the principle of consent to a very important contract. The schools of law came to different conclusions on this issue.

The guardian has two kinds of power over females:

- power to impose a marriage, that is, to contract a marriage for a virgin girl without her consent
- limited power to withhold consent and therefore to prevent a marriage.

3.7.1 *Power of the guardian to impose marriage*

The traditional Hanbalite, Shafiite and Malikite schools allow the guardian of a virgin girl or woman to contract a marriage without her consent or knowledge. Such a marriage contract can be made very early in the girl’s life, with the celebration and consummation coming at a later time.

Some jurists explain that “virgin” here does not necessarily mean physical virginity but “never having been married,” since virginity can be lost in other ways. Some say that premarital sex puts a female in the same class as a non-virgin; others say she will still be counted as a virgin, since the real concern here is to guide inexperienced girls in the ways of men and marriage.

There is a basic assumption that the guardian will act in the best interests of his ward, including the virgin, over whom he has very strong authority. But the jurists recognized that this might not always be true, so they sometimes emphasize that the guardian should not abuse his power. Al-Shafii cautions that a father is permitted to marry off his virgin daughter only if the marriage “is a fortunate one for her, with no harm done to her.” It is not legally permitted for him to marry her to a person unsuitable for her, who is not her equal or who has some physical defect (V, 19).

The jurists sometimes also say that it is recommended that a virgin who has reached puberty be consulted about her marriage, even though this is not a legal requirement. Al-Shafii writes that it would

be better if such a girl's guardian asked for her authorization (V, 22). The Hanbalite Ibn Qudámah says that it is "at the very least, recommended" that a virgin be asked for permission to marry her off since that would "help to conciliate her and avoid conflict." He tells how the Prophet used to follow this practice and adds that it is recommended that the mother also be asked her permission (VII, 384). Malik says that even though the silence of a virgin girl is generally taken to indicate consent, consent should be verified by questioning her using specific words (II, 157).

In the Shafiite, Malikite and Hanbalite schools, only a few guardians are allowed to contract a marriage for a virgin girl without her consent. They are, according to various opinions, the father alone or the father and the paternal grandfather. Some allow these guardians to delegate their power to another appropriate person in a will. The principle apparently operating here is that a father or paternal grandfather is the person most sure to act in the best interests of the girl. Al-Shafii says that if someone other than these persons serves as guardian for a virgin, her consent is needed; and if she is pre-pubertal, the marriage is annulled (V, 22).

Some Malikite opinion says that females who are past the usual age of marriage or who have already been given control over their financial affairs by their guardians because they have reached the age of mental discretion (*rushd*) cannot be married without consent, whether they are virgins or not. A person can show powers of mental discretion at puberty or sometime afterward.

The Hanafites have a different set of rules for imposed marriage than the three other Sunnite schools. The Hanafites allow not only the father and grandfather but also a long list of other males on the father's side to contract the marriage of a girl without her consent and the list goes on to additional relatives if none of these persons is living. That is, they allow the same relatives to act as guardians in imposing marriage as those who serve as guardians to give consent (as explained in the next section).

However, according to the Hanafite school, the power to impose a marriage ends at puberty. It does not last all the time a girl is a virgin, as in the other schools. After puberty, a guardian cannot marry off the girl in his charge without her consent, even if she is a virgin. The Hanafite jurists insist strongly upon this point of difference between them and the other schools.

But the Hanafites also say that the consent of a pubertal virgin can be assumed from her silence and from other behaviour implying consent. One jurist points out that silence is taken as consent only out of necessity, since a virgin might be too shy to speak (Sarakhsi: I, 5 & 8). On the other hand, the discussions of implied consent in Hanafite and other law books give a strong sense that choice of the guardian is given greater weight than the feelings of the girl.

There is another possible advantage for girls in the Hanafite system of arranged marriage. The Hanafites allow a girl when she reaches puberty to reject a marriage that was contracted for her before puberty. However, she would be able to freely reject the marriage when she came of age only if it had been made by a guardian other than her father or her father's father. In order for her to reject a marriage contracted by these two, she would have to demonstrate to a judge that there was negligence on their part.

It seems unlikely that a girl would be able to use the opportunity given to her by Hanafite law of rejecting an arranged marriage when she reached puberty. This is because her agreeing to continue

A woman's consent to her marriage

Muslim laws insist very strongly that a female cannot be married without her consent with the very significant exception of pre-pubertal girls and virgins outlined above.

Al-Shafii lists the agreement of the non-virgin female as the first of the legal requirements for a marriage contract (V, 24). The Hanbalite Ibn Qudámah insists that the marriage of a non-virgin without her permission is entirely void, even if she agrees to it some-time afterward. He tells the well-known story of the Prophet's rejecting the marriage of the widow Khansá, as she complained to him that her father had married her off without her consent. Khansá then married the man she preferred (VII, 385).

The consent of a non-virgin should be expressed in words. Her case is not like that of the virgin, whose silence or other kinds of behaviour may be taken as a sign that she has acquiesced. Ibn Qudámah states that while a virgin's silence can be taken to mean that she agrees, a non-virgin's agreement must be given in explicit words. Her silence would actually indicate that she opposed the marriage (VII, 386).

with the marriage is taken to be implied by indirect action such as failing to object (i.e., silence), accepting maintenance, consummating the marriage, enquiring about her *mahr*, and so on. Although the girl must be aware of the existence of the marriage contract, she does not have to be asked about her consent or explicitly say that she wants the marriage in order for it to continue.

If a girl is not a virgin when her option of puberty comes up, or if she is a virgin but already in the house of her husband, her agreement to continue the marriage has to be more explicit for instance, actually saying that she wants the marriage, engaging in sexual relations or continuing to do so if the initial consummation has already taken place.

The logic in this seems to be that a woman who had actually experienced marriage and her husband would have definite and informed feelings about what she wanted. She would no longer be uninformed and unable to perceive her own best interests, as in the case of a virgin with no experience of marriage.

Traditional Shiite scholars disagree about marrying off a virgin without her consent. Some say that the power of the guardian ceases when she reaches puberty, but others say that it continues. They even disagree about which of these is the majority opinion (Túsi 1:V, 255-6; al-Shahíd al-Thání: VII, 116).

Ayatollah Sistani allows the father or the father's father to contract marriages for male and female minors. The boy and girl will have the right to reject the marriage when they reach

puberty in the case of negligence. If no negligence can be shown, the marriage can still be ended by either partner, according to Ayatollah Sistani, although it will then count as a divorce.

3.7.2 Power of the guardian to prevent marriage

According to the Hanbalite, Shafiite and Malikite schools, in order for a marriage contract involving a non-virgin female to be completely sound, not only is the consent of the bride herself needed but also the agreement and participation of her guardian.

The jurists of the Hanbalite, Shafiite and Malikite schools do not allow a woman to "marry herself off" in the contract in place of a guardian or to choose her own guardian. If the woman tries to do this, the contract will be unsound. The contract will be unsound even if the woman's guardian authorizes her to conclude it herself (e.g., Ibn Qudámah: VII, 337).

The result of these rules is that it is the guardian who participates on the bride's behalf in the exchange of words that make the contract in the contract ceremony. The guardian must obtain the non-virgin bride's consent, but it is he who communicates it in the ceremony and pronounces the necessary words. Because of this arrangement, women sometimes complain that they did not really know what was going on when they supposedly gave their consent as young brides.

However, the guardian's power is again balanced by the rule that he cannot unreasonably prevent a marriage that the woman herself wants. His agreement is needed, but he should not withhold it. Quran 2:232 is cited: "Do not prevent them from marrying their husbands." Al-Shafii says: "A guardian must not prevent a woman from marrying if she decides to marry in a correct way" (V, 13).

If the guardian and bride cannot come to an agreement, the judge or ruling power looks into the matter, and he will order the guardian to carry out the marriage, appoint another guardian or marry the couple himself if the match is suitable and the guardian persists in his refusal (al-Shafii: V, 13).

3.7.3 A guardian's agreement to and participation in marriage

In Muslim law, if a woman is married without the agreement and participation of a guardian, the marriage is invalid (*fásid* or *bátil*) and must be dissolved. It is very important to understand, however, that punishment for fornication (*zina*) is not involved. The woman will get a dower if sexual relations took place or if there was any "touching," and children are considered legitimate. There is no punishment even if the participants were fully aware at the time of their marriage that lack of a guardian would invalidate it. All the schools that require participation of a guardian agree on these points (Málik: II, 178; Ibn Qudámah: VII, 344-5; Muzaní: 163).

The Hanafites, once again, have different rules concerning guardians. There is no need for the agreement of the guardian at all for a marriage a woman chooses for herself after puberty. "If a woman marries herself off, or has someone other than her guardian marry her, the marriage is permitted, whether she is a virgin or not. The marriage is sound, whether the match is suitable or not" (Sarakhsí: V, 10).

It is not legally required in the Hanafite school for a female who has reached puberty to marry with a guardian who will give his consent and communicate the bride's consent in the marriage ceremony. But it is still much recommended. If one eligible guardian refuses to serve, another may be found. All that a Hanafite guardian can do to prevent the marriage of his charge is to bring the attention of a judge to some negligence on her part that would be disadvantageous to her. A common example of negligence is a contract with a man who is not the woman's social equal in income, profession or other standards determined by local custom. There is a debate about whether status and income should really matter or if piety and moral qualities are the best measure of the "equality" (*kafá'ah*) required of a man in order to marry a woman.

The story is told of how the Prophet, as the head of the community, took on the role of guardian in the marriage of a woman whose father had refused to marry her to the man of her choice. One Hanafite jurist comments: "This is proof that it is for the woman to choose her husband, and not the guardian, because she is the one who has to live with him, and conjugal life will be better with the person she has chosen herself." (Sarakhsí: V, 9-10)

Some Hanafites say instead that the refusal of a guardian actually blocks the marriage until the bride applies to the judge, who will see that the couple is married if it is a proper match.

3.7.3.1 Guardians qualified to participate in and agree to a woman's marriage

As seen above, the guardians who can marry off a virgin without her express agreement are limited in all schools except the Hanafite to the father and, in special circumstances, a few others. Many other guardians are qualified to give their consent to a woman's marriage in other situations – with the exception of the Shiites, as noted at the end of this section. They include members of the immediate family (such as a son or father), followed by a list of males from the father's side of the family. There are also others, according to some but not all schools.

The lists vary from school to school, but a general rule is that the guardian who is more closely related to the woman will be the one with prior authority. If the prior guardian is deceased or not available or unsuitable for some reason, the next one serves.

Ayatollah Sistani of Iraq says that a non-independent virgin cannot marry without the permission of her father, while a virgin who is independent in her life should at least seek the permission of her guardian if he has any interest in the matter. According to Ayatollah Sistani, the requirement for a guardian is suspended if the marriage is being prevented without good reason.

Ayatollah Fadlallah of Lebanon says that adult males and females make their own decisions, so a virgin does not have to consult her guardian unless she wants to.

The Shiites do not make it a legal requirement for a non-virgin girl who is of age to have a guardian in her marriage. The contemporary Lebanese scholar Maghniyah goes further than this and states that the majority of Shiite scholars do not require any female who is of age to have a guardian. According to Maghniyah, the majority Shiite opinion is that women contract their own marriages, just like men,

and no one can object to it for any reason (1, p. 38). The Shiites limit guardianship in all cases to the father or grandfather. If neither of these is available, the woman has no guardian and can marry herself.

Forced marriage vs arranged marriage

It is necessary here to distinguish between “forced” and “arranged” marriage. A groom and bride may consent to an arranged marriage, which is often a marriage within the extended family or other social or ethnic group. The couple may, indeed, desire the marriage. This is a private arrangement that does not trespass on the rights of any person. Marriage is forced when it is imposed without the consent and against the will of the groom or bride. Of course, it may be difficult to distinguish arranged from forced marriage without knowing about the types of pressures applied and the quality of consent.

3.8 MODERN REFORMS AND CUSTOMS OF FORCED MARRIAGE AND CONSENT

Beginning in the early twentieth century, Muslim states introduced legislation that suppresses the power of fathers and paternal grandfathers to contract marriages without express consent from their children, including virgin daughters.

In countries where Hanafite doctrine is the basis of family law, increasing the age of legal marriage effectively eliminates the power of a guardian to impose marriage without consent. Hanafites give the guardian power only over pre-pubertal girls

and boys. Some non-Hanafite jurisdictions have accomplished reform by adopting Hanafite rules of guardianship. Several states have explicitly banned forced marriage (e.g., Libya), even providing penalties (e.g., pre-occupation Iraq).

The power of a guardian to withhold consent has always been limited in Muslim law, as explained in the previous section. Muslim states often follow the pattern of the traditional law in their modern codes: permission of a guardian cannot be withheld without good reason, and the court may intervene to complete a marriage. Malaysia lists penalties not only for trying to force marriage but also for unreasonably preventing it. The power of guardians to refuse consent is sometimes limited further by fixing an age above which consent of the guardian is not needed at all, as in Syria, where it coincides with the legal age of marriage.

Legal power to conclude a marriage contract without the agreement of minors and female virgins is rare. Survivals of the requirement that a guardian consent to marriage can be seen in many jurisdictions, but in a reduced form. However, the problem of forced marriage continues outside the legal sphere as a social custom, even where the law has been reformed.

Family members forcing marriages appear to believe that they are backed by Muslim law. Nevertheless, British Pakistanis and Bangladeshis interviewed in the study cited above explained arranged marriage in terms of cultural and family values while maintaining that such unions could not be forced, since forced marriage was forbidden in Islam.

It is evident from this section that if one were to return to the traditional law, there could be support for imposing marriage (although not consummation) on minors, and also, outside the Hanafite and Shiite schools, imposing marriage on other female virgins. A girl's relatives might then consider that a girl who formed affections outside a marriage that had already been contracted for her would have to be punished, along with her boyfriend or husband.

Persons who call for the rule of Muslim law should be asked about instances such as these in the traditional system. Which model of guardianship is to be applied: the model of each school for its adherents, the Hanafite model for all, or a reformed version, like the one in place in most Muslim countries, that bans marriage without consent of the parties, including contracts made for children?

If what is being called for is not an entire return to the traditional system, what reforms will be included? And if reform is allowed, who has the right to decide it and then lay it down as the "Muslim law" to be followed by everyone?

A woman cannot be married without her consent

The idea that Islam does not allow a woman to be married without her consent is very strong among both liberal and conservative Muslims today. Religious authorities who give opinions over the internet sometimes remind girls of this right, even though the girls have apparently not been married before. It seems that the strong legal requirement of Muslim law that a non-virgin consent to her marriage has been extended in the Muslim mind to cover all brides, including virgins. Or this may be an appreciation of the Hanafite position. The Hanafite school is, after all, the most widespread school in the Muslim world.

3.9 AGE AT WHICH A GIRL CAN BE MARRIED

As explained in the section in this chapter on the power of the guardian to impose marriage, according to traditional Muslim law, a contract may be made very early in the life of a male or female by their guardians. There is no minimum age for marriage, although males and females are considered to be ready for consummation of the marriage only when they reach puberty.

Puberty is known by its physical signs, such as menstruation, wet dreams or, in the opinion of some jurists, the appearance of pubic hair. There are minimum ages below which a person cannot be said to have reached puberty, for instance, twelve for boys and nine for girls. There are also maximum ages at which puberty is assumed, even if the physical signs cannot be verified. The most common age mentioned is fifteen years for both sexes; some say eighteen or (for Shiites) nine for girls.

There is recognition in the law books that a girl who has reached puberty at a young age is not likely to be physically ready to support intercourse. It is suggested that the criterion for intercourse in such cases should be appropriate physical maturity (e.g. Buhútí: V, 210).

3.9.1 Minimum age of marriage in Muslim countries

Most Muslim states have responded to new realities in their societies by fixing minimum ages for marriage, usually in the later teens. They have tried to enforce these laws by requiring that marriages be registered.

The minimum age for marriage in some Muslim countries is quite high often higher than is usual in the West. The idea behind this may be to extend the family's power of supervision. Typically, persons who want to get married below the age set by the law must have the permission of their guardians and the court. In Tunisia, for example, the minimum marriage age is 20 for males and 17 for females. In Jordan, the minimum age for marriage is 16 for males and 15 for females. Moreover, court permission is required for a girl under 18 to marry a man who is older than her by 20 years or more.

3.10 IS PHYSICAL VIRGINITY REQUIRED FOR MARRIAGE?

Local custom in some Muslim societies places much emphasis on the physical virginity of a woman in her first marriage. It may even happen that a cloth stained with blood is shown as evidence of the breaking of the bride's hymen. This is aimed not only at demonstrating virginity but also at confirming the honour of the bride's family. In some traditional societies, a woman whose hymen does not seem to be intact on her wedding night may be the target of accusations or even violence.

...Muslim jurists emphasize that a bride is not required to be physically a virgin; that is, to have an intact hymen.

Such practices are not sanctioned by traditional Muslim law. In fact, the Muslim jurists emphasize that a bride is not required to be physically a virgin; that is, to have an intact hymen. The jurists' reasoning is that lack of an intact hymen does not prove that intercourse has taken place. They point out that the hymen can be ruptured in other ways for instance

through jumping, falling or menstruation. The basic presumption of the law is that a woman whose hymen does not seem to be intact has lost it in ways like these. She cannot be accused of wrongdoing.

The subject of a woman's physical virginity (intact hymen) sometimes comes up in discussions of conditions that may or may not be added to a marriage contract. It is raised in this context precisely because physical virginity is not a basic requirement of marriage. It is, at most, a kind of additional expectation.

The majority opinion of the Muslim jurists is that a woman's physical virginity cannot be made a condition or expectation in marriage. Al-Shafii, the founder of one of the five schools of law, states this in very strong terms. He says that if a man marries a woman on the condition that she is beautiful, young or a virgin, and he finds afterward that she is not, the marriage still takes effect, for "marriage is not like a [contract of] sale, in which the buyer has an option [to return the goods]." He points out that physical defects of the spouses that would allow a marriage to be annulled, such as inability to have intercourse or dangerous or repugnant disease, are clearly enumerated by the law, and non-virginity is not one of them (*Umm V*: 90). The Hanafites and Malikites have the same view.

Note that even in the case of physical defects that allow the husband to annul the marriage – primarily incurable inability to have sexual relations, communicable disease or madness – the burden of proof is on the husband (*Umm V*: 90-1).

Some opinion – for instance, that of the Shiites and some Hanbalites – says that a condition of virginity added to the marriage contract is valid; although the burden of proof that the bride's hymen was ruptured through intercourse and not in some other way may rest with the man (Maghniyah 1: 51-5; Linant de Bellefonds: II 90-93). In any case, conditions can only be added to a marriage contract with the agreement of the two sides. A woman contracting her own marriage cannot be forced to accept a condition of virginity or anything else.

In conclusion, physical virginity is not an essential requirement of marriage; the husband does not have any right to an intact hymen; and a woman whose hymen appears to be broken is not assumed to have had intercourse and cannot be accused of that.

3.11 LEGAL DUTIES AND RIGHTS WITHIN A MARRIAGE

A whole range of moral rights and duties between the spouses is urged upon them by religion. Here, only duties that have legal consequences have been discussed.

The husband's duties of dower and support are discussed in section 6 on Muslim law, Spousal Support and Division of Property. In the following sections, what constitutes legal disobedience and the wife's duty of obedience is discussed.

Basic legal duties of the husband and wife

The basic legal duties of the husband are to give the dower (*mahr*) and support (*nafaqah*), including food, clothing and a place to live. The basic legal duties of the wife are certain kinds of wifely behaviour, often called "obedience" (*tá'ah*). This exchange is reminiscent of the part of the traditional Christian oath of marriage that has the man pledge to "keep" and the wife to "obey."

3.11.1 Disobedience according to traditional Muslim law

According to traditional Muslim law, the wife is disobedient if she:

- refuses to live in the same house or socialize with her husband
- leaves the house without her husband's permission
- refuses to engage in sexual relations with her husband.

3.11.1.1 Refusing to live in the same house or socialize with her husband

All the schools agree that a wife is disobedient if she refuses to live with her husband in the same house and socialize with him. The Hanafite jurist Sarakhsí says: "If a wife stays away from her husband or does not move with him to his house or accompany him wherever he wants to travel without good

reason (*bi-ghayr haqq*), then she does not get support, because she is disobedient" (V, 186).

Valid reasons for not living with the husband

Other possible valid reasons for not going to the house of the husband include inadequate or unsafe housing (Ibn Abdín: III, 634) and the presence in the house of the man's other wife or his parents or children other than minors. This is because a wife has a right to be housed separately. In these cases also, the wife is not considered disobedient and still has the right to support.

A wife would continue to have the right to support if she had a good reason for refusing to stay with her husband. A common example of a good reason is the failure of a husband to pay the amount of a *mahr* that is immediately due according to the agreement of the marriage contract – although only if the marriage had not already been consummated (e.g. Sarakhsí: V, 187).

There may be a valid reason for the wife not to go on a trip with her husband without losing the right to support if the trip is dangerous (Buhúti: V, 211).

3.11.1.2 Leaving the house without the husband's permission

A woman may be considered disobedient if she goes out of the house without her husband's permission.

According to some schools and opinions, including the Hanafites, the wife's visiting her relatives is an exception. The wife does not need her husband's permission to visit her relatives a certain number of times. The different schools suggest different frequencies of visits. Going out visiting more does not cause a woman to lose support, although it does give the husband the right to discipline.

The prohibition on going out without a husband's permission includes traveling. A wife cannot go on a trip without her husband's permission, although a husband does not need a wife's permission to go away (Buhúti: V, 211). This rule has affected the laws of some modern states in that a wife needs the husband's permission to acquire a passport and leave the country. The wife going far away for a good amount of time, even with permission, involves loss of support, according to some opinions, but others disagree and say that she continues to get support (Túsí 1: IV, 413).

A wife cannot work outside the home without the husband's permission. This rule found its way into the legal codes of some Muslim states. And a husband cannot oblige his wife to work outside the home, according to many opinions.

3.11.1.3 Refusing to engage in sexual relations

A wife's refusal to engage in sexual relations is considered by the law to be disobedience if she has no valid reason. Valid reasons include menstruation (since sexual relations are forbidden during this time), illness, forbidden sexual practices and failure to pay an amount of *mahr* immediately due if the marriage has not already been consummated.

The Hanafites, however, do not consider a wife's refusal to engage in sexual relations as disobedience that would cause her to lose her right to support. To be more exact, the Hanafites do not consider a husband's claim that his wife is refusing sex as justification for non-support. They apparently take this position because lack of sexual relations is very difficult to establish, and the husband could escape supporting his wife simply by claiming that she was refusing sex. Therefore, according to the Hanafites, if a man claims that his wife will not have intercourse, his wife has only to solemnly swear that this is not the case, and her word is accepted. She is not disobedient, and support continues.

The frequency and nature of sexual relations is, of course, a matter of private understanding between each couple, no matter what the law is outside their relationship. It is not that many Muslim men are necessarily demanding sexual relations as a matter of legal obedience, and on the other hand, some non-Muslim men do see this as a natural, even semi-legal, right. The idea that a wife owes sex as the man wants it seems to be a widespread problem of gender relations created by an imbalance of power in society.

The topic of sexual demands is included in the *Primer* because it might have legal implications for a woman who is considering being ruled by traditional Muslim law. It would be good for a woman whose legal obedience might be called into question to ask about the views of a prospective husband or an authority who might be considering her case. Do they consider sexual obedience a valid part of the law? If so, what is a reason for refusing sex that is justifiable, so that a woman would not lose support because of it?

There is a range of attitudes and views on the question of sexual obedience in modern times. Some authorities do discuss a wife's consent for less common practices, or even her right to sometimes choose not to have sex when the husband wants it.

For example, Ayatollah Fadlallah of Lebanon says that while a couple is entitled to enjoy each other in ways not forbidden by the law, such as sex during menstruation, the woman is not obliged to do anything she doesn't like. For instance, she does not have to perform oral sex if this is not appealing to her. If she is tired or psychologically not well, says Ayatollah Fadlallah, she is not obliged to have intercourse with her husband, since Quran 78:22 says: "God has not imposed any hardship on you in religion."

Sexual duties of the husband

A husband also has sexual duties toward his wife. The common belief of Muslims seems to be that a husband must have intercourse with his wife a minimum of once every four months. This is in accord with the position of the Hanbalites and Shiites (al-Shahíd al-Awwal: 60). On the other hand, the Hanafites and Shafiites say that, while having relations with one's wife is certainly recommended and a part of building a good relationship in general (e.g., Kásání: II, 334), a man is not legally obliged to do so although if he was unable to ever consummate the marriage, that is grounds for divorce.

Other modern authorities believe that the wife must always be available for sex when the husband “calls her to his bed” and must go along with his sexual desires and practices if she has no valid excuse. This is consistent with many statements in the traditional law books. The Hanbalite al-Buhúti says: “The husband has a right to enjoy his wife at any time, in any way he wants to... provided that does not interfere with her religious duties or cause her harm” (V, 212).

Many modern opinions seem to fall between these two attitudes. They approach the problem of sexual obedience by emphasizing the need for mutual love, respect and consideration between the spouses (which the traditional law books also speak about). But they avoid addressing the very serious problem of sexual obedience as a legal rule involving a penalty.

Can the husband’s ceasing sexual relations be grounds for a woman to get a divorce? The Malikites and Hanbalites allow the wife to apply to the judge for a divorce if the husband is not having sexual relations with her. The Malikites say that the wife may decide to bring the matter before a judge as soon as relations cease (Linant de Bellefonds: II, 297-9).

A husband’s refusal to engage in sexual relations is an example of his own “incorrect behavior,” or *nushúz*. As the Quran (4:128) says: “If a wife fears incorrect behaviour from her husband or that he is turning away from her, there is no blame on them if they arrange a fair settlement between them.” Other examples of a husband’s *nushúz*, or incorrect behaviour, mentioned in the law books involve taking a cold and abusive attitude toward the wife.

However, much less attention is given to the husband’s than the wife’s *nushúz*, even though both are mentioned in the Quran. This is apparently because a husband’s “incorrect behaviour” does not have definite legal consequences apart from refusing sex – in the view of some of the schools – and actual physical or verbal abuse in the view of the Malikites.

A woman’s obedience does not include turning over any of her money or property to her husband or letting him control it. A woman’s wealth, including her mahr, is entirely her own, and she can deal with it as she likes...

Note here that “definite legal consequences” mean specific penalties laid down by the law. I was informed by a judge of a *sharia* court in a Muslim country that this did not rule out a husband being liable to “discretionary punishment” (*ta’zír*) for incorrect behaviour or other offences in marriage. Discretionary punishment means that the judge can decide on an appropriate penalty. This can range from a verbal rebuke upward to more severe measures.

A woman’s obedience does not include turning over any of her money or property to her husband or letting him control it. A woman’s wealth, including her *mahr*, is entirely her own, and she can deal with it as she likes; although the Maliki school (and possibly some other opinions) allows the husband to limit her giving away wealth to non-family members.

3.11.2 Consequences of being disobedient

If a wife is disobedient, there are three possible legal consequences in a marriage. These are:

- the husband can stop having sex with the wife

- the husband can “hit” the wife
- support can be discontinued.

Two of the consequences are mentioned in Quran 4:34. This verse says that if a husband fears “incorrect behaviour” (*nushúz*) from a wife, he may discipline her, either by admonishing her, refusing sexual relations or some kind of hitting. The verse has greatly troubled modern Muslim thinkers. They have put much energy into trying to explain it away, and the traditional jurists also tried to minimize its implications, as mentioned below.

Some Muslims, however, take the verse and the law that explains it quite literally, and traditional jurists have explicitly discussed matters related to it, such as whether hitting is allowed the first time a wife disobeys or only if she persists.

3.11.2.1 Husband can stop having sex with wife

If a wife is disobedient, a husband can stop having intercourse with her. Intercourse is an actual legal right according to some schools, and a moral right according to others, as explained at the end of this section.

There is a tendency in the traditional law to try to minimize withholding sex. The jurists debate how long the husband should refrain from intercourse, e.g., only a few days (Ibn Qudámah: VIII, 162). Some say that the husband should show his disapproval in some other way – for example, by not being very sociable, including during sex. One twelfth-century Hanafite jurist points out that intercourse is “a shared right,” and a husband would be causing not only his wife but himself harm if he stopped it (Kásání: II, 334).

3.11.2.2 Husband can “hit” the wife

Muslim law takes care to define who can hit whom. For instance, a father can punish a child in this way. The law also sets limits on hitting and the punishment of the hitter who exceeds those limits.

In accord with the patriarchal spirit of the era in which it was formed, Muslim law allows husbands to hit their wives for certain reasons and within limits. This is why the Malikite law that allows a woman to apply for divorce because her husband has caused her some “harm” applies only when the husband exceeds the right he has to hit her for disobedience.

The part of the Quran 4:34 that speaks of hitting was already controversial in traditional times, and it is very controversial today. Many people have tried to interpret it in ways that would soften or eliminate the aspect of physical abuse. A common approach is to say that the “hitting” referred to in the verse is something very light, amounting to a symbolic gesture, as several sayings of the Prophet suggest (e.g., Bukhárí, *K al-nikáh*, chapter on “That which is Abhorred in the Striking of Women”). The verse is discussed along with the statement of the Prophet’s wife, Aishah: “The Messenger of God, peace be upon him, absolutely never struck any of his wives or any servant, and he never raised his hand against anyone” (Bukhárí, *K. al-fadá’il*). This is taken to mean that, while hitting is allowed in some extreme circumstances, it is a very bad thing that is against the practice of the Prophet.

If a couple is thinking of turning to a particular religious authority to guide them in their marriage or rule on legal matters, it would be good to ask ahead of time about the exact details of that authority's view of discipline. Does the authority believe that a husband has the right to reproach his wife, cut off intimate relations, hit her or withhold support if he thinks she is not obeying him?

This is not merely a modern apology. The jurists were seriously concerned by the implications of allowing the disciplining of a wife. It is common to find warnings in the traditional law books that any of the allowed measures, including a verbal rebuke or refusing sex, should be mild or avoided altogether. The idea, very widespread today, that hitting is only a last and extreme resort in Muslim law, after the two other measures mentioned in Quran 4:34 rebuke and cutting off intimate relations also begins in the traditional sources.

However, these explanations of hitting and other discipline are not enough. Even if hitting were reduced to a symbolic gesture, it is violence, and what is being symbolized is the right of the husband to subordinate and discipline his wife. This is not consistent with an equal and loving relationship. In addition, some persons in our day do not even try to minimize hitting but consider it a kind of supervisory right of the husband and discuss it as if it were an accepted part of marital life.

Note well that physical abuse of spouses is illegal in Canadian law. You can read about this subject in the very important section 1.5 ("Safety-related matters") in the Canadian law part of this *Primer*.

3.11.2.3 Support can be discontinued

A woman who is disobedient is no longer entitled to support. Even if her husband decides not to divorce her, he does not owe her support and may suspend it. Loss of support is the consequence of disobedience that is discussed most in the law books.

The Hanafite Ibn Abdín says that if a wife becomes disobedient and support has been owed her for some months, she loses all that support (III, 633). This is one rule that might be applied. There are numerous rules and differences between schools and jurists, and one has to ask many questions before agreeing to let an authority judge.

The jurists do seem to agree that a wife's right to support resumes when she returns to obedience (e.g. Sarakhsí: V, 187).

3.12 POLYGAMY

Canadian law does not allow any person to legally marry if he or she already has a legal spouse. This includes already having a legal spouse outside Canada. All the participants in a polygamous marriage may be open to penalties. This includes not only the person who has more than one spouse but also the person who solemnizes the marriage knowing that a participant is already legally married. It also includes the new spouse, if she knows that the man is already legally married.

However, Canadian legal penalties against polygamy may not be very meaningful, since men who have more than one wife can get around the law by registering only one with the government. The sections dealing with Marriage (section 3), Custody, Child Support and Child Protection (section 5)

and Spousal Support and Division of Property (section 6) in the Canadian section of this *Primer* discuss other possible implications of registered and unregistered polygamous marriages.

A Muslim woman may be able to get her husband to agree to a condition in the marriage contract that allows her a Muslim divorce and other penalties if he takes another wife in a Muslim ceremony. See Muslim law section 2, Domestic Contracts.

A Muslim woman may be able to get her husband to agree to a condition in the marriage contract that allows her a Muslim divorce and other penalties if he takes another wife in a Muslim ceremony.

Traditional Muslim law has allowed up to four wives at one time. Permission for polygamy is given in Quran 4:3 “And if you fear that you will not be able to deal fairly with [female] orphans, marry those women that seem good to you, two, or three or four; but if you fear that you cannot do justice to them, then only one.”

Many Muslims believe strongly that Islam actually recommends monogamy, since in addition to the verse just cited, Quran 4:129 also says: “You shall never be able to deal equally between wives, no matter how much you may wish to do so.” Other Muslims deal with the verse by reasoning that polygamy is allowed only in the most exceptional cases – for instance, if there are many more women than men because of war, or if there are orphans who need to be taken into a family to be protected.

Traditionalists object to such interpretations and to legislation that eliminates or limits polygamy because they believe that this goes against the Quran and changes Muslim law. Fearing such objections, few Muslim majority states have directly outlawed polygamy. Two exceptions are Turkey and Tunisia.

Most modern state legislation tries instead to curb polygamy, perhaps with the aim of eradicating it altogether. Typical measures include obliging a man wanting an additional wife to obtain the permission of the first, demanding that he show cause before a judge (for instance, inability of the original wife to conceive), or requiring that he demonstrate resources to support all wives equally. Another measure against polygamy sometimes allowed by modern legislation is to include a condition in a domestic contract allowing the first wife to divorce if her husband intends to take another wife.

This and the next section outline some of the traditional rules and present-day realities of polygamy. Section 3.13, on lesser contracts, also includes material on polygamy.

3.12.1 Rights of a plural wife

A plural wife has the right to be housed separately from other wives and the husband’s family members except for minor children. This right may be suspended if the wives agree to live together (e.g., Ibn Nujaym: III, 385).

Should the housing and support given to plural wives be equal? This is not necessarily so, according to the traditional law. Some opinions say that the level of support of any wife is determined by the husband’s own style of life and ability to pay. In this case, support would be equal. Other opinions say that the level of support should be determined according to the wives’ own status and wealth; that is, by the way they were previously accustomed to living or by taking into account both the

wife's and husband's accustomed standards of living together. In this case, the support given to wives can be unequal. For further details, see section 6.1.2 on *nafaqah* (support).

Some modern apologetic literature on polygamy promotes the idea that Muslim wives are not jealous of one another or that they should be able to overcome jealousy through spiritual effort. But the traditional sources are very aware of jealousy. They introduce rights between wives as a way to reduce it and are quite explicit about this. One jurist speaks of jealousy as natural and even noble human emotion, and points to the “great harm resulting from enmity, jealousy, and fighting” if wives are put together (Ibn Qudámah: VIII, 137).

3.12.2 Division of time between wives

Plural wives have a right to equal nights with the husband, along with the days that go with the nights. This is known as *qasm*, or “division.” Division concerns time, not necessarily equal sexual intercourse (e.g., Ibn Qudámah: VIII, 138).

Division of time between wives not a legal right

Division of time between wives does not seem to be actually a legal right, even though the jurists speak of it as “obligatory” (*wájib*). There does not appear to be any specific legal sanction against a husband who does not properly divide his time. However, a judge may impose a discretionary penalty (*ta'zír*) on a husband whose wife complains of unequal division.

The law books discuss division at length. Husbands are warned strongly to treat their wives equally by spending an equal number of nights with each, whether they are already present or new with the exception of a kind of initial honeymoon for new wives. Wives should get their share of the husband's company even if they are ill, menstruating or living far away from one another (Ibn Qudámah: VIII, 137, 152).

However, rights to equal division can be reduced in various ways. A woman may agree to give up her time. The time a man spends on a trip accompanied by a wife may not count for the others. (Note here that the choice of which wife to take along must be done by lot, and not by the man's own preference.) If a

woman has grown old and a man intends to divorce her and marry someone younger, they can agree that she will stay married to him, with less of a turn than the new wife – and even reduction of her support (Sarakhsí: V, 216-19; Ibn Qudámah: VIII, 165).

One jurist mentions that in a situation in which wives have agreed to live in the same house, it is reprehensible (*makrúh*) for the husband to have sexual relations with one in the presence of (meaning in a way obvious to) the other. If this happens, the legal consequence is that the wife is not considered disobedient if she refuses to have relations with him herself (Ibn Nujaym: III, 385).

We see that it is possible to reduce the rules for equal treatment of co-wives in several ways. It is admitted that equal affection and intercourse cannot be guaranteed, and the rules for division of the man's time between the wives has no definite legal sanction behind it. Most significantly, rights can be reduced or cancelled if a woman agrees to give them up. Persons in weak positions can easily be pressured to give up rights.

3.12.3 Realities of polygamy today

The reality of polygamy in North America today usually does not match the suggested standards of the traditional law. Husbands with several wives are unlikely to provide equal support or time. Wives may be only partially supported, receive no support or themselves contribute to the support of underemployed husbands.

A Muslim father is responsible for the entire support and education of his children. This is explained in section 5, Custody and Child Support. Can a Muslim man with more than one household meet this standard today?

In the pre-modern Islamic world, childhood and parental responsibility ended in the early teens. In our time, childhood has been extended into the early twenties. The expenses of support and education are very high, and advanced education is crucial in securing a future. Very few men will be able to fully support several children in different households at today's best standards.

More important, the upbringing and education of children today requires the fullest presence and effort of both parents. A man with more than one household disadvantages his children emotionally when he is not available and leaves the burden of family problems unfairly on the mother while he "holidays" with another wife.

Polygamous marriage is ultimately damaging to the Muslim community. Muslim children of polygamy are likely to go out into the world at a disadvantage, just like other children with difficult family backgrounds.

3.13 LESSER MARRIAGE CONTRACTS

Lesser marriage contracts have less stringent conditions than the regular full marriage contract. They are all controversial.

We know from anecdotal evidence that lesser-contract marriages do take place in Canada. But because they are not practised openly, it is difficult to tell how common they actually are. Lesser-contract marriages appear to be on the rise in the Muslim world, and this upward trend may have affected Muslims in the West.

3.13.1 Mutah marriage

Mutah is marriage for a fixed term. It is an exclusively Shiite institution. The Sunnites believe that *mutah* is not valid marriage and object to it very strongly. Because *mutah* is discussed at length in the Shiite law books, it is the best regulated of the lesser contracts. Only a few of the rules applying to it are mentioned here; for more full and exact rules of *mutah*, refer to the opinions of the ayatollah being followed.

The basic difference between *mutah* and regular marriage is that *mutah* lasts for a limited time, whereas regular marriage is expected to last permanently, unless it comes to a divorce. In order for a *mutah* contract to be valid, it must include explicit mention of the fixed term of the marriage. When the term finishes, it either automatically expires or the spouses agree to renew it.

Rights and duties in a *mutah* marriage

Both the rights and duties of a wife are reduced in a *mutah* marriage. For instance: The *mutah* husband is not obliged to provide support, while the *mutah* wife has more freedom of movement and is not required to share the conjugal bed of her husband beyond what is specified in the contract. Neither spouse of a *mutah* marriage inherits from the other. Children are legitimate, although if some legal issue involving the children arises, they might have to be acknowledged by the father in order to confirm their legitimacy.

The contract must also include explicit mention of an amount of money immediately due to the *mutah* wife. A *mutah* that does not specify the amount due is invalid. Witnesses are not required for a *mutah* marriage.

The parties to a *mutah* may construe the contract in any way they wish. They may fix a term lasting only a few hours (though some modern jurists object to very short terms), or decades. They may specify the kinds of interaction allowed between them.

Some jurists say that a woman not previously married can contract *mutah* with the consent of her guardian; but others say that a virgin cannot be married by *mutah*. Even those who allow *mutah* of a virgin may still consider it legally “undesirable” (*makrúh*). Modern authorities who hold the first opinion

may be thinking of something like a trial marriage, in which *mutah* will be followed by a regular permanent union.

3.13.2 *Urfi, sirrí and misyár marriages*

Urfi means “customary.” Although the concept of *urfí* is vague and can mean different things, the general meaning is a marriage that is not registered with the government. *Sirrí* is “secret” marriage, that is a marriage not properly publicized – for instance, because it has not been registered or is being hidden from friends and family. *Misyár* is an “itinerant” marriage in which the husband visits the wife occasionally where she lives, probably distant from his own regular home.

These types of marriage appear to be almost exclusively practised by Sunnites. Customary, secret, and itinerant marriages are not as well defined as the *mutah* marriage. In both theory and practice, the boundaries between them are not always clear.

Some prominent religious authorities have issued opinions that declare various kinds of Sunnite lesser marriages legitimate. A common argument is that an arrangement that includes agreement of both spouses, a contract, witnesses and at least some kind of minimal or symbolic *mahr* cannot be called illegal in Muslim law. Shaykh Yusuf al-Qaradawi, a contemporary Sunnite authority with a large following, says that even itinerant marriages are valid if the legal requirements of the contract are in place. But he also says that he does not particularly approve of them. Other prominent religious authorities oppose lesser contracts. They point out that lesser contracts do not always include the basic elements of a proper marriage contract and that they endanger the rights and protections given wives by the law.

One marginal practice sometimes presented as a valid lesser contract involves an itinerant marriage of a rich man with a low-income young girl, which is facilitated by her own family. The man visits her or takes her on trips until he decides to divorce.

A “marriage with the intent to divorce” has the man marry a woman while secretly intending to divorce her sometime in the future – for instance, in order to go back to his country when he has

finished his studies abroad. Sheikh Bin Baz of Saudi Arabia (now deceased) issued a controversial opinion declaring such marriages legal. Other authorities, however, reject marriage with the intent to divorce. Most Muslims find it repugnant and unfair.

3.13.3 Realities of lesser-contract marriage

It is argued that the advantage of lesser contracts is that intercourse is properly legalized. It does not involve the disgraceful “fornication” (*zina*) of more casual relations. It is also argued that a liaison that takes place in the context of a contract helps to secure the rights of a woman.

It does indeed happen that liaisons are formed through lesser contracts by the free agreement of a man and woman who cannot contract a full marriage for some reason or do not wish to. For instance, one kind of *urfi*, or “customary,” marriage widely practised in Egypt is contracted by young people who cannot afford the expense of a full marriage, such as having a wedding party and renting an apartment. The couple may hope to follow the usual customs and register their marriage with the government sometime later. *Mutah* marriage, or marriage for a fixed term, is used by some Shiite couples to define the boundaries of their relationship. A girl may enter into a *mutah* marriage because it allows her to licitly date a boyfriend or prospective husband while limiting physical contact or ruling it out altogether.

A woman may also favour *mutah* or other lesser contracts because she can consider herself married and have some sexual satisfaction without the trouble and loss of freedom that comes with a full-time husband. A widowed Lebanese friend declared that if she were ever to have a relationship, she would arrange it as a *mutah*, since she would not have to bring a stranger into the house where she was devoting all her effort to bringing up her children.

Women who speak favourably of *mutah* and other lesser-contract arrangements are probably imagining a monogamous relation in which they have some choice and power.

In reality, the primary use of lesser contracts is to facilitate men’s extra sexual liaisons without requiring them to give the woman the rights of a full-contract wife or inform another wife already in place. Lesser contracts are usually a kind of a low-rent polygamy.

Women in these kinds of lesser-contract marriages are likely to get much the same out of them as any girl-friend or mistress of a man who does not plan to make her his proper wife. Otherwise, the advantage to a wife in a lesser-contract marriage is that she enjoys the personal satisfaction and social status of considering herself married. The disadvantage is that the man is free without much obligation to her (as explained below) while she is bound to him, so he may, if he likes, exercise the rights of a husband over her.

The common element in lesser-contract marriages is that they tend to reduce the rights of the wife as follows:

- The husband may not establish a household. The wife stays in her own or at her parents’ residence, where the husband may visit her.
- The husband may not support the wife. Suspending the legal obligation of support that is so important in Muslim law is sometimes justified by saying that the wife has voluntarily given it up.

- Lesser-contract wives are supposedly counted as one of the allowed four wives. The exception is *mutah* wives. A man may have, at least in theory, as many *mutah* liaisons as he likes in addition to four wives. However, a lesser-contract wife is even more unlikely than others to enjoy the equal rights with co-wives described in section 3.12 on polygamy. It is said that she has voluntarily given them up.
- Do lesser-contract wives have a right to the minimum sexual relations specified by some schools of law? In the case of an itinerant (*misyar*) marriage at least, there is reason to doubt it, since the husband may live far away and visit only occasionally.
- The informality of lesser-contract marriages and the lack of registration make it possible to deny the marriage, especially if the woman does not insist on an explicit witnessed written contract that she keeps with her. This can mean that a child ends up without a father. In Egypt, the popularity of customary marriage has resulted in large numbers of paternity suits before the courts.
- The informality of lesser contracts makes it more difficult for a woman to get divorce rights such as *mahr*. The man might simply disappear.

As the list suggests, lesser-contract marriages often involve the relationship of a man with a woman who has less power or status due to income, age, fear of spinsterhood, and so on. A reliable test of the social prestige of a lesser-contract marriage is to ask an advocate or participant if he would like any of his female relatives to marry in that way.

One reason for these very different opinions of Muslim scholars about lesser-contract marriages (apart from *mutah*, which is firmly established in Shiite law) seems to be that they are not all speaking about the same thing. Some are speaking about marriages that are completely regular, apart from not being registered and accompanied by a wedding party and establishment of a residence. Others are speaking about a contract without proper witness or which is kept at least somewhat secret. Differences in opinion about lesser-contract marriages may also be due to some authorities considering it legitimate for a woman to give up rights and others denying that it is legally allowed.

The main trend of Muslim laws, and certainly the spirit of the law, is against a woman giving up the basic rights of the marriage contract. This can be seen very clearly in discussions of what alterations can be made to a contract, a subject discussed in this *Primer* in section 2, Domestic Contracts, under Muslim law. You will see there that the jurists very carefully avoided taking away the rights of the spouses.

Those who argue for lesser contracts sometimes claim that they were sanctioned by the traditional law. But the traditional Sunnite law books frequently and strongly condemn secret marriages and any marriage contract that does not meet the legal requirements in a very definite way. It seems that Sunnite lesser marriage contracts are rather the result of a breakdown of the legal system under the pressures of modern times.

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4 DIVORCE

4.1 DIVORCE IS DISAPPROVED OF BUT ALLOWED

In Islam, divorce is disapproved of but allowed. The Prophet Muhammad is reported to have said that divorce is “hated” by God (Abu Dáwúd, *K. al-taláq*), and the Quran places limits upon it and urges couples to reconcile (2:226-232). Religious authorities preach against divorce and sometimes speak out against men’s abuses of divorce.

Nevertheless, Muslim law allows divorce. The rules for divorce are complicated, but it is necessary to understand them in order to be aware of what might happen and be ready to assert one’s rights. It is best to learn about Muslim divorce rules before divorce ever comes up, since a man can divorce quickly and without warning. There are also opportunities for the wife, while drawing up a marriage contract, to acquire more rights within the marriage. For example, the wife can ask to have the right to divorce without the agreement of her husband if that ever becomes necessary.

Divorce reforms

In most Muslim countries, the law has placed legal restraints on the man’s power to divorce. It has also made the grounds on which a woman can obtain a divorce wider and has moved to safeguard women’s divorce rights such as *mahr*. These reforms, which were already underway in the nineteenth century, are usually justified on an Islamic basis, and they often build on positive features already found in the tradition. There is ongoing discussion in Muslim countries about such reforms, and the law is constantly changing. Nevertheless, the power to divorce is still unequal in most Muslim countries. Men are still much more easily able to divorce than women.

Just as in other areas of Muslim law covered in the *Primer*, you may encounter different details and opinions than those mentioned below. This does not necessarily mean that you are wrong. You should be prepared to argue your position and ask for advice from authorities you think will support your case.

In traditional law, the power to divorce is given primarily to men. A man is allowed to divorce his wife without giving any reason though the jurists also say that divorce without any reason is morally reprehensible, *makrúh*.

A woman, on the other hand, has few grounds (i.e., valid reasons) for divorce in traditional law.

Division of property and other payments between the former spouses is an important part of divorce. The subject is discussed in sections 5, Custody and Child Support, and 6, Spousal Support and Division of Property, which should be read along with this.

4.2 SUNNAH DIVORCE BY THE HUSBAND

It is strongly recommended that a man divorcing his wife follow procedures referred to in the Quran and confirmed by the approved practice (*sunnah*) laid down by the Prophet and early community.

A *sunnah* divorce begins with the husband’s pronouncement of divorce. He does not have to give any reason for his divorce, and the wife’s agreement to or even knowledge of it is not needed.

However, divorce without real need is considered morally reprehensible (*makrúh*) or even morally forbidden (*harám*), since the man “damages himself and his wife and needlessly destroys something that was beneficial to them both” (Ibn Qudámah VIII, 234).

For a proper *sunnah* divorce, the husband’s pronouncement of divorce must take place at a time when his wife is not menstruating and without any intercourse having taken place since her last menstruation. This timing seems to be intended to encourage reconciliation, since sexual intercourse can take place during non-menstruation. It may also be designed to facilitate the counting of further menstrual periods and prevent a divorce starting when the wife could be pregnant.

4.2.1 The waiting period (*iddah*)

After the man pronounces divorce, the wife enters a waiting period (*iddah*) of three menstrual cycles. The time may be three lunar months if she is too young or too old to menstruate. Material factors and differences in legal opinion may result in various other lengths of *iddah*. For instance, it is said that if a woman’s menstruation is so irregular that her period does not come for many months, the waiting period continues (Sarakh sí: V, 19). Note that a woman’s statements about her own menstruation will generally carry the most weight if the matter is disputed.

If the wife is pregnant, the waiting period ends only with the birth of the child.

During the waiting period, the wife stays in the husband’s house, and he must continue to fully maintain her.

The *sunnah* divorce becomes final only when the waiting period ends. For this reason, if either partner dies during the waiting period, inheritance still passes to the other. There is more information on this in section 7, Inheritance.

4.2.1.1 Taking back the wife and re-establishing marriage during the waiting period

During the waiting period, when the divorce is not yet final, the husband may take the wife back. This does not require the wife’s consent. She has no right to refuse to continue with the marriage even though her husband has tried to divorce her.

It is recommended (*mustahabb*) that if the husband takes back the wife, it should be explicitly known by the wife and witnessed by two witnesses “so that the woman cannot be deceived.” This is the dominant opinion. According to an opinion of al-Shafii – which may not, however, have been his final word on the matter – witness is actually legally required before the return can be considered valid and intercourse allowed (Sarakh sí V, 19; compare to Linant de Bellefonds II: 399–400).

Purpose of *iddah*

The waiting period is designed to prevent hasty divorce. The hope is that the husband will reconsider his action and the couple reconcile. The waiting period also serves to establish paternity. Assigning a child to its father is very important in Muslim law, not only because there is some stigma attached to illegitimacy but also because it is expected that all the needs of the child will be taken care of by the father and, if necessary, his extended family.

Intercourse or a good possibility that intercourse took place because the couple was in a situation where it could have happened re-establishes the marriage. According to some opinion, even looking at the wife with lust re-establishes the marriage (Sarakhsī V, 21). The Shafites, on the other hand, insist that a man has to verbally affirm that he is taking his wife back before any contract takes place in order for the contact between the couple to be licit.

There are many differences in opinion and nuances in the rules about taking back the wife (*rujū*) during the waiting period. This subject is discussed at length in the traditional law books. What is at stake here is the wife's awareness that she has been taken back. The Muslim jurists seem to morally disapprove of the wife not being immediately informed that this has happened, and they generally recommend that she be informed. But leaving her unaware is not necessarily illegal.

This is another example of problems that would be raised by returning to the traditional Muslim law, as some Muslim traditionalists in Canada would like to do. In Muslim countries, of course, such features of the law have been curbed by reform, and divorce is controlled by the courts.

Note that the husband can take back the wife during the waiting period only in the approved *sunnah* procedure just described. In the other even less respectable divorce procedures described below, the husband loses the right to stop the divorce and take the wife back during the waiting period.

4.2.2 A less approved *sunnah* divorce

The Hanafites and others add another kind of *sunnah* divorce involving three pronouncements of divorce by the husband. Although the divorce is still considered to be in accord with the practice of the early Muslim community and is therefore called "*sunnah*," it is less approved than the *sunnah* divorce described above.

The less approved *sunnah* divorce begins with the man pronouncing divorce at a time when the woman is not menstruating and there has been no intercourse since her last menstruation. Then he decides to take her back. He then pronounces divorce at the very next time of non-menstruation, and decides to retract it again.

The two-time limit on pronouncing divorce

The two-time limit on retraction is apparently designed to prevent the husband's using repeated threats of divorce against his wife as a kind of psychological weapon. It is the answer of the law to Quran 2:229: "Divorce must be pronounced [only] twice, after which the wife must be kept in a fitting manner or humanely released."

Many opinions also speak about a two-time limit during the life of a marriage on a husband's pronouncing divorce and still being able to take back his wife. The limit is intended to further restrain the husband from playing with divorce. Ayatollah Sistani of Iraq says that "if a man divorces a woman twice and takes her back, or divorces her twice and takes her back by [marrying her], or takes her back after one divorce and returns her by [marrying her] after the second divorce, she becomes *harm* (forbidden) for him after the third divorce." See www.sistani.org for the full opinion.

If he does this again in the third consecutive time of non-menstruation, the divorce is final (*ba'in*) and he can no longer take the woman back or approach her. The waiting period, usually lasting three menstrual periods or approximately three months, begins without the husband being able to stop it.

Section 4.1 and its subsections have outlined basic rules applying to different types of *sunnah* divorce and to a husband taking a wife back during or after divorce. There are, as always, variations in rules between, and even within, the various schools of law.

If your husband is divorcing you in Muslim law, it may help to learn more about the rules so that you can pay close attention and recognize opportunities to either keep the marriage or end it.

Whether your Muslim marriage is registered or not, refer now to the Canadian part of this *Primer* to learn about your possible rights in Canadian law.

4.3 QUICK DIVORCE

Traditional Muslim law recognizes a man's quick divorce of his wife, even though it contradicts the careful regulations laid down in the Quran and is disapproved of by several sayings of the Prophet.

The quick divorce is called *bidah* by the jurists themselves, a very negative word meaning “innovation” contrary to approved *sunnah* practice. Nevertheless, quick divorce is considered to be legally effective by all the Sunnite schools. The jurists cite sayings of the Prophet they consider to be in favour of the practice (e.g., Bukh ari, *K. al-tal aq, Man aj aza al-tal aq al-thal ath* #4855; the had ith does not seem relevant, but see the commentary of Asqalani, *Fath al-b ari*). The legally important consensus of the community is also cited.

Quick divorce is completed by the man's pronouncing some word indicating divorce three times at once – for example, “*t aliq, t aliq, t aliq*” (“divorced, divorced, divorced”). A phrase such as “You are three times divorced” will also do. Even a single word with the showing of three fingers is effective, according to some opinions.

Features of the *sunnah* divorce such as the waiting period, the ban on divorce during menstruation or confirmed pregnancy, and the right of the woman to at least some maintenance may disappear in a quick divorce.

Not all Sunnite jurists accepted the quick *bidah* divorce. The most famous jurist among the band of Sunnites from various schools who rejected quick divorce was the fourteenth-century scholar and the grandfather of modern fundamentalism, Ibn Taymiyah. Ibn Taymiyah ruled that a triple divorce declaration was equal to only one, so it was only the beginning of a divorce process.

Power of the husband in Muslim divorce

The power of the husband in Muslim divorce is very strong. If he violates some of the rules of *sunnah* divorce – for instance, divorcing during the wife's menstruation or having intercourse since the last menstruation – his divorce will no longer be *sunnah*; but it can still count as a divorce. Even if the things a husband does in divorce are morally reprehensible (*makr uh*) or actually sinful and you try to use the divorce rules to bring some pressure, the divorce will still go forward and be legal in Muslim law – unless, perhaps, you can find an authority who refuses to accept it or your community does not accept it.

Quick divorce is firmly rejected by the Shiites. Some Shiite authorities say that it does not count for anything at all. Others say that it is counted as only one divorce declaration (which means that there will be a waiting period during which the divorce can be taken back). The Shiites do not allow the irregularities that might happen with quick divorce such as pronouncing divorce during a woman's menstruation or while she is pregnant.

However, Shiite opinion also says that a divorce by a Sunnite of his Shiite wife according to the Sunnite rules is valid. A Shiite husband divorces his Sunnite wife by his own Shiite rules (Maghniyah 2: 149-50).

4.3.1 Quick divorce and modern state reform

A very common state reform in modern times has been to ban quick divorce – for instance, by considering it to be a single declaration, which would then require a waiting period and other obligations from the husband. The idea that quick divorce is “against Islam” is passionately held by many Muslims.

Traditionalist loyalty to quick divorce nevertheless persists. Traditionalists condemn even Ibn Taymiyah on this point, and conservative clerics in India continue to insist that quick divorce must be part of what they call “Muslim Personal Law.” The quick divorce also survives as a widespread popular image, sometimes seen in films.

The quick divorce has been used in North America and approved by some local religious authorities. Quick divorce can be traumatic for a woman. On the other hand, quick divorce might be useful to a wife who is in a bad marriage, as the man may pronounce it in a burst of anger, immediately freeing the woman from her religious marriage. The husband does not have any right to take back, touch or approach her.

A man cannot harass, approach or impose himself in any way on a former wife, since there is no longer a marriage tie to justify any relation.

The man will have no right to take back, touch, or approach his former wife from the moment he divorces, since quick divorce is immediately *bá'in*, final. Of course, this is the case with all final divorces, including completed *sunnah* divorces. A man cannot harass, approach or impose himself in any way on a former wife, since there is no longer a marriage tie to justify any relation. He will have no more right to approach his former wife than would “any other man or suitor” (Sarakhsí: V, 19).

The negotiated, or *khul*, divorce described below and virtually all judicial divorces (especially in modern practice) are also final. A final divorce means that the husband will have no rights whatsoever over the wife, including during the waiting period if the divorce was final before it.

Note, however, that there are some different opinions as to which divorces are final. It is necessary to clarify whether a divorce is final (*bá'in*) or of the kind that would allow a man to take his wife back as he liked before the end of the waiting period.

4.4 THREATS OF DIVORCE

The traditional law books discuss situations in which men speak of divorce in a vague way, as a joke or while drunk. Some say that such divorce pronouncements are not valid. Others (particularly the Hanafites) say that they do make a divorce even if the husband says afterward that he did not really mean it, as long as the words he used could reasonably be understood to indicate intent.

There was much discussion of how specific the words used to pronounce a divorce have to be in order to take effect. For example, does a divorce come into effect simply by a husband alluding to it? The Hanafite jurists required the least explicit words, and the Shiites the most explicit. The different approaches of the schools to these questions are influenced by their philosophies of the legal act and contract law; but there also seems to be a concern on all sides to somehow prevent husbands from using the threat of divorce as a psychological weapon.

This could work in different ways. The Hanafites say that ambiguous divorce declarations or even allusions (*kindyāt*) to divorce can make an immediate, final divorce. This could prevent a husband from using threats and abusive language, especially if there were any witnesses present, since he would find that his wife, if she liked, could claim divorce without him having any right to take her back. If the Hanafite rules were applied, a husband could not even refer to divorce jokingly or claim after mentioning divorce that he was only joking. He would have to watch his language and could not keep his wife on edge with implied threats of divorce.

Other Sunnite opinion puts much more emphasis on the man's intent and says that declarations of divorce do not have any effect if they are ambiguous and the man says he did not mean it. If these rules were applied, a woman could feel more secure that she was not divorced. She would not have to strain after her husband's words and be left wondering.

Modern legislation has followed the spirit of the traditional law by declaring divorce pronounced in vague terms or uncertain circumstances as invalid. Many modern fatwas also emphasize the intent of the man and rule that vague divorce is invalid.

Modern legislation has followed the spirit of the traditional law by declaring divorce pronounced in vague terms or uncertain circumstances as invalid.

4.4.1 Pronouncements of divorce to take place in the future

Divorce pronounced so as to take place at some future time or possible event (e.g., “You shall be divorced on the tenth of May”) is also discussed in the traditional texts. Among the Sunnites, future-conditional divorce is considered valid by all except the Malikites. The Malikites say that divorce pronounced so as to take place at some time in the future immediately turns into a final divorce. This is apparently meant as a punishment against a husband who would be so careless and cruel.

Modern Sunnite reform has banned abusive future-conditional divorces. The reformists cite the opinion of dissenting jurists, including the very famous fourteenth-century scholar, Ibn Taymiyah.

The Shiites do not allow joking, vague, or future-conditional divorces, or divorce through alluding to divorce. None of these has any legal effect for the Shiites. Shiite divorce must be pronounced explicitly, in very specific words, in Arabic if possible, and with full intent (Túsí 1: IV, 430 ff.). A divorce by a Shiite man must also be pronounced in front of witnesses although it does not necessarily have to take place in the presence of the wife or with her immediate knowledge.

4.5 AN ADULTEROUS WIFE MAY BE IMMEDIATELY DIVORCED BUT NOT MURDERED

A man's accusation of adultery against his wife also leads to a kind of quick divorce. Following a procedure laid down in the Quran itself (chapter 24, verses 6 to 9), a husband who believes that his wife is an adulteress bears witness four times and swears by God that she has committed adultery. The wife then bears witness four times and swears that she has not committed adultery. There is no punishment involved, and the couple is divorced.

Accusing a wife of adultery (through the procedure described above and without punishment) may be approved if the husband really believes that his wife is going to give birth to a child that is not his. It is only approved if he knows (a) that she has had intercourse with someone else and (b) that he did not have intercourse with her during the time she became pregnant. The traditional law books and, in fact, traditional Muslims to this day are shocked at the idea of a man having a definitely illegitimate child assigned to him.

There is at the same time a very strong tendency, especially in the Sunnite schools, to consider children legitimate if at all possible. This may extend to assigning a child to the man to whom the mother was previously married, even if they are long divorced or the husband has been dead for years.

“Honour killing” not sanctioned by Islam

The Quranic procedure of the husband bearing witness four times and swearing that the wife has committed adultery and the wife bearing witness four times and swearing to her innocence is designed to prevent what has become known in our day as “honour killing.” An anecdote of the Prophet (*Bukhárí, K. al-taláq, Man ajáza al-taláq al-thaláth*) tells how he was asked whether a man who had caught his wife with another man should then kill her and then be killed in return (since killing without proof or trial makes the killer liable for homicide). The Prophet became very angry at this ugly question and refused to answer. But the man concerned then asked the question in public. At this point, God revealed Quran 24:6 to 9, and the Prophet had the husband and wife take oaths against each other as the verses said, following which they were divorced. In this way, murder and punishment for murder were avoided.

As indicated by the Prophet's anger and disgust at having to listen to such a story, it is not recommended that a man even accuse his wife of adultery, even if he believes or knows the accusation to be true. It is considered more proper to simply divorce her through the normal procedures, without accusation (e.g., Ibn Dúyán, *Manár al-sabíl, section on qadhá*; trans. into English by G. Baroody as *Crime and Punishment under Islamic Law: 74*).

4.6 NO NEED FOR WITNESSES OR NOTIFICATION OF THE WIFE

We have seen that although traditional law tries to restrain divorce, it does not require the man to give any reason for divorcing. It is true that divorce without good reason is strongly disapproved of. It has even been said that divorce without “need” cannot be considered *sunnah* (Kásání III, 89, quoting Málík). Nevertheless, the basic legal fact is that no reason has to be given.

A husband’s divorce action also does not require a woman’s consent. Even though marriage is a contract that requires the agreement of both spouses, Muslim law considers divorce to be a unilateral action (*iqá*) of the man.

Nor does the wife have to be present at the time of divorce in order for it to be valid. A husband does not even need to immediately inform his wife that he is divorcing her (although the jurists do say that informing her as soon as possible is highly recommended). Divorce without the presence or immediate knowledge of the wife is called *ghiyábi* divorce, i.e., divorce *in absentia*. If we look at the traditional law, we see that divorce in absentia is not the norm. The Sunnite law books contain long discussions of many different phrases uttered by a man that can make a divorce, and almost all of these (e.g., “I divorce you,” “You are divorced,” “You are forbidden to me”) are evidently meant to be addressed directly to the wife.

Since divorce is considered a unilateral action, a man also does not have to have his divorce action witnessed, according to the Sunnites.

Nevertheless, it may happen that a Sunnite divorce is witnessed, and this subject is sometimes discussed in the traditional law books (e.g., Sarakhsi VI, 145 ff). The matter of witnesses hearing a man say something that may be construed as divorce and later testifying to it is also raised. Such “accidental witness” is possible in Sunnite law because the procedure for pronouncing divorce is very loose (see the section above on threats of divorce). Accidental witness may help a woman obtain a divorce. But this is not certain, since witness may not be accepted and a man’s denial may be taken into account.

A wife who has not been immediately informed will no doubt find out sooner or later that a divorce action has been set in motion or in case of a quick divorce, that she is already divorced. However, springing the divorce as a surprise (perhaps when her husband has already married another wife) can put her at a disadvantage. All opportunity for discussion is cut off, and it could be more difficult to claim divorce rights. Lack of witness and notice in the traditional law can also cause problems if some aspect of the divorce is disputed, since it will be more difficult to establish when and how the divorce took place.

Modern reform has attacked the problems of lack of witness and notice by requiring official notice and registration, as explained below.

The Shiites, in contrast to the Sunnites, consider that verse two of the Quranic chapter “Divorce,” which says “take for witness two persons,” involves a legal obligation and not just a recommendation, as some Sunnites say. Thus according to the Shiites, divorce must be witnessed by “two just witnesses” (Sadúq 272), that is, two legally qualified males of good moral character and standing in the community.

The Sunnite schools agree that a husband can divorce his wife by sending a letter (Samarqandí II, 185-6). This rule has recently led to a few husbands announcing divorce through text-messaging. Religious authorities and women's advocates have expressed outrage at this practice, but it is still apparently considered legal according to the religious law (although not necessarily by state legal systems).

A specific, unambiguous oral formula must also be used. If these strict conditions are not fulfilled, there is no divorce.

Usually in a Shiite divorce, the woman is present and one of the witnesses is the local cleric, who might ask the woman if she is being divorced against her will and talk to the couple to see if there is any chance they might change their minds. Note, however, that although the woman's presence is recommended by the Shiites, it is not actually necessary according to their law.

Divorce *in absentia* is possible.

Even though a man can legally divorce by himself without anyone's authorization, many Muslims today believe that getting a divorce through an imam or other religious authority is necessary or desirable.

4.7 WOMEN'S GROUNDS FOR DIVORCE IN TRADITIONAL LAW

It is very difficult for a woman to obtain a divorce under the traditional law. A woman actually cannot divorce by herself. The husband has a unilateral power of divorce, but the wife has no independent power to divorce at all. She must ask for a divorce from her husband or from a judge. (In the West, "judge" would mean any qualified authority or organization.) The husband or judge may agree or not agree to the request.

Note, however, that in cases that depend on the establishment of evidence, such as when a wife claims that her husband is impotent, the judge is obliged to grant divorce when proof is established. He cannot arbitrarily decide to deny the divorce.

There are three ways for a woman to get a divorce:

- She can use her delegated right of unilateral divorce (*tafwid*).
- She can apply for a judicial divorce (*faskh*).
- She can ask the husband for a negotiated divorce (*khul*).

4.7.1 Delegated right of divorce (*tafwid*)

The wife may be granted the right to divorce at the time of the marriage through delegation and contract.

Tafwid of divorce is already well established in the traditional law. It is one of the normally available types of power of attorney and is also applicable to the divorce action. Reformists also cite in support of delegation a well-known incident, referred to in Quran 33:28-29, in which the Prophet gave his wives the choice of divorcing or staying married to him.

Tafwid of divorce means that the husband grants the wife the power to divorce herself from him on his behalf (since he is the one who owns the power of divorce) when she wishes. A husband's *tafwid* of divorce to his wife cannot be taken back; although, of course, the husband can still divorce his

wife himself before she ever uses her delegated power. Divorce may be delegated at the beginning of a marriage or later.

The power of divorce delegated to the wife by her husband should be for an immediately final (*bá'in*) action so that the wife is not caught in a divorce that would allow the husband to take her back during the waiting period. This would make the whole strategy useless.

Further information on delegation of divorce and a wife's power of divorce through conditions added to the marriage contract are given in section 2 of Muslim law, Domestic Contracts.

Tafwid

Many people will know “delegation” by the Arabic term *tafwid* or in the pronunciation *tafweez*. The word *tawkil* is used for a very similar process. The law books sometimes refer to delegation as “putting the wife's affair in her hands,” and Egyptian men intending to delegate divorce to their brides say “The *ismah* (power) is in your hand.”

4.7.2 Judicial divorce (*faskh*)

A woman may apply to the court for a judicial divorce (*faskh*), citing valid grounds. There are few valid grounds admitted by traditional law, although there are differences between the schools and many more grounds allowed in reformed law. Some possible grounds are listed in section 4.9.2 below.

4.7.3 Negotiated Divorce (*khul*)

A third possible way to get a divorce is to ask the husband for a negotiated divorce, called *khul* (you might also see this written in English as *khola* or *khula*). *Khul* involves the wife proposing divorce in return for part or all the amount of the marriage dower (*mahr*).

It is important to understand that in the traditional law, the decision to grant a divorce in a *khul* negotiation still rests with the man. He may refuse to grant the divorce.

Despite these possible escape routes, Muslim women have often been forced to stay in difficult or even abusive marriages.

According to the traditional opinion of the Hanafite school (changed by reform long ago), divorce would not be available even to the wife of a husband who had long since disappeared, leaving her without companionship or support.

Khul and mahr

Some women seem to think that *khul* involves automatically giving up all of the *mahr*. This is not necessarily so. A woman can give up part of her *mahr*, all *mahr* plus other benefits or nothing at all in return for a *khul* divorce. The *khul* compensation is a matter of negotiation. There is more information on this in the Muslim section of the *Primer* in section 6, Spousal Support and Division of Property.

4.8 HUSBAND CAN DIVORCE LESS EASILY IN MODERN MUSLIM LAWS

Reform depends on the state bringing divorce under government control. Many (although not all) Muslim states today require that divorces be registered. It is also commonly required that if there is any dispute or negotiation involved, the case be brought to court to be considered with the help of a judge. The divorce is completed and registered when everything is settled to the satisfaction of the legal system.

Let us begin with restraints imposed by reform on the husband's traditionally free power of divorce. To begin with, the quick *bidah* divorce has been ruled out in most Muslim countries. This means that there must be some delay in divorce.

The husband's power of divorce is also restrained to some extent by the requirement that he register the action. This means that the wife can delay the process by suing for financial divorce rights. In this way, even though the wife cannot refuse divorce, her assent or the ruling of the judge is needed for the action to go through.

The husband may also hesitate to divorce, as he is presented with significant financial consequences. The traditional *sunnah* divorce procedure also made the husband pay for divorce, but payment is now enforced by the state.

In most Muslim countries, the unequal balance of power between husband and wife is partially compensated for by bringing the courts in on the side of the woman.

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For example, the judge may intervene in a negotiated, *khul*, divorce to ensure that the woman gets a good part of her *mahr*, rather than having to bargain it all away for her freedom or custody of the children. (Note that, strictly speaking, custody is not supposed to be part of the negotiation, as explained in section 5, Custody and Child Support.) A judge may order back-payment of support by a husband who had stopped paying prior to the divorce action although back-payment might still depend, even in modern times, on the wife's demonstrating that she had been "obedient" during the marriage.

In Iran, a judge can order a man who divorces his wife without proving any fault on her part to give a substantial amount of back pay to his wife for the housework done by her during the marriage. This is based on a rule of the traditional law that the exchange of the marriage contract does not actually include the wife's labour, even though it is meritorious for her to contribute it. It is not clear if such awards are often given.

Note that the no-housework rule is found in some but not all schools. The Hanafites are one of the schools that say that if the husband is not rich enough to hire servants, the wife must do the housework as part of her wifely duties.

4.9 WIFE CAN DIVORCE MORE EASILY IN MODERN MUSLIM LAWS

This section discusses the many reforms in the Muslim world that have given women greater access to divorce. Traditionalists in Canada who want to return to the old laws of divorce are asking Canadian women to accept lesser rights than most of their sisters in Muslim countries.

Women's grounds for divorce have been broadened in three main ways:

- by encouraging delegation of divorce to the wife (*tafwid*)

- by adding to the grounds for judicial divorce (*faskh*)
- by reforming the procedure of the negotiated (*khul*) divorce.

4.9.1 Encouraging delegation of the right to divorce to the wife

Delegation, *tafwid*, is discussed above and mentioned in section 2, Domestic Contracts.

4.9.2 Adding to the grounds for judicial divorce

In the traditional law, there were very few valid reasons a woman could present before a judge to obtain a divorce. The Hanafites were the most restrictive. A husband's impotence was really the only ground they allowed. The traditional Malikite school of law allowed the widest grounds for judicial divorce. The rest of the schools were more liberal than the Hanafites, although not nearly as liberal as the Malikites. Modern reform has been profoundly influenced by Malikite law.

Judicial divorce, *faskh*, in modern times will probably be considered immediately *bá'in*, or final, as it is in most cases in the traditional law. The husband will have no right to take back, touch or approach his former wife.

4.9.3 Additional strategies of judicial divorce allowed by the Malikites

Traditional Malikite law allows two additional strategies of judicial divorce for women. These are useful for obtaining divorce where very specific grounds cannot be established. They have been incorporated into the law of many states. The concepts underlying the two strategies are:

- harm (*darar*)
- breach between the couple (*shiqaq*)

4.9.3.1 Harm (*darar*)

The first strategy is for the wife to prove that some "harm" (*darar*) has been done to her by the marriage. "Harm" in the Malikite books covers a range of circumstances. Generally speaking, it means actions

Grounds of divorce accepted in Muslim countries

Muslim state legislation has drawn on different schools and opinions and reinterpreted the law in order to give women more possible grounds for divorce. Grounds for judicial divorce admitted by the law of many modern states include: sexual dysfunction or failure to engage in sexual relations for a certain period, e.g., four months; communicable or repugnant disease; madness; absence of the husband for a certain period (e.g., one year), including absence due to imprisonment (even if the wife is still maintained, the crucial issue being lack of relations); taking of a second wife, especially without the first wife's permission; physical abuse; immoral behaviour; and sinking to a social status that is below the dignity of the wife (since Muslim law requires that a woman not be married to someone of lesser status than herself). Non-maintenance might also be grounds for divorce, but this may be limited to cases in which the husband continues to refuse or is unable to pay after having been given the opportunity to do so by the judge. These are general trends, applied in different ways and degrees in different countries.

Interpretation of “harm” in Muslim divorce

The question of “harm” in Muslim divorce law highlights the problem with requiring a woman to prove some grounds for divorce before a judge, in whose hands her fate then lies. Reasons for divorce that require objective proof, such as physical abuse, can be difficult enough to prove. A more severe judge may be willing to admit only obvious physical injury as evidence. How is a woman to prove more subtle and covert “harm” to herself, such as mental cruelty? Much depends on the sympathy of the judge.

Some judges are open and sympathetic to the concerns of women. Others adhere to the very widespread traditional belief that it is the duty of a good wife to patiently tolerate ill treatment in order to preserve the marriage. Women’s advocates report that imams have counselled “patience” even in quite extreme circumstances.

not allowed by the law, such as physical or verbal abuse or not allowing the wife out of the house for normal social visits. The judge evaluates the claim and grants a final divorce if he finds it valid.

4.9.3.2 Breach between the couple (*shiqāq*)

What happens if the wife cannot establish harm? This is where the second Malikite strategy comes in. The Malikites allow a wife to claim that there is an irreparable “breach” (*shiqāq*) between the couple. The rule is based on Quran 4:35: “If you fear a breach between them, appoint two arbiters, one from his family and one from hers, and if they wish reconciliation, God will bring about an agreement between them.” Most traditional legal opinions considered this to be only a recommendation of the Quran. But the Malikites believed it had legal force. (*Bukhārī, Talāq, Bāb al-shiqāq wa-hal yushir bi-al-khul’ ind al-darūrāh*; the commentary of *Asqalānī, Fath al-Bārī*, explains the Malikite understanding.)

Therefore, according to the Malikites, if the wife claims before a judge that the couple is not getting along and that there is effectively a “breach” between her and her husband, the case would have to be referred to arbitration, as required by Quran 4:53.

If the arbitration fails and if the judge finds that the husband is at fault, the woman is granted her divorce. She does not have to give up her *mahr*. If on the other hand, the woman is at fault, the judge may either refuse the divorce or grant divorce in return for a payment made by the woman.

What often actually happens is that the woman gives up some of her *mahr* in return for divorce, or all of it in order to get out of the marriage quickly.

The Malikite idea that divorce can be initiated by a woman due to a simple “breach” has not been easily accepted in the Muslim world. Even though the decision to grant the divorce remains in the hands of the judge, critics of this kind of divorce action object to a woman being able to initiate divorce based on her own feeling that the marriage has broken down.

As these strategies were discussed in non-Malikite jurisdictions in the Muslim world, the question arose: Does “harm” mean just something against the law, something very obvious such as physical abuse, or does it extend to less clear circumstances such as mental abuse, neglect, disgraceful behaviour, and so on? “Harm” has been interpreted either widely or narrowly by different authorities.

4.9.4 Reforming the procedure of the negotiated divorce

The negotiated *khul* procedure has been used by governments of Muslim-majority countries in modern times to give women more capability to divorce. The woman’s power of divorce is expanded by not

requiring the agreement of the husband that is necessary for *khul* in the traditional law. The wife makes an application to the court, and the court then either helps the couple to come to an agreement or imposes a settlement and grants the divorce.

The advantage of the reformed *khul* over judicial divorce is that the woman does not have to cite grounds and prove them before a judge. Her own feeling that she cannot stay in the marriage is enough. She will not, however, get her full *mahr* and may have also to give up other financial rights.

Some modern thinkers cite as a basis for such a *khul* divorce the Prophet's well-known action of granting a divorce to a woman who simply did not like her husband, though he was inoffensive in himself and had caused her no harm (Bukh ari, *K. al-tal aq, B ab al-khul' wa-kayf al-tal aq fih i*). Not requiring the husband's consent for a *khul* does seem plausible on the basis of the texts, since neither the Quran nor sayings of the Prophet indicate that he should have the final say. But this is not what the traditional law decided.

Egypt has recently passed a reformed *khul* law. The law, however, has met with opposition. Opponents argue that *khul* on the initiative of the woman is a violation of the rules of the *sharia*. They also say that it is a threat to the integrity of the family, since women are supposedly emotional by nature and will divorce on impulse. Women who apply for *khul* suffer social stigma, and their husbands may still delay the divorce by failing to show up for court sessions.

4.10 MUSLIM DIVORCE IN CANADA

Some Muslims say that since marriage is a civil contract, Muslim divorce is really a simple dissolution of that contract. This would mean that a Canadian divorce also makes a religious divorce and there is no need for further recognition by an imam or any other religious authority. Those who hold this view argue that Muslims seek religious divorce because they want laws similar to the Muslim-inspired laws of their homelands. It is also argued that getting a religious divorce is actually a popular custom.

Other Muslims believe that a divorce by Muslim law is necessary to end a Muslim marriage, even though this is not legally necessary to obtain a divorce under Canadian law. Some women feel that they need to have a divorce recognized by a religious authority so that their changed status is acknowledged by the community, especially if they want to remarry.

Just as in any other group, the majority of divorcing Muslim couples manage to come to a reasonable settlement of their differences and do not try to harm each other. Religion may help in this matter. The Quran repeatedly urges divorcing husbands to act "decently" (e.g., 2:236) and "not to make a mockery" (2:231) of God's revelations by abusing divorce.

The Quran repeatedly urges divorcing husbands to act "decently" (e.g., 2:236) and "not to make a mockery" (2:231) of God's revelations by abusing divorce.

Nevertheless, men still have greater legal and social power, and women suffer when husbands do not exercise the moral restraint urged by their religion. Two situations of this kind are discussed below:

- obtaining a religious divorce
- being divorced by one's husband.

4.11 OBTAINING A RELIGIOUS DIVORCE

Since Muslim law in Canada operates privately without court records, we do not know how common it is for women to seek a religious divorce. One imam from Montréal reported that getting a divorce was the main reason related to Muslim law that women approached him for help.

Cases have been reported of women in North America having difficulty obtaining a Muslim divorce although, as explained at the beginning of this section, some people feel that a woman divorced by civil law does not need a separate religious divorce. It is not unknown for Muslim men in the West to refuse to give their wives a religious divorce and claim that they must remain married. This may be done out of a genuine desire to continue the marriage or as a form of harassment.

A man may also refuse to divorce until he is paid sums of money that had been given in dower and marriage gifts such as jewelry. This situation is related to the negotiated *khul* divorce, discussed above and in section 6, Spousal Support and Division of Property.

Seeking a religious divorce can be avoided altogether by having the husband delegate (tafwid) the power of divorce to the wife at the beginning of the marriage...

Seeking a religious divorce can be avoided altogether by having the husband delegate (*tafwid*) the power of divorce to the wife at the beginning of the marriage, as described in the section above on traditional divorce law and in section 2, Domestic Contracts. This might seem unromantic, but delegation of divorce is an authentic Muslim practice discussed extensively in the traditional law books.

If divorce was not delegated by the husband to the wife, Muslim judicial divorce generally known by the term *faskh* may help. As explained earlier, not all Muslim divorces need the agreement of the husband. Muslim law allows a woman to apply to a judge for a divorce. In North America, a “judge” would be any competent person or organization.

The obstacle that has to be overcome in getting a Muslim judicial divorce is that, unlike in Canadian law, a woman has to convince the judge she has grounds (i.e., valid reasons) for wanting it. It is true that in some schools and opinions, there are few grounds available for a woman to divorce. The Hanafite school, which is the one followed by most Muslims, is the most restrictive if applied in its traditional form. A woman will probably find little opportunity for divorce if she applies to a person or body that is determined to strictly follow traditional Hanafism.

However, Muslims (especially Sunnites) are not tied to one particular authority, or even necessarily to one legal school. Muslims certainly do not have to follow a person because he or she happens to be a leader in a particular ethnic community.

The lack of state control over Muslim law in North America and the traditionally loose structure of legal authority in Islam can work to the advantage of a woman trying to obtain a Muslim divorce, since this leaves her free to go to the person or group she believes is most just and sympathetic to her concerns. There have been instances in which progressive Islamic councils took it upon themselves to pronounce divorces for women whose former husbands were insisting they were still married.

Of course, it will be important for a woman to know as much as possible about the standards and past actions of the person or organization she is thinking of asking to help her divorce.

The thought of many authorities has been influenced by divorce reforms in the Muslim world, so they might consider, for instance, verbal abuse or irreconcilable differences between the couple to be valid grounds. Some authorities generally apply the divorce laws of their countries of origin, especially if the community they are ministering to is from the same background.

Enquiring about specific grounds for divorce could be useful. An imam in Montréal mentioned, among possible grounds for divorce, non-support; “behaving badly toward the wife” (Arabic: *su’ al-mu’ámalah*), including physical, verbal, or mental abuse; and a husband’s having relations with another woman to whom he was not married, according to Quran 24:3: “A fornicating man can only be married to a fornicating woman.”

In the final analysis, the attitude of an authority and the ability to appreciate the concerns of a woman is probably as important as legal rules. Some persons are open and sympathetic to the concerns of women. Others might feel that it is the duty of a good wife to patiently tolerate even very serious problems and mistreatment in order to save the marriage.

The *khul* divorce may be the most common type of divorce in the Muslim world today. It is not clear at this point how common it is in Canada. In the *khul*, the woman proposes a divorce and gives up some or all of the payment due to her from the husband in return for her freedom. In many jurisdictions in the Muslim world today, the state imposes a *khul* initiated by the woman so that the agreement of the man is not needed.

Canadian law may help persons who are being refused a religious divorce by bringing certain pressures to bear on the spouse. This is explained in section 4.5 of the Canadian law part of this book (“Removal of barriers to religious remarriage”). The law was originally intended to help Jewish women who were unable to remarry because their husbands would not agree to a divorce.

Note, however, that Muslim women are able to obtain divorce in their own religion fairly easily through delegation of divorce, judicial divorce and reformed *khul*. Obtaining a Muslim divorce should not be a great problem for Canadian women if they apply these rights with the help of sympathetic authorities. As explained in the first paragraph of this section, some Muslims also consider that a Canadian civil divorce effectively makes a Muslim divorce, so a separate religious divorce would not be needed at all.

If a marriage has been registered in a Muslim jurisdiction outside Canada, a Canadian divorce will not necessarily be automatically recognized there by the *sharia* or other types of courts. If having the

A possible advantage of religious divorce

Canadian divorces require a separation period of one year (except if the grounds are adultery or cruelty) followed by at least some months for the legal process itself. Since completion of a Muslim divorce takes less time, a woman determined to leave her marriage can free herself sooner, at least in religious terms, by obtaining a Muslim divorce. Of course, a civil divorce is still needed, since Muslim divorce does not have any legal effect in Canada. A legally married woman with only a religious divorce will not be able to get the divorce rights of Canadian law or remarry.

The Khula Society

A young Muslim woman from South Africa recently told of how a group of now aged male community leaders in Johannesburg had formed an unofficial group called the Khula Society. The Khula Society provides the women it advises with a form letter and Khula Declaration to be sent to the husband. The woman requests a regular divorce (*taláq*) and announces her intention to declare a *khul* if her husband does not give the *taláq*. If the husband answers, mediation may follow. But if he fails to respond by the date specified or if mediation fails, he is sent a “Khula Declaration” and arrangements are made for the *mahr* to be returned.

marriage legally exist somewhere outside Canada is a concern, a separate divorce registration or other action may be necessary there. For recognition of a foreign religious divorce in Canada, see section 4.6 in the Canadian law part of this book.

Divorce illustrates a general problem with the operation of Muslim law in Canada. In most Muslim nations today, the power of men to divorce is controlled through a reformed law. In Canada, on the other hand, a Muslim husband may simply take it upon himself to religiously divorce his wife, since the traditional law allows men an almost unlimited prerogative of divorce.

It is important to understand that being divorced through Muslim law does not affect a wife’s rights or a husband’s obligations under Canadian law. As explained in section 4 on Canadian divorce, a woman married by Canadian law cannot be legally divorced except through the formal process of the *Divorce Act*. Until the process is completed, the marriage is not over in the

eyes of the law. The woman still has the rights of a married or separated woman under Canadian law, and she will later be able to claim Canadian rights of divorce.

Even a woman who was in a relationship that was not registered with the government may be able to claim rights as a “common-law partner” when the relationship ends. Note, however, that these rights will be more difficult to get than if she had been officially married. They may also be lesser in some areas than those given if the marriage was official. This is explained in the Canadian law part of this book in section 2 (Domestic Contracts) and section 6 (Spousal Support and Division of Property).

5 / CUSTODY AND CHILD SUPPORT

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5 CUSTODY AND CHILD SUPPORT

5.1 CUSTODY

The custody of children in Canada can be decided only through Canadian law. Child custody and support issues cannot be legally settled through arbitration. Even if private agreements are made concerning custody and support, they can be challenged in a Canadian court. If you have child custody or support concerns, refer to section 5, Custody, Child Support and Child Protection, in the Canadian law part of this book.

A section on custody and child support in Muslim law is included in here in case there is an international aspect to the custody situation or parents might be thinking of making additional private arrangements. (Note again that such arrangements can be challenged and altered in a Canadian court.) Professionals working with Muslim families can also gain insight into traditional Muslim norms from reading this section.

Fathers have brought up the special Muslim father's rights described in this section in a few Canadian custody cases. The record shows that the courts are unlikely to be open to such arguments. In *Sheikh v Sheikh* [2004] O.J. No. 4384, a father argued before the Ontario Court of Justice that he had to take the child in order to properly instruct him in his religion, since the less conservative Muslim mother was supposedly incapable of doing so. This did not aid the father in his custody case.

In the case of *Cormier v Abu-Safat* [2004] O.J. No. 3613, the Ontario Court of Justice ruled that the children of a divorced couple were to have continued access to their "Arabic and Islamic heritage" through visits with their father. Visits on Muslim holidays and religious and language instruction were also specified. However, this decision was not based on the traditional right of a Muslim father to supervise his children's education and instruct them in religion. Rather, the court considered that the "best interests" of the children were served in preserving this part of their identity.

5.1.1 Principles of child custody

Muslim child-custody law is based on four principles:

- descent through the male bloodline
- male responsibility and authority
- maternal care
- interests and wishes of the child.

5.1.1.1 Descent through the male bloodline

It is believed that a human being ultimately belongs with and is taken care of by the father and the father's extended family. This is why divorced women return to their original families, and also, apparently, why they do not traditionally take the family names of their husbands.

5.1.1.2 Male responsibility and authority

Muslim law requires males to provide their wives, children and needy members of the extended family with maintenance (*nafaqah*). Maintenance is the responsibility of males only. Authority is given along with responsibility, so the male who is financially responsible for children will also have legal authority over them.

Authority is given along with responsibility, so the male who is financially responsible for children will also have legal authority over them.

5.1.1.3 Maternal care

Children, especially female children, are believed to need maternal care in the earliest period of their life, or even somewhat later, depending on the views of the legal school. After the time of maternal care, as worldly affairs such as education become more important, the supervision of the father is believed to be more appropriate.

5.1.1.4 Interests and wishes of the child

The three principles already mentioned are assumed to be in the child's best interests in most cases. But if they are found to be against the child's interests, they may be overruled. The interests of the child are important in deciding on the fitness of a guardian, visiting rights and giving up custody.

For example, some traditional legal opinion says that children who are ill when they are due to be transferred to the father should stay with the mother until they recover, or even be returned to her to be taken care of if they fall ill afterward. The interests of the child are important in deciding fitness of a guardian, visiting rights and giving up custody.

The Shafiites, Hanbalites and Shiites take into account the wishes of children as to which parent they want to live with. For the Shafiites and Hanbalites (Hanbalites with regard to boys only), choice of whether to live with the mother or father comes at the age of discernment, which is about seven years. Children can even change their minds afterward and go to the other parent.

Although the Shiites transfer children to the father at the very early ages mentioned in the next section, the children can later choose which parent they want to live with, at age nine for girls and age fifteen for boys. However, in this as in all other matters, the opinions of particular ayatollahs may be different.

5.1.2 How Muslim child custody works

The principles just described result in the following model of custody in the traditional law:

The child is financially supported by the father or, if the father cannot provide support, by various male relatives on the father's side named by the law. In the meantime, young children automatically stay with the mother until a certain age.

When the period of maternal care comes to an end, the father takes actual custody of the child along with his already existing legal custody. The child goes to live with the father or his family unless the parents agree to prolong maternal custody or the child chooses to stay with the mother.

Maternal custody (*hadānah*) and legal custody (*wilāyah*)

Maternal custody (*hadānah*) is a very limited power. Although the father cannot take the children, he still has the legal custody (*wilāyah*) that he owned from their birth. Legal custody includes power to decide any matter outside of maternal care, including education, appropriate upbringing and discipline. The father is also given responsibility for the protection of the child. The father is, at least in theory, much involved and actually in control of the child's life, and the mother cannot exclude him.

There are significant variations on this model between the legal schools, which are sometimes apparent in the different tendencies of the laws in modern Muslim states. For example, the age at which the children are transferred to the father varies from two years for boys and seven for girls according to the Shiites, to puberty for boys and consummation of marriage for girls according to the Malikites. The Hanafite school transfers boys at seven years and girls at nine.

Two of the four Sunnite legal schools, as well as the Shiites, take into account the wishes of children as to which parent they want to live with, and the Malikites leave the children in the custody of the mother until late in life. The Hanafites are actually unusual in the way they limit maternal care. But the Hanafite legal school is also the most widespread in the Muslim world and has much influence on popular perception and state laws.

5.1.3 Losing custody and custody by relatives

If a mother is deceased or unfit, maternal custody is handed over to relatives on the mother's and sometimes the father's side for instance, the maternal grandmother. The priority of relatives is fixed by law in a list extending to even quite distant relations. There are variations between the schools, but the preferred candidates are generally females, with the father some way down the list. The Shiites, however, say that the father takes custody from the mother and then the mother from the father before resorting to other relatives.

The remarks just made concern maternal custody. A father is entitled to legal custody (*wilāyah*) from children's birth until their independence. If the father is deceased or unfit, legal custody is given to the paternal grandfather, followed by other relatives whose priority is set by law.

Maternal and legal custodians must be mentally, physically and morally fit for custody. (The traditional law books and modern codes give details of particular instances of unfitness.) Ability to ensure physical contact and other material aspects of maternal care are considered important, so a mother who spends time at work may have her custody questioned. The same may be true for a father who has no appropriate female in place to play the maternal role.

5.1.4 Custody upon remarriage

A woman who has remarried may not have custody of her child, according to all the schools. An exception is made, at least among the Sunnites, if the new husband is also the child's relative and is close enough to be within the degree of prohibition of marriage. There seems to be a fear that an unrelated man might interfere with the child, especially a girl, although the law books actually concentrate instead on the problem of an unrelated husband lacking natural affection for the child and monopolizing the mother's attention.

A husband is allowed to bring his small children from another marriage to live with another wife. A wife cannot bring even small children into the house of a new husband without his permission (remembering that the husband would have to be quite closely related to the child in any case).

The traditional law books sometimes mention (e.g., *Túsi 1: mas'alah* #38) the opinion of the very famous eighth-century authority Hasan al-Basri that a remarried woman does not lose custody of her children.

A remarried mother may regain custody of her child if she subsequently divorces and the divorce becomes final. In fact, the general rule in cases of unfitness (except according to the Malikites) is that custody may be regained when the unfitness is removed. This includes difference of religion, discussed in the next paragraph.

5.1.5 Custody by non-Muslim mothers and relatives

A non-Muslim (i.e., Jewish or Christian) mother is allowed maternal custody in the Hanafite and Maliki schools. The Shafites, Hanbalites and Shiites do not allow a non-Muslim mother custody. This rule applies, of course, not only to the mother but to any female whose turn comes in the list of relatives eligible for custody. Since the relatives of a non-Muslim are also likely to be non-Muslim, that probably means that the child of divorce will be taken away from that side of the family altogether.

The reasons given in the law books for denying custody involve possible alienation of the child from its religion. This kind of caution about non-Muslim custody is given even by the schools that allow it. An apostate may not have custody of a Muslim child.

5.1.6 Custody by non-relatives and adoption

Muslim law and traditional social norms abhor giving a child to non-relatives. Members of the extended family tend to feel responsible for the care of a displaced child. There is also some belief that only blood relatives can offer real affection. According to Muslim law, if the long list of relatives specified by the law is exhausted, custody goes to the judge, and not a “stranger” (*gharib*), as non-relatives are called in the traditional law books.

There also seems to be a perception that a child given to a stranger is not effectively protected “protection” being an important function of the legal guardian. This certainly includes protection from sexual abuse. Even within the extended family, children may not, according to the traditional law, be passed to relatives who are outside the incest prohibitions (e.g., cousins). Same-sex relatives who would be excluded if they were of the opposite sex are also ruled out, apparently because their spouses, with whom the child would also come into contact, would not be within the prohibited degrees.

These remarks on custody of a child by a non-relative are included to throw light on attitudes held by some Muslims toward out-of-family placement. Others will have different views. This also applies to the following remarks on adoption.

Adoption, in the Western sense of removing the child from previous family ties, is not permitted by the traditional law. It is also generally not allowed in modern Muslim states. Apart from the law,

there is some feeling that adoption is an injustice to children, as they are alienated from those who are naturally closest to them. The strong feeling of mutual responsibility common in traditional societies means that displaced children are unlikely to be available for adoption, because they will have been taken up by members of the extended family.

However, Muslim tradition does encourage “tutelage” (*kafálah* or *wiláyah*) of children. Tutelage involves taking care of children without alienating them from any living relatives they may have and without changing their names.

It appears that traditional law does not restrict the father in taking the child away from the mother after the period of maternal custody. At the time of the writing of this *Primer*, no information was available on joint custody arrangements in modern Muslim states.

5.1.7 Agreeing to give up custody

Muslim law discusses the possibility of custody of children becoming part of the exchange of a negotiated divorce (*khul*). The law is generally against shifting custody in this way, since custody is supposed to be arranged in the interests of the child.

...if a mother gives up custody as part of a khul agreement, that part of the agreement will be considered invalid, but she will still get her divorce.

Therefore, according to many authorities, if a mother gives up custody as part of a *khul* agreement, that part of the agreement will be considered invalid, but she will still get her divorce. The eleventh-century Hanafite jurist Sarakhsí explains that this is so due to “the rights of the child itself, since it is in its best interest (*anfa'*) to stay with her” (VI, 169).

The same rule applies to a father agreeing to leave the children with the mother after the period of maternal custody as part of a divorce agreement.

He cannot do this simply for his own convenience. But some jurists say that the father’s giving up custody would be invalid only in the case of a male child, since boys need a male role model (e.g., Ibn Abdín: III, 502).

The Lebanese scholar Maghniyah (1, pp. 98-9) reports that in his country, the courts of the four Sunnite schools all apply the rule just described. The Shiite courts, however, allow the father to take the child.

5.1.8 Theory and reality of child custody today

The model of custody described above is still generally in place in the Muslim world. However, in the matter of custody, as in other subjects discussed in this *Primer*, information about laws and attitudes should be taken as a general guide only. The laws of particular Muslim jurisdictions and the views of persons involved in custody cases should be investigated. Tunisia, for instance, has taken the step of allowing a remarried woman custody, provided the new husband is of good character.

Several rules of the traditional law disadvantageous to a mother have been incorporated into the codes of various modern Muslim states. One is the prohibition against remarriage. The rule against non-Muslim custody survives in some codes, but is absent in others, perhaps because of Hanafite influence.

A mother or other female guardian may still, under some state laws, be deprived of custody if she insists on dwelling far enough away from the father that he cannot effectively supervise the child. The legal custody (*wilayah*) given to the father in the traditional law has spilled over into modern state laws, so only he may sign official papers for the child, and the father may be given power over “non-maternal” matters such as the child’s formal education. In modern Muslim custody cases, just as in the West, a woman’s ability to provide appropriate care if she works has sometimes been at issue.

Traditional law does not fully reveal the reality of child custody and support. Muslim legal theory says that the father supervises and fully supports children during maternal custody, then takes over their affairs entirely. Some fathers will play this role, especially since rights over children are important to the sense of patriarchal honour. But women may also be left alone with the children, or alone without any financial support, while fathers continue with their lives. These circumstances, so common in our own country, are also found in the Muslim world.

Fathers have also managed to get around children’s and mother’s rights given by Muslim and state laws in order to separate them from each other, sometimes completely. Males in traditional societies have even greater power than in our own, and they may use this power to force arrangements outside the legal system or manipulate the system itself. Muslim societies are not, of course, the only settings in which this takes place.

5.1.9 International custody cases

Muslim custody law gives some recognition to mothers’ and children’s rights, and state reform has enlarged these rights in some places. But the laws and culture of Muslim countries still tend to favour fathers. Western laws have favoured maternal rights instead, a development that began in the nineteenth century.

These different legal standards are matched by a strong emotional belief in the appropriateness of either paternal or maternal care. Both the legal and cultural factors come into play in cases in which the father is a Muslim with ties to a Muslim jurisdiction, and the mother is living in the West.

In this circumstance, each of the parents has an interest in keeping the offspring in his or her own jurisdiction, where a custody decision is likely to be favourable. The situation resulting from this conflict that has become famous in the West involves Muslim men absconding with children to their home countries.

Modern reform in child-custody laws

Some reforms have been made in state child-custody laws. A very common reform of maternal custody is to raise children’s age of transfer from the mother by some years, effectively until the children are grown, by adopting Maliki law. In many jurisdictions, judges also have the power to delay transfer.

Reform can come not only through articles of the law but also through the outlook and rulings of judges. There is currently discussion in the Muslim world about putting more emphasis on the best interests of the child, a standard already present in the traditional legal model of child custody. The little information available about actual custody cases shows that at least in some instances, the best-interests standard has inspired judges to award custody to the more appropriate parent or relative, even when the formal rules give others prior claim.

It is difficult to for mothers to recover such children, since only a few Muslim countries have signed the *Hague Convention on the Civil Aspects of International Child Abduction*. This is a treaty that binds a signatory to return children “wrongfully removed to or retained in” its jurisdiction.

Cultural perceptions complicate international custody cases. Courts in Muslim countries are apt to consider not only paternal care but also life in the circle of the father’s extended family in a traditional society as being in the interests of the child. Western courts, in the meantime, are likely not only to favour maternal care but also to look with disfavour on the standards of a relatively conservative society in which the child might not enjoy the individualistic freedoms idealized in the West. Such views make granting custody to the out-of-culture parent more unlikely in both systems, although foreign women have occasionally won custody in Muslim countries.

5.2 CHILD SUPPORT

According to traditional law, a father or other person holding legal custody of a child is entirely responsible for all its expenses.

According to traditional law, a father or other person holding legal custody of a child is entirely responsible for all its expenses. The mother is not required to contribute, even when she has maternal custody.

Education expenses are explicitly included, as Muslim civilization has always valued education very highly. According to many or most jurists, this includes maintenance (*nafaqah*) while the children are acquiring their education. The codes and courts of modern Muslim states have confirmed

the duty of a father to pay education expenses (Bousquet: II, 132-3). The traditional books of law speak of the father paying education expenses of a male only, since at the time they wrote, women were usually educated at home by family members. It is reasonable to assume that the rule would extend to females in our day.

Some (not all) opinion also says that a finally divorced mother or other female custodian gets a wage for her care of the child. It may be possible for a woman to get free use or rental of the residence in which the child is being housed during maternal custody, though not all opinions agree on this.

It is important to understand that a wife may agree to give up child support as part of her payment for a negotiated divorce (*khul*). It is possible to lose all right to child support in this way, including even the payment for breastfeeding discussed in Muslim law.

The child support specified by Muslim law can be generous if it is not taken away through *khul*. However, women trying to claim child support should remember that in the Muslim system, support is part of an exchange. The children are fully supported (in theory) by the father because he has complete authority over them and he has the right to finally take them.

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6 SPOUSAL SUPPORT AND DIVISION OF PROPERTY

6.1 SPOUSAL SUPPORT

Spousal support of a wife in traditional Muslim law comes from two sources:

- dower (*mahr*) pledged at marriage
- maintenance (*nafaqah*) to be paid during marriage and possibly for a short time afterward.

Neither the wife nor the wife's family owes the husband any dowry at marriage or maintenance during marriage. Such payments are actually against traditional law.

6.1.1 *Mahr (dower) at marriage*

The marriage dower (*mahr*) is property promised or given to a woman at marriage. To non-Muslim observers, dower may seem like a purchase price. Muslims regard it, rather, as a sign of respect to the wife and security against divorce or death. Some Muslim jurists, like their Jewish counterparts, take care to point out that a marriage contract is not a contract of sale (e.g., al-Muhaqqiq al-Hillí, *Shará'í al-Islám, Nikáh*).

The mahr is given to the bride and becomes her property. Her husband has no right to take any part of it, and he has no say in how it will be managed or spent.

The *mahr* is given to the bride and becomes her property. Her husband has no right to take any part of it, and he has no say in how it will be managed or spent.

Many verses of the Quran and sayings of the Prophet address the subject of dower, and Muslim law has many rules to protect women's right to it. This property, however, can be easily lost in divorce, and sections 6.1.1.4 and 6.1.1.5 on dower at divorce, should be read along with this one.

Dower is a necessary part of marriage. The exact amount of the dower is usually specified in the marriage contract. This is the practice most approved by the law. But even if a dower is not specified, the woman receives it, and she may actually make a condition that it will be specified before consummation.

If the marriage contract includes an agreed condition that there will be no dower, the condition is invalid, but the marriage remains valid. Even if a marriage turns out to be invalid for some reason (e.g., not witnessed, no guardian's consent), the woman may receive a dower if intercourse took place or even if there was physical contact without intercourse.

6.1.1.1 What and how much may be given as dower

The jurists insisted that a dower consist of tangible property. Although there is discussion in traditional law of the possibility of a dower that consists of some kind of service rendered to the wife, such as

teaching her the Quran, most jurists either did not recommend this or they prohibited it. There is also a debate in the law books about whether or not a dower can be something of very little material value. The usual conclusion is that it must be of real and substantial value. Some of the schools set a minimum dower in the currency of their times. No legal maximum of dower is set by any school.

It is recommended that the wife not ask for an excessive dower. What the jurists mean by excessive is an amount that would cause the husband real financial hardship or that he could never actually pay. They do not mean that a wife should accept a small or symbolic amount. It seems that this rule is intended partly to prevent a situation in which a dower is so unrealistic that the woman would be unlikely to get anything at all.

While stipulating a lower *mahr* does not affect the contract, it may deprive the woman of a useful advantage if the marriage ends in divorce. A larger dower can give a woman some bargaining power in a *khul* divorce negotiation. A substantial dower can also give a woman an advantage if she finds herself with a co-wife and still wants to keep her marriage. If the situation comes to a point where the man has to give up one wife, he might be more likely to divorce the one whose *mahr* cost him less – if he was the kind of person who was inclined to fulfill his *mahr* obligations at all. Since Muslim law does not have a concept of family property, some women take the title to the matrimonial home as part of their *mahr*.

A dower can be agreed on by the couple not only at the time of the marriage contract but afterward as well. An agreement at the time of marriage that one of the spouses alone will decide the dower later, or that another party will arbitrate it, is void (although the marriage is still valid). A husband can raise the amount of the dower payments himself later, if the wife agrees. Note that the aim of this rule is not for the dower to be set at less than a correct amount and then raised later. The rule allows a husband to exercise generosity perhaps because he has become wealthier than he expected when he married.

Dower of Fatimah

Some Muslims believe that a woman should ask for only a small symbolic *mahr*, to show that she is not interested in material things and has faith in the marriage. This is sometimes called the “dower of Fatimah,” since it is believed that this daughter of the Prophet took only a small *mahr* and always lived very simply. The traditional law does not have any such attitude toward *mahr*. Muslim law considers *mahr* an integral part of the contract of marriage and discusses it openly and extensively.

6.1.1.2 Specifying dower (*mahr*) in the marriage contract

If dower is specified in the contract, which is the usual practice, it must be clearly defined. It cannot be vague in any way. If the dower is not specified in the contract, or if it is specified in an irregular way that makes it invalid or is clearly too little, the amount is determined by a calculation of what the woman should have received. This is called the “equivalent dower” (*mahr al-mithl*). The calculation is made by taking into account factors such as the wife’s social status, age, virginity or non-virginity (i.e., whether she was previously married or not), intelligence, and the amount of dower usually given in the local community.

6.1.1.3 Payment of the dower

A dower does not have to be paid immediately. The dower is considered to be a debt against the husband, and like any other debt, it can be put off until the wife decides to claim it. But any amount remaining is immediately due at death and may also be due at divorce, as explained in the next section.

The schedule of payments can be agreed on by the spouses. This is a valid condition in a marriage contract according to all traditional law. *Mahr* can be paid immediately or as a series of installments. If there is no agreement, the usual practice is to pay in two parts: one immediate and one sometime later, usually at divorce or death.

It would seem logical that the refusal or inability of a husband to pay the dower or the part of it due would allow the woman to get a divorce. But this is not so in the Hanafite school. The three other Sunnite schools allow her to divorce in these circumstances only if the marriage has not been consummated.

6.1.1.4 Receiving *mahr* at death or divorce

If either spouse dies, any dower still due is immediately payable. If the husband dies, the dower will be a debt against his estate. The dower of a deceased wife will go to her estate. The full dower is due at death even if the marriage was not yet consummated.

After divorce, any dower remaining has to be paid. It is payable at the finish of the *iddah* (waiting period) if the divorce is revocable (for instance, in the basic type of *sunna* divorce) or immediately, even before the term of *iddah* if the divorce is irrevocable.

The wife is likely to have a claim to *mahr* if it is the husband who has divorced her. But she may get less *mahr* or none at all if she initiates the divorce herself or can somehow be shown to be at fault.

Husband forcing a *khul* divorce

A divorce may turn out to be *khul* precisely because the husband wants to avoid paying dower or to get it back. Because the husband has a financial interest in *khul*, he may try to make life very unpleasant for his wife so that she would be the one to ask for divorce. One can imagine, in an extreme example, a Canadian Muslim man marrying another woman (without, of course, registering the marriage with the government) and telling his wife that she could stay on as one of the two wives. If the wife wanted a Muslim divorce, she would have to initiate it herself and probably lose her dower.

What a woman gets of her *mahr* when she applies for a judicial divorce depends on the judge's evaluation of the situation. In the *khul* divorce, the wife's request for divorce is followed by financial negotiation. In this case, part or all of the dower and perhaps also other benefits might have to be given to buy the woman's freedom. The dower can be an object of negotiation even if it has already been paid to the wife.

Note that in Hanafite law, all debts between spouses are extinguished at the point of the *khul* divorce. This means that a wife may not get any dower that was still due to her. This is not the case in the other schools.

Payments that can be negotiated away as part of *khul* payment include not only the dower but support during the waiting period as well as child support.

A *khul* divorce can actually be legally completed without the husband getting compensation and with the wife receiving any dower still due. Not all traditional opinions agree with this, but at least one modern authority (Fyzee: 138-41) believes that it should not be assumed that a woman will have to give up *mahr* in a *khul* divorce.

A khul divorce can actually be legally completed without the husband getting compensation and with the wife receiving any dower still due.

6.1.1.5 *Mahr* in Canada and Canadian courts

Muslims today usually fix a *mahr* at the time of the marriage contract. The amount is often written in or on the back of the certificate or contract form given out by the mosque.

There are problems with relying on *mahr* instead of other resources and rights such as the division of family property and post-divorce support (alimony) of Canadian law. One is that *mahr* does not go up as family income, inflation and expenses increase. A woman in a marriage that had lasted a long time might be left even before having to bargain her *mahr* away with an amount that was not very meaningful by the time she was finally divorced.

Although a woman has a firm right to receive dower as a part of marriage, she is likely to lose it or a good part of it if she asks for a divorce and initiates a *khul* negotiation. If a man is not one of the many good Muslims who takes his religious obligation to pay dower very seriously, he might try to represent the divorce as a *khul* or simply refuse to pay without even trying to justify himself.

Receiving dower at divorce in Canada really depends on the good will of the husband, unless the dower has been properly secured through Canadian law or the wife has required payment early in the marriage (which she has a right to do) and secured the property under her own name.

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6.1.1.5.1 Enforcement of *mahr* by Canadian courts

The record of American and Canadian cases is mixed. Some court decisions have upheld *mahr*, but others have not, and a clear line of reasoning and precedent does not yet seem to have emerged.

Several decisions from British Columbia have enforced payment of *mahr*. The decision in *Amlani v Hirani* [2000] B.C.J. No. 2357 ordered payment of *mahr* specified in a written Ismaili Muslim marriage contract. The judge concluded that the marriage contract did meet the definition of a “marriage agreement” referred to in British Columbia’s *Family Relations Act*.

The careful wording and witness of the contract, apparently a result of standard Ismaili practice, may have helped the woman in her case. In particular, the contract specified that the husband’s payment of *mahr* was to be “in addition to and without prejudice to and not in substitution of all of my obligations provided for by the laws of the land.” Two other cases, both in British Columbia, in which a claim for *mahr* succeeded also referred to such an Ismaili contract. In the *Amlani* case, the husband had

argued that the mahr was payable only in absence of civil remedies for the wife. In *N.M.M. v N.S.M.* [2004] B.C.J. No. 642, the husband had claimed that the *mahr* was symbolic.

The other British Columbia case was *Nathoo v Nathoo* [1996] B.C.S. C. No. 2705. The Supreme Court Justice in this case argued not only that the mahr was part of a “marriage agreement pursuant to s.48 of the *Family Relations Act*,” but also as follows:

Our law continues to evolve in a manner which acknowledges cultural diversity. Attempts are made to be respectful of traditions which define various groups who live in a multi-cultural community. Nothing in the evidence before me satisfies me that it would be unfair to uphold the provisions of an agreement entered into by these parties in contemplation of their marriage, which agreement specifically provides that it does not oust the provisions of the applicable law.

There is greater possibility of agreements having legal force if they are carefully constructed in a way intelligible to the courts.

These cases highlight the point made in the Muslim section of this *Primer* on Domestic Contracts (section 2): There is greater possibility of agreements having legal force if they are carefully constructed in a way intelligible to the courts. The provision that the *mahr* be paid “in addition to” civil divorce rights seems particularly useful, as it defeats the argument that the dower is already satisfied by those payments.

This does not, however, mean that the British Columbia precedent will result in *mahr* claims being accepted in other cases or provinces. For one thing, contract law and its interpretation is largely provincial rather than federal.

6.1.2 Nafaqah (support) of the wife

Support in Muslim law is a firm obligation of the husband as long as the marriage endures. It is his entire responsibility, so the wife collects support even if she has her own means, according to almost all opinions.

A wife also continues to get maintenance in her waiting period following a revocable divorce. The Hanafites allow a wife to receive full maintenance even during the waiting period of a final divorce that was not initiated by the wife and in which she had no fault. According to other opinions, she gets at least partial support (usually housing) in the waiting period after a final divorce.

A divorced woman who is pregnant must still be fully maintained, as per Quran 65:4: “If they are pregnant, support them until they give birth.”

A widow does not get support from her husband’s estate for any time, even if she is pregnant.

It is agreed that a wife who is given support in cash can spend the money as she likes. The husband cannot tell the wife how to spend, and he cannot stop paying because he disapproves of the way she is spending. But much of the time, the traditional law seems to be thinking of a system in which the wife does not get support directly in cash but rather in kind: as food, housing, and clothing. The

jurists go so far as to detail what clothes should be given – for instance, a set of winter and a set of summer clothing (e.g., Sarakhsí: V 180). If this model were followed, a husband’s control would certainly be increased.

6.1.2.1 Amount of support to be given

Support is not something that is fixed by agreement but depends on material circumstances. The circumstances taken into account vary between the schools.

The Shafiites say that the level of support of a wife is determined by the husband’s own style of life and ability to pay. If the husband’s resources improve, payment goes up, but if his situation worsens, payment goes down. The Malikite and Hanafite schools determine the level of support according to a wife’s own status and wealth – i.e., by the way she was previously accustomed to living. The Hanbalites talk of the level of support being determined by the circumstances of husband and wife together (Ibn Qudámah: IX, 230; but Linant de Bellefonds: II, 286, reports the opinions of the schools differently).

A husband’s obligation to support his wife is important enough that if she is not supported, she has the right to seize his property (although this might be difficult to actually do). If there is really no way for a wife to get the support she is entitled to, she can apply to the judge for divorce. Note, however, that divorce because of non-support is not allowed in traditional Hanafite law.

It is important to understand that support of a wife during marriage is not her free right, but part of an exchange. The wife who receives support owes her husband obedience, and a wife who is disobedient can lose support. The meaning of obedience is explained in section 3.11 on support and obedience in the Muslim law part of this book. That section should be read along with this one.

A woman who wants to claim rights should think about the obligations they depend on and whether she is willing to undertake those obligations.

6.1.3 Lack of support after divorce

Traditional Muslim law does give a wife some support after divorce but usually only for the waiting period. The assumption in traditional Muslim society was that a divorced woman would return to her

Is housework the duty of the wife?

The law books also speak of the wife being given servants to do the housework, debating whether this should be one or two. The question of servants comes up because housework, in the view of many, is not one of the duties of a wife. But this supposed right may be limited to “women not used to serving themselves, because they come from a high class or are ill” (Ibn Qudámah: IX, 237). There is also talk of a wife’s service (*khidmah*) to her husband and duty to keep the house if he does not have enough money to pay for servants.

It is sometimes said that Muslim women have a right not to do housework. However, this may not be a very firm right in the traditional law. It is certainly unrealistic in practice, except perhaps for the very rich or in the case of a Muslim man determined to completely share the housework as a way of doing his best to conform to the spirit of the law.

family after the divorce and be supported by them. In this case, there was no need for support from the former husband. In some opinions, the most a woman could get in long-term support was a small wage for children in her custody; according to others, she could get a fair part of the children's support in accord with her needs. Polygamy and free divorce probably also militated against alimony.

Modern reform has tried to find a basis for support payment after divorce, as in Quran 2:241: "And as for divorced women, let there be a fair provision. This is an obligation on those who are mindful of God." Like some other passages of the Quran and sayings of the Prophet, the implied advantage to women in this verse was not fully explored and made into law. Building on the work of the minority of mediaeval scholars who had decided that the "fair provision" for divorced women mentioned in the Quran was obligatory, modernists proposed that it should consist of sufficient support for the lifetime of a divorced woman.

The debate over support after divorce continues. A Canadian woman seeking alimony through Muslim authorities might be told that she would get support until she remarried, support for a few years or support only during the waiting period and nothing afterward.

The rights to division of property and post-divorce support under Canadian law explained in the Canadian section of this *Primer* are clearer and much more likely to be enforced.

6.2 NO DIVISION OF PROPERTY IN MUSLIM LAW

Muslim law does not include a concept of family property. The property of the spouses remains separate, and husband and wife each have control over their own without interference from the other.

The positive side of this approach is that it gives some independence to women. A wife can accumulate her own property – for instance, through inheritance, dower or her own business and invest and deal in it. This is not always a merely theoretical right. Records from mediaeval Islam show that women were economically active even in that time and sometimes became rich.

Shah Bano case in India

That a woman is entitled to sufficient support for her lifetime after the divorce was one of the arguments put forth in the infamous Shah Bano support (alimony) case in India. Shah Bano had been divorced by her husband in her early sixties, without compensation or any other resource after a long marriage in which she had given birth to several children. Shah Bano proved to be the Rosa Parks of Muslim family law, although with a sadder outcome. Quran 2:241 was one of the arguments brought before the Supreme Court, where the case finally landed years after Shah Bano was divorced in 1978. Support was awarded to her partly on that basis. But the court victory was followed by agitation that led to an attempt to weaken the decision through new legislation. Shah Bano herself preferred to give up the derisory sum of her support so as not to be the target of traditionalists.

A more liberal view was taken by the Bangladesh High Court in 1995 when it decided that "fair provision" in the Quran referred to support of a divorced woman until her remarriage. Egypt has used the interpretation in a more limited way by laying down support for one or two years only.

The drawback in modern times of not having a concept of family property is that in the natural course of life and marriage, a husband is likely to accumulate more wealth than a wife. This is certainly true if a woman decides on a career as a stay-at-home wife and mother. But it is also likely to happen in most other cases.

The limits Muslim law places on a woman's going outside the home without her husband's permission could further reduce the possibility of her working and earning a substantial income. The rule that women should stay at home is still upheld as an ideal by traditionalists today – as well as some ostensibly modern males. Ayatollah Fadlallah of Lebanon may be the only traditional authority today who believes that going out freely and working is a woman's human right.

A partial solution to the problem of lack of family property in Muslim law might be to very rigorously separate assets under the names of each spouse with an eye to the husband making free gifts to the wife during their marriage to compensate for lost earnings. A couple might also agree in their marriage contract that *mahr* be adjusted for inflation and cost of living. The Iranian courts sometimes take inflation into account when awarding *mahr* in divorce cases.

6.2.1 Division of household goods

Muslim law does discuss division of household goods. This does not include the matrimonial home, which remains the property of the spouse who owned it.

The general principle is that household goods, even if they are costly, go to the woman.

The Hanafite jurist Sarakhsí says that if the husband and wife disagree about which part of the household goods belongs to whom, things that would usually belong to women, such as household furnishings, are hers. Things that would usually belong to men – Sarakhsí gives the examples of armour and arms – belong to the man. But if the goods are not gender-specific, they belong to the husband.

Sarakhsí reports other opinions that say variously that out of all the goods acquired during the couple's marriage, the woman is entitled only to "the clothes on her back," that household goods should be divided equally between the spouses, or that all household goods belong to the spouse who owns the house, whether that is the wife or husband (V, 213-4). These very different opinions, all reported by one jurist, alert us once again to the importance of enquiring about all aspects of Muslim law before assuming rights.

Do dower and maintenance compensate for women's lesser inheritance and not working?

It is often argued that a woman is compensated for lack of income and lesser inheritance by the fact that she is given dower, is entirely supported by the husband without having to contribute to the household and is taken care of by her own male relatives if she is unmarried, divorced or widowed. None of these is an actual reality. Even a dower that is fairly substantial is unlikely to be enough to support anyone, especially if it is a fixed amount that is not adjusted for inflation. Wives who have any wealth or income inevitably contribute to household expenses. If the woman was able to put aside some of her own money, that would have to enter into the government's calculation of benefits (e.g., scholarships, daycare subsidies) as something that could be spent. Moreover, it is not only that one cannot count on being taken care of by male relatives in case of divorce but that most women in the modern age do not want to lose their independence or become a burden.

7 / INHERITANCE

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7 INHERITANCE

7.1 BEGINNINGS OF THE INHERITANCE SYSTEM AND THE PLACE OF WOMEN

The system of inheritance begins to be laid out, in considerable detail, in the Quran itself. For example, part of Quran 4:11 says: “God charges you concerning provision for your children: to the male the equivalent of the portion of two females, and if there are only women [i.e., daughters] more than two, then two-thirds of the inheritance is theirs, but if there is one [daughter only], then half. And to each of his [the deceased’s] parents a sixth of the inheritance, if he has children; but if he has no children and his parents are his only heirs, then his mother receives a third, while if he has siblings, his mother receives a sixth....”

The attention to detail in this and other verses dealing with inheritance shows that the Quran intended to introduce significant reform. The Quranic reform of inheritance was aimed at distributing wealth in the family, the new basis of society established by Islam, rather than the tribe, the basis of old Arabian society.

Moreover, Quranic reform was aimed at including women in inheritance: the wife, the daughter and others. The Quranic verse (4:7) that begins the series having to do with the final rules of inheritance shows this clearly: “To men belongs a share of what the parents and near relatives have left, and [*also*] to women belongs a share of what the parents and near relatives have left....” In fact, this verse is thought to have been revealed by God to address the complaint of a widow who had been excluded along with her daughters from inheritance by distant male relatives.

...Quranic reform was aimed at including women in inheritance: the wife, the daughter and others.

Previously in Arab tribal society, the dominant or exclusive custom was to pass inheritance only through males, to the point where even wives themselves could be inherited (expressly prohibited by Quran 4:19). The great tenth-century commentator on the Quran, Tabari, explains in relation to 4:11 that until the coming of Islam, women and minor children were excluded from inheritance because wealth could be passed only to those who could fight for the tribe in war.

Despite this promising beginning, females are disadvantaged in some ways in the calculation of inheritance as it was finally worked out by the Muslim jurists.

7.2 HOW INHERITANCE IS CALCULATED

Inheritance is distributed automatically after expenses such as funeral costs, the deceased’s debts (including any *mahr* due to a wife) and any bequest – i.e., will made by the deceased. The bequest, or *wasiyah*, is discussed below in section 7.4.

As can be seen from verse 4:11, the Muslim system of inheritance is so concentrated on distributing shares of the estate objectively to members of the extended family that it does this by precise mathematical

...the Muslim system of inheritance is so concentrated on distributing shares of the estate objectively to members of the extended family that it does this by precise mathematical calculation.

calculation. The jurists used sayings of the Prophet and legal reasoning to elaborate the mathematics suggested by the Quran so that all different possible combinations of heirs would be covered.

The inheritance calculation involves giving each heir a set fraction of the estate. The fraction is determined by how closely the heir is related to the deceased, the existence of other heirs, and whether the heir is male or female. If the fractions in the final calculation add up to more than the whole, they are proportionally reduced. For example, if the survivors are several daughters + mother + father + wife, the total comes out to $2/3 + 1/6 + 1/6 + 1/8 = 9/8$. Everyone's shares are reduced so that the

wife receives somewhat less than her original one-eighth, and so on. The Shiite system, however, gives the wife at least her minimum share of one-eighth and the husband his minimum share of one-quarter.

If a part of the estate is left over after the shares of all the heirs are added up, it may be turned over to the Muslim treasury, according to some Sunnite opinion. According to other Sunnites and the Shiites, it is given back to the closer relatives (excluding spouses).

The final calculation can be enormously complicated as the fractions are adjusted to even more minutely calibrated fractions and different heirs come to inherit. Also, the existence of some heirs excludes other heirs from inheriting. Because of these complications, only a few features of the Muslim law of inheritance are sketched in this section. Many rules and details have been left out.

Because the aims of the Quran were to favour the family over the tribe and grant females inheritance, the heirs it lists are members of the close family and mostly females. The husband, the wife and the children and parents of the deceased are the main heirs.

According to Quran 4:11, the wife, or wives together, take one-fourth of the husband's estate if there are no children. With children, including certain grandchildren, a wife or wives take one-eighth. The husband, another of the heirs specified in the Quran, takes one-half or one-quarter of his wife's estate, since males generally have twice the share of females in the same class. Daughters will receive the shares established in the verse, but if there are sons, the sons share the inheritance with them at the rate of twice what is given to the daughters.

7.2.1 Differences between Sunnite and Shiite calculations

The Quranic material is only the start of the calculation. The jurists believed they had to include other, more distant, family members in the system. Here there is a significant difference in the way Sunnites and Shiites extend the system.

7.2.1.1 Sunnite inheritance calculations

The Sunnite jurists decided that after the shares of the heirs specified in the Quran were initially established, patrilineal relatives would be brought in to share with them and take any part left over. The list of these members is long, but some examples are: sons, paternal cousins and paternal uncles

of the deceased. The effect of the Sunnite interpretation was that a great deal of the inheritance often went to the male line, to the detriment of other and sometimes closer family members, whose inheritance might be reduced.

Reduction of the portion of closer members of the family by further members generally affects females more than males. For instance, a son excludes the brother and sister of the deceased from inheritance, but a daughter does not exclude and has to share the estate with them. A son excludes all grandchildren, but a daughter does not exclude a son's children and they will inherit with her.

The Sunnite system also has a tendency to favour heirs linked to the deceased through a male. Relatives whose link to the deceased goes through a female could inherit, but they are very far down in priority. One result is that the children of a son of the deceased do receive inheritance, but there is unlikely to be anything for the children of a daughter.

There are reasons why females and female links are sometimes disfavoured in the Muslim inheritance system. These reasons are rooted in the society in which the jurists made the law, and they are mentioned in section 7.3 below.

7.2.1.2 Shiite inheritance calculations

The Shiites have a different view of inheritance by more distant members of the male line. They point to Quran 4:7, which declares that there is to be a "fixed share" for not only males but females. They also point to Quran 33:5 "blood-relations have closer personal ties among themselves." From these and other texts, the Shiite jurists conclude that the further male line should not be able to affect the inheritance of closer relatives, including females. In other words, a closer female relative prevents further relatives, including males, from inheriting.

Consider an example in which the only close heirs of a man are one or more daughters. In this case, a part of the estate would be left over after the one daughter's one-half or multiple daughters' two-thirds share was satisfied. Unlike the Sunnites, the Shiites do not let a male-line relative of the deceased such as his brother and his brother's children take any of the leftover estate. Instead, the rest of the estate is given to the daughters. In Lebanon, this feature of the Shiite system has sometimes led fathers with only daughters to convert to Shiism to protect the daughters' inheritance.

Wife divorced by a mortally ill husband may inherit

Hanafite opinion says that the inheritance of a wife whom a mortally ill husband has divorced and whose divorce becomes final will pass to her only if the husband dies during the waiting period. The Hanbalites say the inheritance will pass unless the divorced wife has remarried; the Shiites have a similar opinion. The Malikites allow it to pass even if she has remarried. The Hanbalites and the Malikites clearly want to make sure the divorced woman does not get cheated out of her inheritance, no matter how long it takes after the divorce for the ailing husband to die. But the Shafiites reject the whole principle and say that a wife whose divorce by the husband becomes final does not inherit, even if he pronounced the divorce during his mortal illness. There are further variations within the schools of law. For instance, a contrary Shafiite opinion says that the wife does inherit. The one thing that is agreed on by all is that a husband does not inherit in these circumstances, even while the wife may inherit from him (Tusi 1: IV, 101-102).

The inheritance rules of the five traditional schools for a wife divorced by a mortally ill husband have been laid out here as one example of how widely the law can vary. There are similar variations for other rules. Women must educate themselves and ask many questions before thinking of regulating any of their affairs through Muslim law.

Links through the male line are also not favoured by the Shiites as they are by the Sunnites. For instance, a daughter as well as son excludes all grandchildren from inheritance, whereas in the Sunnite system, as already mentioned, a daughter does not exclude a son's children and they will inherit with her. Grandchildren have their chance at inheritance whether they are through a son or a daughter (provided the son or daughter is not present to exclude them).

Differences between Sunnite and Shiite inheritance have not been brought up to say that one is better than the other. The point is rather that there can be very different interpretations of laws among and within the legal schools. The laws of inheritance are one interesting example.

Note finally that all schools agree that husband, wife, parents and children cannot be excluded from inheritance. These family members always inherit some fraction from each other. Also according to all the schools, if either spouse dies while a divorce is not yet final, the other shall inherit.

In addition, if a divorce is pronounced by a husband during an illness that might reasonably be expected to end in death or while he is in other mortal danger (for instance, war), he cannot deprive his wife of inheritance by divorcing her even if the divorce becomes final. This rule has been put into the codes of many modern states. However, there are variations on it in the traditional law.

Objectives of the half-share rule

The aim of the Quran in establishing the half-share rule is not to disadvantage females. Rather, the aim is to establish the principle that females do inherit, by specifying that their shares, along with those of other members of the nuclear family, are to be determined first so that they cannot be somehow passed over and that other shares, including that of sons, will be calculated at the rate of only twice the share of same-class females.

The half-share was probably radical for its time. The Quran announces with much emphasis at the very beginning of its outline of inheritance rules: "to the male [only] the equivalent of the portion of two females."

Nevertheless, we cannot avoid the question: What are the social and personal consequences of the half-share rule in our times?

7.3 WHY FEMALES SOMETIMES GET HALF THE SHARE THAT MALES DO

The rule that the share of a female should be half that of a male in the same class is probably the most controversial aspect of the Muslim law of inheritance. It is also resistant to change, because it is specifically mentioned in the Quran (4:11): "to the male the equivalent of the portion of two females." The half-share rule survives in the inheritance laws of many modern Muslim states.

Note again that the half-share applies to females and males *in the same class*, e.g. brother/ sister, husband/wife, and other combinations where the heirs are parallel in inheritance rights. A female's inheritance will not be automatically half that of other males, and may be more. The rule of a half-share for males and females in the same class does not take effect in a few cases. For example, the share of the mother and father of the deceased where there is a son, sons and daughter(s) or no sons and more than one daughter is one-sixth for each.

The half-share rule and other laws disadvantageous to females were put into the Muslim inheritance system because society

at the time expected women to depend on male relatives to take care of them. By law, such financial responsibility is given to men only. Theoretically, a man must maintain not only his wife and family but

also other relatives in need whose priority is set by the law. In theory, unmarried females are supported by one or another of these relatives son, brother, father, and so on. This is apparently why females get less and inheritance is passed through the male line.

This theory does not apply in our society today. Social and economic life is different. Women cannot expect to be supported by the males of an extended family, and most women would prefer to be independent. Married women often bear equal or sole financial responsibility for a family. Parents would probably like to see their daughters equally provided for after their deaths and independent of other relatives.

Often the argument is heard that a Muslim woman's lesser portion of inheritance is justified because she does not have to contribute to household expenses and receives a *mahr* (dower) from her husband. This argument is completely unrealistic, as explained in section 6, Spousal Support and Division of Property, in the Muslim law part of this book.

Real-world considerations, however, are not considered valid by traditionalists, since in their view, the law is not meant to move with the times but is a fixed duty. Traditionalists cite verses 13 and 14 of Chapter 1V of the Quran, which follow the main group of inheritance verses, to prove that inheritance law cannot be changed: "These are the limits set by God.... But those who disobey God and His Messenger will be sent to an eternal fire."

Modernists believe that the Quranic provisions for inheritance point toward a new financial justice and independence for women, and that it would be a betrayal of the spirit of the Quran not to realize those principles as fully as possible in our age, just as the jurists tried their best to do in their own time.

7.4 MODERN REFORM OF INHERITANCE LAWS

Reforms in Muslim countries have tried to preserve more inheritance for the immediate family, reflecting its rising position as the basic social unit in the Muslim world.

The extension of bequest (*wasiyah*) is a significant move in this direction. According to Sunnite opinion, up to one-third of a decedent's wealth may be bequeathed – that is, given out as he or she wills. The rest then goes to the eligible heirs.

However, the one-third bequest is allowed on the condition that no part of it is given to any established heir, except if some or all of the other heirs consent to having their own shares reduced to accommodate that. This traditional Sunnite position is very restrictive. In reality, few if any heirs will voluntarily agree to have their shares reduced in favour of other persons. According to many opinions, the agreement of the other heirs also has to be confirmed after the death of the person making the bequest, when the deceased can no longer exercise any control over the situation.

Quran 4:13-14

Some recent opinion argues that verses 4:13-14 of the Quran do not mean that it is a duty to follow the systems of inheritance later built up by the jurists, since these did not exist at that time. It is said that the purpose of these verses was rather to warn the Arabs of the Prophet's time that they were absolutely obliged to give women their own independent inheritance, even though they were very reluctant to do so. The famous ninth-century commentator on the Quran, Tabari, cites a report from the Prophet's companion Ibn Abbas that the warning verses were sent down by God to answer a man who angrily refused to accept female inheritance, protesting that "those who do not ride horses or fight" could not possibly inherit "half the wealth or all of it."

Reforms introduced in some Muslim countries allow a bequest of up to one-third to already eligible heirs even without the consent of the others. This reform happens to be in line with the traditional Shiite rule. A person making a will might use such a law to compensate persons who are disadvantaged in the traditional system – for instance, daughters.

In a situation in which a spouse is the sole surviving heir, leaving a considerable part of the estate undistributed, most traditional opinion rules that what is left over is given to the Muslim state. The Shiites apply this in the case of the wife only. Many modern Muslim states now have laws that return what is left over to the spouse instead.

Extending the power of bequest and allowing a spouse who is the sole survivor of the deceased to inherit all of the estate are two examples of reforms designed to keep more inheritance in the nuclear family. Other laws of this kind have been introduced in many Muslim countries – for instance, laws to restrain the strong traditional right of the paternal grandfather to inherit to the detriment of some closer family members.

Traditional law has always allowed Muslims to grant gifts while still living. Some families in the Muslim world use this strategy to make the wealth passed to daughters equal to that of sons.

It is also possible to make gifts during one's lifetime. Traditional law has always allowed Muslims to grant gifts while still living. Some families in the Muslim world use this strategy to make the wealth passed to daughters equal to that of sons.

7.5 MUSLIM INHERITANCE IN CANADA

A section on Muslim inheritance in Canada is included here for two reasons. The first concerns a point that has been made several times in the *Primer*: Muslims in non-Muslim countries must be exceptionally careful when dealing with Muslim laws because they are not defined and administered

Muslims in non-Muslim countries must be exceptionally careful when dealing with Muslim laws because it is not defined and administered by a state.

by a state. Some Canadian Muslims might have in mind the reformed laws of their countries of origin when they think of inheritance and other Muslim laws, while those urging Muslim law upon them might be thinking of unreformed, entirely traditional law.

There are different interpretations and views of the law even in a case as apparently well defined as inheritance. This section suggests an active approach to Muslim inheritance laws, just as the Canadian part of the *Primer* encourages an active approach to Canadian law.

The second reason for including a section on Muslim inheritance in Canada relates to Canadian society. Some features of Canadian society are different from Muslim-majority societies. For instance, adoption is widely practised, many Muslims have non-Muslim relatives, and there is probably a greater instance of blended families in Canada and other Western countries than in the Muslim world. There are special rules related to each of these circumstances.

A Muslim in Canada cannot depend on any Muslim state law that makes inheritance clear and administers it. In order to get an idea of how wealth will be distributed, it is necessary to ask for a prior determination of who the heirs might be and what fractions they might receive. A preview of how the inheritance will be automatically divided is also needed to decide how much of the allowable one-third to bequeath or how much to give away before death in the form of gifts.

In order to know how a Muslim inheritance might play out, it is also necessary to find out what kind of law is being proposed. Just as in other areas of the law, the result can be different depending on the views of the persons consulted. For instance, will it be possible to bequeath in favour of heirs, as in the reform described in the previous section?

Adopted children will not receive inheritance shares, since Islam allows only a kind of fostership, but not adoption.

Persons who decide to follow Muslim inheritance laws should be aware of certain restrictions in addition to those already mentioned.

According to traditional law, non-Muslim relatives are excluded from inheritance shares. This includes non-Muslim wives. According to all but the Shiites, Muslims also cannot inherit from non-Muslims. Adopted children will not receive inheritance shares, since Islam allows only a kind of fostership, but not adoption. An adopted child receives inheritance from his or her blood relatives only.

Stepchildren do not share in the inheritance of their non-blood parent. An illegitimate child does not inherit through the father, according to the Sunnites, and through neither the father nor the mother,

Differences between Muslim and Canadian laws of inheritance

Three features of the Muslim law of inheritance stand out when compared with Canadian laws and usual Canadian practice:

- Inheritance according to Muslim law is distributed among members of the extended rather than the nuclear family. The nuclear family i.e., wife, husband, and children must share with more distant relatives, especially those in the male line.
- The heirs and the amounts given to the heirs are fixed. The decedent cannot choose the persons she or he wants to inherit; neither is it possible to change the amount of inheritance that is to be given to each according to the law.
- The power of the decedent to make bequests (wasiyah) aside from the amounts already fixed by the law is limited. The decedent has little power to dispose of her or his wealth freely as she or he wills.

These features of the Muslim law of inheritance have a definite social rationale. They were intended to fairly distribute wealth in a society in which the extended family was the basic social unit and source of social welfare. Just as the members of the extended family have financial obligations toward one another during their lifetimes that they cannot shirk, so do they have obligations in death.

This is very different from the Canadian system, in which persons may make wills that distribute their wealth more or less as they like. The positive side of the Canadian approach is that decedents can leave most or all of the wealth they have built up to the persons nearest to them, such as spouses and children. They do not have to give parts of it away to more distant relatives, as in the Muslim system. The negative side is that decedents can ignore deserving heirs and leave the estate to anyone else; although Canadian law does protect the close heirs to some extent, as explained in section 7, Inheritance, in the Canadian law part of this book.

according to the Shiites. (What is meant here is a child who is illegitimate in Muslim terms; no child is considered illegitimate in Canadian law.)

It is typical in Canada for spouses to leave most or all of their inheritance to each other so that the survivor can continue to live an independent life and enjoy the property the couple has built up together. Children and others tend to inherit after the spouses are both gone. Muslim inheritance, however, requires immediate division of property upon death. This might not have been a problem in times when extended families lived under one roof, but it may now lead to impoverishment and family tension.

Some of the situations mentioned in this section might be addressed through bequests or living gifts. These aspects of Muslim law are described in the previous section. Note, however, that the giving of a gift, *hibah*, may involve complete loss of control over the donated property. In addition, in the traditional law, a gift made to an heir during a final illness becomes like a bequest in that it requires the agreement of the other heirs and will be limited to one-third unless the heirs also agree.

CANADIAN FAMILY LAWS

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1 INTRODUCTION TO THE CANADIAN LEGAL SYSTEM

Along with case law and family law, in Canada, human rights and women's rights are also regulated and protected by:

- The *Canadian Charter of Rights and Freedoms*, specifically sections 15 and 28, in conjunction with sections 2(a) and 27.
- International covenants and treaties such as the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW). Adopted by the United Nations General Assembly in 1979, the Convention was signed by Canada on July 17, 1980, and ratified on December 10, 1980. The Convention is often referred to as an international bill of rights for women. The *International Covenant on Civil and Political Rights* (ICCPR) was adopted by the UN General Assembly on December 19, 1966. It entered into force on March 23, 1976. Canada acceded to the ICCPR on May 19, 1976.

1.1 WOMEN'S RIGHTS UNDER CANADIAN LAWS

Human rights are regulated differently in different parts of the world. In Canada, the *Canadian Charter of Rights and Freedoms* as well as provincial and federal human rights codes are the most important pieces of legislation that set out basic human rights for Canadians.

1.1.1 The Canadian Charter of Rights and Freedoms

The *Charter* enshrines the equality rights of particular categories of people, including women.

Section 15 states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Section 28 sets out women's equality rights even more specifically: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

These rights coexist with other sections of the *Charter*, which are sometimes used in an attempt to limit women's equality rights. For example:

- the right to freedom of religion, which is set out in section 2(a): "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion..."
- Canada's commitment to multiculturalism, which is set out in section 27: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

Finally, all sections of the *Charter*, including those dealing with women's equality, are subject to section 1: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

1.1.2 International covenants and treaties

As well as domestic laws and regulations, Canada has signed a number of international treaties and covenants that are committed to ensuring the equal rights of women. Some of those agreements stipulate specifically the right of women and children to live free of violence and the threat of violence.

In particular, Canada has signed and ratified the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW), which states that signatories shall take all appropriate measures

to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

It further states that signatories “condemn discrimination against women in all its forms ... [and will] take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”

CEDAW clearly ranks gender equality higher than cultural practices or customs, which would include religious norms.

In another international covenant signed and ratified by Canada, the *International Covenant on Civil and Political Rights* (ICCPR), limits are set on religious freedom as follows:

Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Both these documents provide equality rights protection for women that may not be found in all countries of the world and that cannot be subsumed to the right to religious freedom, which is also a value protected in Canada in the *Charter of Rights and Freedoms*.

1.1.3 Case law

In addition to the written laws of the land, case law (court decisions) further addresses the issue of women’s rights. In family law, for instance, court decisions about custody cases sometimes talk about women’s role in society and in the family and may refer to the *Charter* or to human rights codes.

Public court decisions are required to conform with the *Charter of Rights and Freedoms*, and public laws cannot conflict with the *Charter*. For example, family laws such as the *Divorce Act*, the *Family Law Act*, the *Children’s Law Reform Act* and others must ensure that the provisions of the *Charter* are upheld. Decisions made in family courts must reflect women’s equality rights as they are protected in the *Charter*. Domestic contracts such as marriage contracts and separation agreements, however, despite being governed by the *Family Law Act*, are private matters and not necessarily subject to *Charter* scrutiny in the same way as court-based decisions are. The law in Canada allows competent people, under the appropriate circumstances, to contract out of their legal rights. Please see section 2, Domestic Contracts, for more detail on the law in this area.

1.2 GENERAL RIGHTS FOR WOMEN

Women in Canada enjoy much more formal equality than those in some other parts of the world. We have, in theory, equal rights to men. There are laws that protect women from violence. There are

laws that require women to be paid equally to men when they do similar work. There are regulations against sexual harassment and discrimination in the workplace, in housing and in getting access to many services.

Either a woman or a man can decide to end a marriage. Women and children are not the property of men – this is reflected in Canadian and provincial family laws.

Women in Canada have many general rights as well – to own property, to vote and to make decisions about their reproductive capabilities (for example, women have legal access to birth control and abortion). Both women and men can choose whether to keep their name or change it when they marry. Either a woman or a man can decide to end a marriage. Women and children are not the property of men – this is reflected in Canadian and provincial family laws.

1.2.1 Family law

In Canada, family breakdown is governed by a number of laws, some federal and some provincial. Divorce is regulated federally under the *Divorce Act*. 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.

For people who are not married and married people who are not seeking a divorce, provincial legislation governs what happens when their relationship ends. In Ontario, the *Children's Law Reform Act* covers custody, access and child support, while the *Family Law Act* deals with property division, spousal support and restraining orders.

Child-protection matters are ruled by provincial laws; in Ontario, the statute is called the *Child and Family Services Act*. Inheritance is also a matter for provincial regulation; in Ontario, through the *Succession Law Reform Act*. 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.

This legislation exists to assist families and to provide minimum common standards across the country. A public law system supports a consistent approach, some measure of equality and accountability.

However, many people resolve their own situations with little or no reference to laws of any kind. There is no requirement in Canada that people use any of these laws when they separate from their partners. People can simply separate and continue with their lives under a new arrangement they have made themselves.

Unless one or both of the spouses wishes to remarry, it is not even necessary to divorce. Many people remain married to a former partner for the rest of their lives, even if they engage in a subsequent long-term relationship that is not formalized by marriage. Many other people work out issues such as custody, support and division of property between them without turning to the law. Others attempt to do so, and only when this attempt is unsuccessful, do they turn to the law for assistance.

In cases where people do not turn to the law, there is no regulation of the outcomes, and they may live with arrangements that do not respect their legal rights or are inconsistent with or even contravene the written law.

The formal law only becomes involved if one of the parties invokes it or if there is a matter, such as the safety of a child, that comes to the attention of an outside authority.

1.2.1.1 Women's rights in family law

Canadian family law states that both the mother and the father have an equal right to custody of their children if the parents separate. There are laws requiring fathers to provide financial support for their children and their wives. Because, in Canada, marriage is considered a partnership, a woman has a legal right to a share in the property the family accumulated during the marriage, whether or not she contributed financially to that property.

This has not always been the case. Family law has seen significant development over the past century, moving from the private to the public arena. In the process, the law and the courts have moved away from a Judeo-Christian framework to a more secular one. Among other improvements, the equality rights of women have become increasingly entrenched, although laws are still written in gender-neutral language even when reality would seem to dictate otherwise. The examples given in the previous paragraph are intended to reflect the gendered realities in most families in Canada – mothers are most often the custodial parents, fathers most often pay support, and husbands more commonly own more property than wives.

Because, in Canada, marriage is considered a partnership, a woman has a legal right to a share in the property the family accumulated during the marriage, whether or not she contributed financially to that property.

Making family law a matter for public regulation has also brought issues such as violence within the family into public scrutiny. While much work remains to be done to ensure women's equality under family law, there is no doubt that creating a body of public family law has greatly improved the situation of many women and their children.

1.2.2 Formal vs substantive equality

However, as stated above, while these rights exist in written laws, codes and agreements, they do not always exist in the reality of women's lives. There is a difference between the written law and its interpretation and enforcement.

Restraining orders provide a good example of this. A woman who has received a restraining order from the family court, pursuant to the *Family Law Act* of Ontario, has a piece of paper that clearly states that her husband is prohibited from any contact, direct or indirect, with her. She has obtained this order to protect herself should her husband threaten her safety in any way. If he breaches the order, she expects the police to enforce it by arresting her husband and laying the appropriate charge.

However, women's experiences of enforcement vary. Some women report that the police take so long to respond to a call for help that the husband has left before they arrive. Others say that the police try to mediate the situation, rather than simply arresting the husband. Still others have a very positive experience and report that the restraining order has allowed them to move ahead with their lives, free from ongoing harassment and abuse by their husband.

1.2.3 Public vs private law

There are laws and systems in place that are intended to ensure women's equality rights under the law. These are *public* laws that are open to public review and scrutiny. Those who interpret them are accountable to the public in a variety of ways, including through formal complaint processes. Court decisions are a matter of public record. They can be appealed to higher courts. In Canada, everyone involved in a court matter has a right to legal representation, and legal aid, while inadequate, is an attempt to ensure that those without financial resources can still have legal representation. In other words, anyone who is involved in a court proceeding has the right to have a lawyer represent her/him. People who cannot afford a lawyer may make an application for assistance from legal aid – a government-funded program that provides financial assistance to those who meet the economic requirements and the funding criteria. Not every legal matter is covered by legal aid, but most family and criminal law matters are.

The role of interpretation

Written law and how it is interpreted are two very different matters. Often the interpretation or enforcement of a law seems to bear little resemblance to the law as it is written. This is because the writing and interpretation and enforcement of laws is influenced by the lived experiences and biases of those who write, interpret and enforce them. Unfortunately, it is still the case in Canada that the perspectives of those people (e.g., politicians, lawyers, judges, police officers) do not always reflect the interests of others.

Not only are there many differences between Canadian and Muslim laws, but there are also many examples of differences in both legal systems between the way they are written and the way they are interpreted.

Private rules, including religious law, do not offer these same protections. They are not based on a commitment to women's equality, 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 never available.

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

1.3 ACCESS TO JUSTICE

It is one matter to discuss what the laws in Canada say; it is another to ensure that everyone has access to justice under those laws. Often, it is women who have the least access, and some women have less access than others. Poor women, immigrant and refugee women, Aboriginal women, women who speak no or little English and women with abusive husbands or partners have less access to justice than any other group in Canada.

1.3.1 Legal representation

Everyone involved in a family law matter can use the services of a lawyer to support and assist them. Whether the person is negotiating a separation agreement, meeting with a mediator or taking court action, s/he may hire the lawyer of her/his choice to represent her/his interests. In some cases, children can have lawyers appointed for them.

In Ontario, paralegals are not permitted to represent people in family court proceedings, although they can assist with out-of-court matters such as drafting a separation agreement or divorce application.

1.3.2 Legal aid

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. In Ontario, the legal aid plan is called Legal Aid Ontario (LAO). Ontario's model provides successful applicants with a certificate for coverage, and they select their own lawyer.

The financial criteria in Ontario are very limited – people will generally only receive a certificate if they are living in extreme poverty. Eligibility is determined by a review of the person's income and expenses.

A number of family law matters are covered by LAO: custody and access, child and spousal support and restraining orders in particular. Uncontested divorces are not covered, and many property division matters are not covered because LAO takes the position that lawyers can be paid out of the property being divided between the parties.

LAO can place a lien against the property of someone who is otherwise unable to pay for legal representation. LAO can also require someone to enter into a payment contract before providing that person with a certificate.

Because the hourly rate paid by LAO to the lawyer is much lower than most lawyers can charge privately, the list of lawyers prepared to take legal aid certificates is relatively small. People living in small communities, especially, may have difficulty finding a lawyer who will accept their certificate.

1.3.2.1 Legal aid in private dispute resolution

One of the biggest limitations of legal aid in Ontario is that it covers representation for court-based matters only. People who use mediation or arbitration cannot apply for legal aid, so they will have to either cover the cost of their legal representation themselves or enter into the process without a lawyer. This can leave them vulnerable and is a matter of considerable concern for women in particular, who are often too poor to be able to pay for a lawyer.

Duty counsel/Family Law Information Centres (FLICs)

FLICs in family courts are centres where people can get general information about the family court process, family law, mediation services, and so on. These services are free.

Legal Aid Ontario provides other services for those who cannot afford to pay for their own legal representation. All courts, including family, have duty counsel available to assist those who require it. Duty counsel are lawyers who are paid by LAO to spend their time at the courthouse meeting with unrepresented parties. Anyone who has a matter before the court and who does not have a lawyer can ask for assistance from duty counsel. This lawyer cannot represent the individual but can give legal information, assistance with simple matters such as adjournments, provide the forms that will have to be completed and make suggestions to the person. Where both parties in a family law matter seek assistance from duty counsel, a second lawyer will be provided to avoid a conflict of interest.

1.4 PRIVATE DISPUTE RESOLUTION

Many people prefer to resolve the issues arising from the end of their relationship outside the court system. Often, these resolutions are more successful because both people feel they have been part of the process and have received at least some of what they want. People are more likely to follow an agreement they feel good about than an order that has been imposed upon them.

However, in situations where one person has much less power than the other (because of abuse, different levels of knowledge about the law, different levels of language ability, etc.), these private resolutions may not reflect either the legal rights or the interests of the person with less power.

Private dispute resolution is just that – private. Parties may be able to enter into agreements that do not reflect the laws of the country, but these may then be difficult to appeal or have enforced. Legal aid is not available to ensure that both parties have proper legal representation.

In Ontario, the main kinds of private dispute resolution used in family law are:

- mediation
- collaborative law
- arbitration.

1.4.1 Mediation

Some people choose to work with a mediator to resolve their family dispute. If they do this privately, they can hire whatever mediator they agree on, and they will pay for this person's work. They will meet with the mediator (together, separately or both) to discuss the outcomes they want. The mediator's role is to try to get the two parties to come to an agreement (usually a compromise) on issues where they do not agree.

If the parties are able to come to an agreement, then they will each meet with their own lawyer to review the agreement, get legal advice about it and, if all proceeds well, to sign the agreement. This agreement, called a separation agreement, will set out the terms of the parties' separation – who has custody, how much child support is to be paid by whom and to whom, how property is to be divided, and any other issues. Either party can call on the court to have the agreement enforced if the other party later fails to honour it.

If mediation is unsuccessful, then the parties will make an application in the family court for an order to resolve the issues between them. For more information about separation agreements, please see section 2, Domestic Contracts.

Judges can appoint mediators when they think it will be helpful. Both the *Family Law Act*, section 3, and the *Children's Law Reform Act*, section 31, set out that the court may, if requested by the parties, appoint a mediator, who has the duty "to confer with the parties and endeavour to obtain an agreement."

Mediation can be either closed, meaning what happens during the course of mediation remains private and cannot be brought into any court proceeding, or open, meaning that a full report of the mediation proceedings can be made available to a court proceeding.

In some cases, where the family law dispute is in front of the court and one or both parties are assisted by Legal Aid Ontario, continued funding can be made conditional on the parties entering into mediation. In this case, the mediation is often conducted by a lawyer on behalf of LAO. Often, either or both parties are not interested in mediation but have been told they will lose their legal aid coverage if they do not try to resolve their issues in this way.

Mediation can be inappropriate in cases of family violence, and many mediators screen potential cases for violence before agreeing to mediate.

1.4.2 Collaborative law

This is a relatively new approach to family law in Canada. It is a style of practice, and no legislation governs it specifically. The parties each retain their own lawyer (at their own expense – because this is not a court matter, legal aid is not available) who is a specialist in collaborative law. The lawyers and the parties then work to come to an agreement about the issues relating to the end of the parties' relationship. The lawyers are committed to coming to an agreement – going to court is not considered an acceptable option in collaborative law. While there are some similarities with mediation, collaborative law is distinct in that it is lawyers who are negotiating with one another.

At the end of a successful negotiation, the parties will sign a separation agreement setting out the terms of their separation.

As with all separation agreements, the outcomes of collaborative law negotiations are governed by the *Family Law Act*. Please see section 2, Domestic Contracts, for greater detail on separation agreements.

If the collaborative approach is not successful, the parties must hire new lawyers, who will begin court proceedings.

1.4.3 Arbitration

In Ontario, arbitration of all matters, including family law, is governed by the *Arbitration Act*, which sets out the rules and procedures to be followed. There is an increasing use of arbitration in which family law lawyers operate as arbitrators in disputes between separating parties.

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.

There have been recent and significant changes to the *Arbitration Act* with respect to the arbitration of family law disputes. While any qualified person is permitted to arbitrate a dispute, the arbitration must be conducted

Collaborative law not appropriate where history of abuse

As with mediation, collaborative law can work well for people coming from relatively equal positions of power, but it is not as appropriate when there is a history of abuse or violence. In those cases, the less powerful partner may be intimidated or coerced into agreeing to things that s/he does not really feel comfortable about. Collaborative lawyers screen for family violence in their clients and will proceed in those cases only if it is clear that the victim of the abuse is very committed to the process.

While any qualified person is permitted to arbitrate a dispute, the arbitration must be conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction.

exclusively in accordance with the law of Ontario or of another Canadian jurisdiction. Any arbitration conducted using any other system of law, including religious law, is not considered a “family arbitration” and is not enforceable in Ontario.

In order for a family arbitration award to be enforceable, the parties must each have had independent legal advice.

Family arbitration awards can be appealed to the Family Court or to the Superior Court of Justice.

Regulations are in the process of being prepared that will govern such areas as the qualification of arbitrators, a standardized method of record-keeping and the way in which parties to arbitration will be screened for power imbalances and domestic violence.

The amendments to the *Arbitration Act* create many safeguards for women leaving abusive relationships, especially where there may be cultural or religious pressures to enter into agreements that do not reflect the woman’s rights under Canadian law.

While private dispute resolution, such as domestic contracts, is appropriate for many families, it offers little protection to vulnerable people who may enter into the process with no knowledge of their legal rights and no access to legal representation. For this reason, many organizations that work on behalf of vulnerable people oppose the expansion of these private processes.

Criminal law as a source of protection

While the focus of this book is on family law, a few points about criminal law are warranted:

- A number of criminal charges can be laid against an abusive spouse – for assault, uttering threats, forcible confinement, criminal harassment and sexual assault, among others.
- There are no criminal charges that can be laid for emotional or psychological abuse.
- When someone is charged with a crime and released on bail, they are almost always ordered to stay away from the victim.
- When criminal charges are laid, victims can get support and services from the Victim/Witness Assistance Program at the criminal court.
- When criminal charges are not laid, anyone who is afraid of another person may apply for a peace bond which, if issued, will order that person to have no contact with the other for up to twelve months.
- In Canada, it is the police who decide whether or not criminal charges should be laid, not individuals. In fact, in cases of domestic violence, if the police believe there is evidence a crime has been committed, they will lay the charges they believe to be appropriate, regardless of the wishes of the victim.
- The police, and other professionals, have a legal obligation to report any domestic violence to the appropriate child-protection authority when there are children in the family, whether or not the children were directly involved in the violence.
- The police, if they are informed that any of the people involved in a domestic dispute do not have legal immigration status, are legally required to inform Immigration Canada of this fact.

1.5 SAFETY-RELATED MATTERS

Family law in Ontario provides some protections for women who have safety concerns when they end a relationship with an abusive partner.

Provincial family law allows a victim of domestic violence to apply for:

- a restraining order and/or
- exclusive possession of the matrimonial home.

1.5.1 Restraining orders

A restraining order is an order of the family court prohibiting one individual from having any contact with another.

The *Children's Law Reform Act*, section 35, states: "On application, a court may make an interim or final order restraining a person from molesting, annoying or harassing the applicant or children in the applicant's lawful custody and may require the person to enter into the recognizance or post the bond that the court considers appropriate."

The *Family Law Act*, section 46, states: "On application, a court may make an interim or final order restraining the applicant's spouse, same-sex partner or former spouse or same-sex partner from molesting, annoying or harassing the applicant or children in the applicant's lawful custody, or from communicating with the applicant or children, except as the order provides, and may require the applicant's spouse, same-sex partner or former spouse or same-sex partner to enter into the recognizance that the court considers appropriate."

When a restraining order has been issued under either act, it is an offence to contravene it that can lead to a fine of \$5,000 and/or a period of imprisonment of not more than three months for a first offence and not more than two years for a subsequent offence. Police officers may arrest, without a warrant, a person who is breaching a restraining order.

Police officers may arrest, without a warrant, a person who is breaching a restraining order.

1.5.2 Exclusive possession of the matrimonial home

The *Family Law Act*, section 24, states that the court may give one spouse exclusive possession of the family home for a specified period of time. This is regardless of the ownership of the home and will have no impact on the sharing of the value of the home at the time the family property is divided between the spouses.

In deciding on whether a spouse should have exclusive possession of the home, the court shall consider:

- the best interests of the children
- any existing orders with respect to property and support
- the financial position of both spouses

- any written agreements between the parties
- the availability of other suitable and affordable accommodation
- any violence committed by a spouse against the other spouse or the children.

Once such an order has been made, the other spouse is not permitted on the property, and the spouse with the order can change the locks and make other appropriate changes to ensure her/his safety. If the other spouse contravenes the order, s/he may have to pay a fine and/or be placed in jail. Police officers can arrest a person in breach of this order without a warrant

Restraining orders and exclusive possession

Both restraining orders and exclusive possession orders are important legal steps women can take to protect themselves from abusive partners, especially during the early days of separation, when the risk of violence often increases. Neither order results in criminal consequences for the abuser unless s/he breaches them. Neither order affects any other rights or responsibilities under family law – custody or access or a fair division of property – of either partner. Applications for a restraining order and/or for exclusive possession of the home can be made as part of a larger court proceeding dealing with custody, access, support and/or division of property, or they can be made as separate applications.

2 / DOMESTIC CONTRACTS

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2 DOMESTIC CONTRACTS

Limits on private contract arrangements

Section 56 of the *Family Law Act* sets some limits on private contract arrangements:

- A court can set aside any provision of a domestic contract that, in the opinion of the court, is not in the best interests of the child.
- A court can disregard any provision of a domestic contract that is unreasonable with respect to child support.
- Provisions that make the rights of a party dependent upon remaining chaste are unenforceable.
- Upon application, a court may set aside a domestic contract or parts of such a contract if a party failed to disclose to the other significant assets or debts and liabilities or if a party did not understand the nature or consequences of the contract or if the contract is not “otherwise in accordance with the law of contract.”
- A court may, upon application, set aside all or part of a separation agreement or settlement if the court is satisfied that the removal by one spouse of barriers preventing the other spouse’s remarriage within that spouse’s faith was a consideration in the making of the agreement.

Moreover, section 33(4) of the *Family Law Act* provides that a domestic contract may be set aside with respect to child support (a) where the provision for support or the waiver of the right to support results in “unconscionable circumstances”; (b) where the provision or waiver is by or on behalf of a dependant who qualifies for support out of public money; or (c) where there is default in payment of support under the contract.

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

2.1 MARRIAGE CONTRACTS

Section 52 of the *Family Law Act* defines a marriage contract as an agreement entered into by a man and a woman who are married to each other or who intend to marry, in which they agree on their respective rights and obligations under the marriage or, upon separation, the dissolution of the marriage or death. This can include such matters as ownership and division of property, support obligations, the right to direct the “education and moral training” of their children and any other matter. 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.

It should be noted that this provision in the *Act* was written before the legalization of same-sex marriage, so the language referring to “man” and “woman” remains in effect until challenged in court or until the legislation is rewritten.

2.2 COHABITATION AGREEMENTS

Section 53 of the *Family Law Act* provides for two persons of either the opposite sex or the same sex who are living together or are planning to live together without marrying to enter into an agreement in which they agree on their respective rights and obligations during the time of cohabitation or upon ceasing to cohabit or death. Matters to be included or excluded are the same as with a marriage contract with the exception of provisions relating to the matrimonial home, which would not apply to unmarried cohabiting couples.

If a cohabiting couple marries, the cohabitation agreement is deemed to be a marriage contract.

2.3 SEPARATION AGREEMENTS

Section 54 of the *Family Law Act* governs private agreements that can be made between two people of the same or opposite sex who have cohabited (including people who were married) and are now living separate and apart. The *Act* allows separating couples to agree on their respective rights and obligations, including ownership and division of property, support obligations, custody and access, the right to direct the education and moral training of their children and any other matter.

2.4 JURISDICTION

Part IV of the *Act* also sets out how domestic contracts made outside Ontario are to be handled within Ontario. Section 58 states that a contract from another jurisdiction is valid and enforceable in Ontario if it was entered into in accordance with Ontario's internal law. Contracts that, if made in Ontario, would not be enforceable because the outcomes of such contracts would be unconscionable, are not enforceable even if they would be in the jurisdiction in which they were written.

The *Family Law Act*, section 33(4), provides that a domestic contract may be set aside with respect to child support where the provision for support or the waiver of the right to support results in "unconscionable circumstances," where the provision or waiver is by or on behalf of a dependant who qualifies for support out of public money or where there is default in payment of support under the contract.

Section 35 allows either party to a domestic contract to file that contract with the clerk of the Ontario Court (Provincial Division) or the Unified Family Court in order to allow enforcement of any support provisions contained within the contract. Once this step is taken, the contract will be treated as if it were an order of the court where it is filed.

2.5 INDEPENDENT LEGAL ADVICE

Domestic contracts require that an "independent legal advice" (ILA) or a "waiver of independent legal advice" certificate be signed by a practising lawyer in the province of Ontario. Because domestic contracts allow people to contract away their legal rights, it is important to try to ensure they are doing so freely, without coercion and only after they sought independent legal advice. Before a lawyer signs an ILA or waiver certificate, s/he must satisfy him or herself that the person understands the content of the contract, is in agreement with it, and is not being coerced into signing it. Of course, this is not always a simple matter or even possible.

Because domestic contracts allow people to contract away their legal rights, it is important to try to ensure they are doing so freely, without coercion and only after they sought independent legal advice.

2.6 ENFORCEABILITY

To be enforceable, a domestic contract must conform with the requirements contained in the *Family Law Act*, as set out above, which allows individuals to contract out of certain legal rights but prohibits

***Hartshorne v Hartshorne* [2004]**

Appellant: Robert Kenneth Hartshorne

Respondent: Kathleen Mary Mildred Hartshorne

In this case, the parties had been together for twelve and a half years. They were married for nine of those and had two children. At the time of the marriage, the wife, a well-educated lawyer, with the help of independent legal counsel, signed a marriage agreement. Although her lawyer advised against it due to the unfairness of the agreement, she went ahead and signed it with a few minor changes.

The British Columbia courts set aside the marriage agreement as unfair and ordered a reapportionment of the family assets. On appeal, however, the Supreme Court of Canada took a different view. The Court felt that private arrangements regarding division of property in case of a relationship breakdown ought to be respected. All the more so in this case because independent legal advice had been sought.

them from contracting out of others – most notably, rights of children with respect to custody, access and child support.

In other words, while a competent adult, not under duress or coercion, is legally able to sign away her rights to property, she cannot sign away her children's rights to support or an appropriate custody arrangement. This somewhat confusing regime has been, and continues to be, debated in family law cases in Canada. Essentially, the question is: Can we allow people to sign away their legal rights?

The Supreme Court of Canada, in the recent case of *Hartshorne v Hartshorne*, has answered the question with a resounding “yes.” This decision, which is binding on all courts in Canada, supports the notion that domestic contracts (in this case a marriage contract) should be given great deference, that courts should only intervene to set aside a domestic contract in extreme circumstances, that adults are free to sign away their legal rights and must assume responsibility when they so do, even if the consequences prove to be negative.

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

There is some protection against such situations (the court has the power to overturn provisions in a domestic contract that are not in the best interests of the children or that would result in an unconscionable outcome), but it is limited because the court will become involved only upon the application of one of the parties. In the case of a woman leaving an abusive partner who has been coerced into signing a separation agreement that does not reflect the best interests of the children, there is every reason to assume she would be too intimidated to then make an application to the court to have that agreement set aside.

There is little case law dealing with the enforceability of domestic contracts based on religious laws or practices. In a 1998 case, *Kaddoura v Hammoud*, the Ontario Court of Appeal refused to require the husband to pay the wife the *mahr* (dower), which is a Muslim marriage tradition, because the contract had a “religious purpose” and therefore the court was not under obligation to adjudicate it.

In this case, the husband had agreed to pay the wife \$30,000 in an Islamic marriage contract. The contract was valid in that it conformed to the requirements of the *Family Law Act*; nonetheless, the court found it to be unenforceable under Canadian law. In his decision, the judge noted:

I cannot help but think that the obligation of the Mahr is as unsuitable for adjudication in the civil courts as is an obligation in a Christian religious marriage such as to love, honour and cherish, or to remain faithful, or to maintain the marriage in sickness or other adversity so long as both parties live, or to raise the children according to specified religious doctrine. Many such promises go well beyond the basic legal commitment to marriage required by our civil [public] law and are essentially matters of chosen religion and morality. They are derived from and are dependent upon doctrine and faith. They bind the conscience as a matter of religious principle but not necessarily as a matter of enforceable civil law.

Whether this is a good decision or not, it is an indication that Ontario family courts will limit their role in enforcing private contracts based on religious principles and practices, and so will offer little protection to women who turn to the courts for assistance. Interestingly, British Columbia courts appear prepared to play a more active role in enforcing such contracts.

3 / MARRIAGE

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3 MARRIAGE

In Canada, 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*.

Rules about who can marry whom are governed federally under the *Marriage (Prohibited Degrees) Act*.

Bigamy and polygamy are dealt with under the federal *Criminal Code*.

3.1 WHO CAN MARRY

The *Marriage Act* of Ontario allows anyone (male or female) who is the age of majority (18 years of age) to marry anyone else who is the age of majority. If either person is between 16 and 18 years of age, they can marry if they have the written consent of their parents (section 5).

People who have been previously married can marry in Ontario if that previous marriage has been dissolved in a manner recognized in Ontario (section 8).

3.2 TYPES OF MARRIAGE

Marriage in Ontario can be by way of either a civil or a religious solemnization (section 4). At least two adult people (men or women) must witness the solemnization, whether it is religious or civil. Following either a civil or a religious marriage, the person who performed the ceremony must enter the details of the marriage in the appropriate register. That person shall also complete a Statement of Marriage (Form 7) and file it with the Registrar General within two days of the marriage.

3.3 BREACH OF PROMISE

Section 32 of the *Marriage Act* prohibits a person from being sued if s/he breaches a promise to marry.

3.4 WHO CANNOT MARRY

The federal *Marriage (Prohibited Degrees) Act* specifies that a person cannot marry someone if they are related lineally as brother and sister, whether full or half, by consanguinity (blood) or by adoption.

3.5 SAME-SEX MARRIAGE

In June 2005, the federal government passed legislation permitting same-sex marriage in all provinces and territories of Canada. This follows years of *Charter* litigation across the country in which many courts, Courts of Appeal and ultimately the Supreme Court of Canada, found that gays and lesbians were discriminated against contrary to their rights in the *Charter* if they were not permitted to marry.

3.5.1 Bigamy and polygamy

As with same-sex marriage, Ontario's *Marriage Act* is silent as to bigamy and polygamy, but they are prohibited under the federal *Criminal Code*.

Section 290 of the *Criminal Code* states that anyone who “being married, goes through a form of marriage with another person” commits bigamy and is liable to a maximum penalty of five years’ imprisonment.

Certain exceptions are permitted – for example, when the person has reasonable grounds to believe their spouse is dead or when the person’s spouse has been “continuously absent” for at least seven years.

Section 293 prohibits any form of polygamy or “any kind of conjugal union with more than one person at the same time” and imposes a maximum penalty of five years’ imprisonment on anyone who “celebrates, assists or is a party to” such a “rite, ceremony, contract or consent.”

Section 293 prohibits any form of polygamy or “any kind of conjugal union with more than one person at the same time” and imposes a maximum penalty of five years’ imprisonment on anyone who “celebrates, assists or is a party to” such a “rite, ceremony, contract or consent.”

There are both bigamous and polygamous marriages in Canada that are not prosecuted under the *Criminal Code*. In some cases, the second or subsequent wife is completely unaware that she has married someone who is already married. This is especially possible if the second or subsequent marriage takes place privately – for example, in a church, mosque or synagogue without the necessity of a marriage licence.

What this means to the wives in a polygamous marriage is not entirely clear. Certainly, women who feel cultural or religious pressure to enter

into or consent to polygamous marriage are left in a very vulnerable position in terms of their rights under Canadian law.

According to Canadian divorce law, adultery is a ground for divorce. However, this is not so if the wife is aware of the “adultery” and “consents” to it. This would appear to rule out using polygamy as a basis for divorce for a first wife who remains in the marriage even after her husband has married a second or subsequent wife.

Often, the first wife will have been married in both a religious and civil marriage. This means that upon marriage breakdown, whatever the reason, she will have access to any rights contained in Canadian civil law such as support and division of property.

The legal status of the second or subsequent wife is more ambiguous. If she was aware that she was entering into a polygamous marriage, she may only be married in the eyes of the religion, which would leave her without rights under civil law. However, if she could prove that she did not know her husband was already married and that she would not have married him had she known, she might be able to acquire some of her rights under civil law (for example, to property and support).

Unless her marriage were properly registered with the state (see above), however, no matter what she believed, she would not be able to get a civil divorce for the simple reason that she would never have been married under civil law.

Requirements of religious and civil marriages

Civil marriage:

- The parties purchase a marriage licence from the municipal clerk (section 11) at a cost of \$75.
- The solemnization is performed by a judge, justice of the peace or any other person designated by the Regulations (section 24).
- There is no particular form to be followed, but certain statements must be made by each party and by the person solemnizing the marriage. These statements are set out in section 24.

Religious Marriage:

- The legislation defines “church” as “chapel, meeting-house or place set aside for religious worship,” which clearly extends to a wide variety of religious gathering places.
- The parties have banns published – this is when the intention of the parties to marry is “proclaimed openly in an audible voice during divine service” in the church(es) attended by each of the parties (section 17). Often, this is done by the religious leader announcing the upcoming marriage of two members of the congregation during the regular services for a number of weeks prior to the intended marriage. Anyone who believes the marriage is not permissible is expected to inform the religious leader before the date of the marriage.
- The solemnization is performed by a person (man or woman) who is registered as “a person authorized to solemnize marriage” by the Minister of Consumer and Business Services (section 20). In order to be registered, the person must:
 - a. be ordained or appointed according to the rules of their religious body
 - b. be recognized by that religious body as being entitled to perform marriages
 - c. belong to a religious body that is permanently established
 - d. be resident in Ontario.

The Marriage Act does not set out any particular form for the solemnization – this is a matter decided upon by each religious body.

4 / DIVORCE

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4 DIVORCE

A man and a woman who are validly married to one another can pursue a divorce to terminate their marriage and to resolve issues of custody, access and child and spousal support.

Divorce is governed by the *Divorce Act*, which is federal legislation. At the present time, divorce is available only to married opposite-sex spouses – indeed, the *Act* defines spouse as “either of a man or woman who are married to each other.” Until amendments are made to the *Divorce Act* (which are expected soon, now that the federal government has passed legislation supporting same-sex marriage), same-sex married couples who separate will have to remain married and resolve the issues between them (such as custody and support) either privately or through relevant provincial legislation. As a result, neither would be free to remarry at this time.

Divorce cannot be dealt with by way of domestic contract or private agreement. A divorce cannot be arbitrated. While all issues attached to the termination of a relationship can be so dealt with, divorce is the state’s acknowledgement that a marriage is terminated, and so can only be provided through the formal process of the *Divorce Act*.

4.1 GROUNDS FOR DIVORCE

A divorce can be initiated by either a man or a woman. The legislation allows for one ground for divorce – marriage breakdown. This is defined in section 8 of the *Act* as:

- the spouses having lived separate and apart for at least one year
- either spouse having committed adultery or

Characteristics of living separate and apart

The characteristics of living separate and apart are:

- The one-year period of living separate and apart must immediately precede the determination of the divorce proceedings and must be in effect at the commencement of the proceedings.
- There must be physical separation. Physical separation can be achieved even if the parties remain in the same house.
- Recognition that the marriage is over. This need only come from one of the spouses.
- The end of sexual intercourse is not in and of itself conclusive but, rather, only one factor to be considered while determining whether the couple is living separate and apart.
- Other factors to be considered are whether the spouses continue to communicate; whether they socialize together; whether others view them as a couple; how they share the space in the house (if they continue to reside under one roof); whether they have separated their financial obligations and responsibilities; and how they share responsibility for the children.

The law allows for separating couples to resume cohabitation for the purpose of reconciliation for not more than 90 days during this one year of living separate and apart without interrupting the calculation of the one year.

- either spouse having treated the other with “physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.”

4.1.1 *Living separate and apart for at least one year*

This is by far the most common ground on which Canadian married couples base their divorce application. It is the easiest to prove and does not require that either party accuse the other of wrongdoing.

4.1.2 *Adultery*

Where one spouse commits adultery, the other spouse may use this, with proof, as the 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 other spouse, who continued with the relationship regardless, it will be difficult to have adultery accepted as the basis of a divorce.

4.1.3 *Physical or mental cruelty of such a kind of as to render intolerable the continued cohabitation of the spouses*

Both cruelty and its intolerability must be established for this ground to succeed as the basis of a divorce application. For example, where 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.

Note: Where the grounds for divorce are either adultery or cruelty, there is no requirement that the parties live separate and apart for one year. However, the length of the proceedings may result in a lengthy time delay.

4.2 BARS TO DIVORCE

Section 11 of the *Divorce Act* sets out three barriers to the granting of a divorce:

- inappropriate child support
- collusion
- condonation or connivance.

4.2.1 *Inappropriate child support*

The court can withhold the granting of a divorce until it is satisfied that reasonable arrangements have been made for the support of any children of the marriage. We will discuss what is reasonable in section 5 of this part of the *Primer*.

4.2.2 *Collusion*

“Collusion” is defined in the *Act* as “an agreement or conspiracy to which an applicant for a divorce is either directly or indirectly a party for the purpose of subverting the administration of justice, and

includes any agreement, understanding or arrangement to fabricate or suppress evidence or to deceive the court, but does not include an agreement to the extent that it provides for separation between the parties, financial support, division of property or the custody of any child of the marriage.” For example, if a couple separates at the husband’s initiative because he is having an affair, the wife could properly apply for a divorce on the basis of his adultery. If, on the other hand, he wants the divorce and asks her to apply on the basis of his adultery, this could be collusion because she is essentially entering into an agreement to pursue a divorce at his request. Likewise, if there were no adultery, but the spouses claimed one of them was having an affair in order to speed up the divorce, this would be collusion. This bar is not strictly or closely enforced by the courts.

4.2.3 Condonation and connivance

Condonation and connivance are not defined in the *Act*. “Condonation” is the reconciliation of the parties, where one party is aware of and accepts the adultery or cruelty of the other. “Connivance” must involve corrupt intention.

Where any of these situations exists, the court can refuse to grant a divorce.

4.3 DUTIES OF LAWYERS AND COURTS

Section 9 of the *Divorce Act* requires lawyers to discuss the possibility of reconciliation with the client and to inform the client of counseling or other services that might assist the client and spouse to reconcile “unless the circumstances of the case are of such a nature that it would clearly not be appropriate.”

The legislation provides no assistance in determining what circumstances would be of such a nature that discussing reconciliation would not be appropriate, but case law has established such situations as an extremely lengthy separation, a well-established subsequent relationship, children from a subsequent relationship and mental and physical cruelty as ones where reconciliation need not be discussed.

Lawyers are required to discuss with their clients the “advisability of negotiating the matters that might be the subject of a support order or a custody order” and to make the client aware of mediation services that might assist in those negotiations. Unlike the previous requirement, this one carries no qualifier. Lawyers must provide a statement certifying that they have had such discussions with the client as part of the divorce application.

The court, too, is obligated to “satisfy itself that there is no possibility of the reconciliation of the spouses, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so” before it considers the application for divorce. And, if at any stage in the divorce proceeding, the court believes there is a possibility of reconciliation, it shall adjourn the proceeding to allow the spouses an opportunity to achieve such a reconciliation (section 10).

Lawyers are required to discuss with their clients the “advisability of negotiating the matters that might be the subject of a support order or a custody order” and to make the client aware of mediation services that might assist in those negotiations.

4.4 COROLLARY RELIEF

The *Divorce Act* allows people seeking a divorce to also resolve the related issues of child support (section 15.1), spousal support (section 15.2) and custody and access (section 16). This is known as corollary relief and will be discussed in detail in sections 5 and 6 of this part of the *Primer*.

4.5 REMOVAL OF BARRIERS TO RELIGIOUS REMARRIAGE

In section 21.2, the *Divorce Act* sets out provisions to ensure that neither spouse can unreasonably refuse to remove barriers to the religious remarriage of the other spouse. If a spouse does unreasonably refuse, the court can dismiss any application by that spouse. The court is permitted to refuse to exercise this power if the spouse has “genuine grounds of a religious or conscientious nature” for refusing to remove the barriers.

4.6 RECOGNITION OF FOREIGN DIVORCE

The *Divorce Act* permits Canada to recognize divorces granted in other countries by “a tribunal or authority having jurisdiction to do so” as long as either former spouse was “ordinarily resident” in that country for at least one year immediately before the commencement of proceedings for the divorce (section 22(1)). A religious divorce is recognized in Canada if its validity is recognized by the country in which it was granted, but not otherwise (section 22(3)). For example, if a couple were married in a Muslim country according to a particular Muslim tradition and subsequently divorced there following the same tradition, and then later one of them wished to remarry in Canada under Canadian law, s/he would be able to state that s/he was legally divorced. On the other hand, if the couple were married under Canadian law and then divorced only within their religious tradition, they would still be viewed as married by Canadian law.

5 / CUSTODY, CHILD SUPPORT AND CHILD PROTECTION

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5 CUSTODY, CHILD SUPPORT AND CHILD PROTECTION

5.1 CUSTODY

For many women, ensuring the custody of their children is the first priority when they leave a relationship. This may be especially true for women with abusive partners because there will likely be safety concerns for both the children and the mother.

Family law in Canada, as it is written in the *Divorce Act* and Ontario's *Children's Law Reform Act* and as it has been determined by cases in front of the courts, provides a set of rules (formal and informal) for deciding the custody of children upon the end of the parents' relationship. These rules provide significant direction but also leave considerable room for discretion on the part of the court.

Discretion is important, because every family is unique, and an absolute set of rules applied in an identical manner to everyone would not create good outcomes for all. However, discretion can also open the door to unfair interpretation when the courts lack information and awareness about important issues such as violence against women, cultural differences in how families function, and so on.

There are other important features of a public law system that can protect the rights of the most vulnerable. The family law system is public and open. Court orders are written public documents that can be reviewed and studied. Orders can be appealed to a higher court if there are concerns about their fairness or legality.

There are other important features of a public law system that can protect the rights of the most vulnerable. The family law system is public and open. Court orders are written public documents that can be reviewed and studied. Orders can be appealed to a higher court if there are concerns about their fairness or legality. The *Divorce Act* and the *Children's Law Reform Act* (like all statutes in Canada) are subject to the *Charter of Rights and Freedoms* in both their content and their interpretation.

In Ontario, custody is dealt with by way of two possible pieces of legislation:

- The *Divorce Act* governs custody proceedings that are undertaken as part of a divorce.
- The *Children's Law Reform Act* governs all other custody proceedings.

Each of these laws will be referred to throughout this section as we discuss the various issues relating to custody and access.

5.1.1 Equal rights to custody

The *Children's Law Reform Act*, section 20(1), states: "Except as otherwise provided in this Part, the father and the mother are equally entitled to custody of the children." This means that neither parent has an automatic right to the custody of their children. If the parents separate, neither can decide on his or her own to take and keep the children.

5.1.2 Who can apply for custody

The *Divorce Act*, section 16(1), states that “either or both spouses or any other person” may make an application for custody of or access to any children of the marriage. The right of any person other than the spouses to make such an application is limited to situations where the court has provided leave (section 16(3)).

The *Children’s Law Reform Act*, section 21, allows “a parent of a child or any other person” to apply for custody or access. There is no requirement that the court provide leave.

This wording in both pieces of legislation leaves an opening for non-parents to apply for custody of and/or access to children. Grandparents, in particular, often have an interest in maintaining a close relationship with their grandchildren, especially in extended families, in which three generations of family members have lived together and that arrangement is coming to an end because of a separation. However, the language of both statutes allows *any* person other than the parents the possibility of applying for custody. This includes other family members such as aunts and uncles but also people outside the family such as close family friends.

Although this right exists in Canadian law, non-parents are generally only successful in custody or access applications where there are extenuating circumstances – for instance, when there are serious concerns for the child’s safety if s/he is left with the parents.

5.1.3 Jurisdiction

For married people, custody can be dealt with under the *Divorce Act* in any province where either spouse has been ordinarily resident for at least one year (*Divorce Act*, section 3(1)), regardless of where the two people got married. If the child is “substantially connected” with a province other than the one where the divorce proceeding is commenced, the custody component may be transferred, by a court, to that province (section 6(1) and (2)).

In order for an Ontario court to hear a custody application under the *Children’s Law Reform Act*, normally the child must be habitually resident in Ontario at the time the application is begun (section 22(1)(a)). There is an exception to this rule described in section 22(1)(b): if the child is not habitually resident in Ontario but:

- is physically present in Ontario at the start of the application
- substantial evidence relating to the best interests of the child is available in Ontario
- no application with respect to custody has been begun elsewhere where the child is habitually resident
- no other custody order is in place
- the child has a real and substantial connection with Ontario and
- it is appropriate on a balance of convenience

then the custody application can be brought in Ontario.

Habitual residence

For the purposes of custody applications under the *Children's Law Reform Act*, a child is habitually resident where s/he lived with both parents or where s/he lived with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other parent or with a person other than a parent on a permanent basis for a significant period of time (section 22(2)). The legislation does not define "significant period of time."

A further exception exists where the child was brought to Ontario and would suffer serious harm if removed from Ontario (section 23).

5.1.4 Best interests of the child test

Regardless of the legislation being used, custody of children in Canada is determined using the "best interests of the child test":

"In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the conditions, means, needs and other circumstances of the child" (*Divorce Act*, section 16(8)).

"The merits of an application under this Part in respect to custody of or access to a child shall be determined on the basis of the best interests of the child" (*Children's Law Reform Act*, section 24(1)).

The *Divorce Act* provides no further guidance as to how this test is to be determined.

The *Children's Law Reform Act* was recently amended. While this statute has always provided a list of criteria to assist judges in determining what is in the best interests of a child, the amendments now include, for the first time, a mandatory consideration of family violence. Section 24(2) of the Act states:

The court shall consider all the child's needs and circumstances, including:

- (a) the love, affection and emotional ties between the child and
 - (i) each person entitled to or claiming custody of or access to the child
 - (ii) other members of the child's family who reside with the child and
 - (iii) persons involved in the care and upbringing of the child
- (b) the child's views and preferences, if they can reasonably be ascertained
- (c) the length of time the child has lived in a stable home environment
- (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child
- (e) any plans proposed for the child's care and upbringing
- (f) the permanence and stability of the family unit with which it is proposed that the child will live and
- (g) the ability of each person applying for custody of or access to the child to act as a parent and
- (h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

5.1.5 Consideration of past conduct

Under the *Children's Law Reform Act*, courts can consider the past conduct of those seeking custody or access in certain circumstances:

- (3) A person's past conduct shall be considered only
 - (a) in accordance with subsection 4 or
 - (b) if the court is satisfied that the conduct is otherwise relevant to the person's ability to act as a parent.
- (4) In assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against
 - (a) his or her spouse
 - (b) a parent of the child to whom the application relates
 - (c) a member of the person's household or
 - (d) any child.
- (5) For the purposes of subsection (4), anything done in self-defence or to protect another person shall not be considered violence or abuse.

The federal *Divorce Act* does not explicitly require the court to consider family violence or abuse.

Courts are very limited, under the *Divorce Act* and the *Children's Law Reform Act*, in the amount of attention that can be paid to past conduct of the persons who are seeking custody. Past conduct can only be considered if it is relevant to the ability of that person to act as a parent of a child (*Children's Law Reform Act*, section 24(3); *Divorce Act*, section 16(9)).

5.1.6 Assessments

In some cases, courts will use a family assessment to assist in determining the best interests of the child. Most commonly, an assessor is appointed by the court, often through the Office of the Children's Lawyer, which is part of the provincial Ministry of the Attorney General. Parents can request that the court appoint someone, or the court can make this decision on its own. If the parents are able to afford an assessor, they can hire one privately and submit the report to the court. However, the parents have to be able to agree on who this assessor should be and who will take responsibility for paying for the report.

This individual meets with the children, the parents and sometimes others involved in the care of the children, to gather information about the family and assess what would be in the best interests of the children. Assessments are not always helpful, especially when the assessor is unaware of or insensitive to cultural, racial or religious diversity. Issues relating to assessments are governed by section 30 of the *Children's Law Reform Act*.

5.1.7 Maximum contact

The *Divorce Act* makes it clear that it supports custody being granted to the person who will support maximum contact between the child and the other parent. This is known as the "maximum contact principle" and is set out in section 16(10) as a required consideration for the court, and it means that the parent seeking custody must be prepared to support and encourage liberal access by the other parent.

5.1.8 Right to information

Both the *Divorce Act*, section 16(5), and the *Children's Law Reform Act*, section 20(5), guarantee the right of any person with access rights to information about the health, education and welfare of the child. This means that an access parent can ask questions and be given answers about counseling, school report cards and activities, health care and other such matters, whether or not the custodial parent consents.

5.1.9 Orders judges can make

A number of custody and access arrangements are available to judges in custody cases that come before the courts. For example (though not limited to), joint custody, sole custody, shared custody and supervised access.

5.1.9.1 Changing an order

Custody orders can be changed only when there has been a significant change in circumstances (*Children's Law Reform Act*, section 29; *Divorce Act*, section 17(5)) and not simply because one of the parents wants a change.

Terms commonly used in custody orders

Joint custody: Parents share the decision-making responsibilities for their children. Often, the children will live mostly with one parent (say the mother), but the father has the right to be involved in decision-making, even if he spends relatively little time with the children.

Sole custody: The parent with whom the children spend most of their time can make decisions without consulting the other parent.

Primary residence: The home in which the children spend most of their time. One parent can have primary residence whether the custody arrangement is sole or joint. When the children spend roughly equal amounts of time with each parent, there is no primary residence.

Shared custody: Children spend their time roughly equally with each parent.

Access: The time children spend with the non-custodial parent. Sometimes access is specified precisely (for example, "the father shall have access to the children every other weekend beginning at 4:00 p.m. Friday and ending at 5:00 p.m. Sunday"). At other times, it is left open to the parents to arrange access on an ongoing basis. Access can be by telephone, email and regular mail as well as in person.

Supervised access: Access time is supervised by a third party. In some cases, this is a friend or family member. In others, access takes place in an access centre where there are professionals to supervise. The Children's Aid Society may also supervise the access. Supervised access is ordered when there are concerns that the children may not be safe with the access parent.

Supervised exchanges: Exchanges of the children from one parent to the other are supervised because of safety concerns for one of the parents, usually the mother, due to the behaviour of the other parent. Supervision of exchanges may be formal or informal.

Parenting plans: Plans presented by each parent to the court for how they will care for the children.

5.1.9.2 Enforcement

There are enforcement mechanisms contained in sections 36 and 37 of the *Children's Law Reform Act* to ensure that custody and access orders are not violated. The court may:

- order the apprehension of the child in order to return her/him to the rightful parent
- direct a police force to locate, apprehend and deliver the child
- prohibit the removal of a child from Ontario where such removal is not permitted
- make an order for the return of a child to Ontario
- order that the child's passport and/or the passport of the person not entitled to remove the child from Ontario be delivered to the court or some other specified individual.

As well, anyone who violates a custody order can be found in contempt of court and fined up to \$5,000 or imprisoned for up to ninety days (section 38(1)).

5.1.9.3 Extra-provincial matters

Ontario will enforce most custody orders made outside the province. However, if the order was not made using the same principles as Ontario legislation (i.e., the best interests of the child test), it will not be enforced in Ontario. As well, where the court is concerned that to enforce the extra-provincial order would, on the balance of probability, cause the child to suffer serious harm, then Ontario can supersede that order (section 43).

5.1.10 International matters

Canada is a signatory to the *Hague Convention on the Civil Aspects of International Child Abduction*, known more commonly as the *Hague Convention*. This international treaty requires all signatory states to cooperate with one another when a child is wrongly removed from one of those states to another. If a child is removed illegally from Canada to another country that has signed the *Hague Convention*, the parent in Canada must contact the central authority here, which is either the federal Minister of Justice or the Ontario Attorney General.

5.1.11 Domestic contracts

Parents can decide on the custody arrangements for their children in a separation agreement. Section 56 of the *Family Law Act* states that courts can set aside any provision of a domestic contract that is not in the best interests of the child. However, this protection is limited, because a court will only become involved upon the application of one of the parties. In situations of extreme coercion, this may never happen, even if provisions in the contract are clearly not in the best interests of the children.

The Hague Convention

The *Hague Convention on the Civil Aspects of International Child Abduction* came into force on December 1, 1983. Canada was one of the four countries to ratify it. There are now 53 states that are a party to it. The *Hague Convention* is the only multilateral agreement providing assistance in cross-border abduction.

The objectives of the convention are:

- to deter child abductions
- to promote cooperation among countries and their respective authorities and
- to ensure the prompt return of abducted children to their home countries.

Definition of child support

Child support is the money paid by the parent who does not have primary responsibility for the care of the children to the parent who does, and it is intended to ensure that the child benefits from the financial support of both parents. This system of child support is based on the assumption that the parent with whom the children primarily reside is the parent who incurs the majority of the costs of child rearing. This parent likely has to live in a larger home, buys more groceries, buys the children's clothing, pays for school-related expenses, and so on. Especially because women still earn, on average, less than men, and are also most often the custodial parent, most child-support orders require fathers to pay support to mothers.

5.2 CHILD SUPPORT

Child support is governed by both federal and provincial legislation. Those pursuing child support as part of a divorce application would use the *Divorce Act*, the Federal Child Support Guidelines and the *Family Orders and Agreements Enforcement Assistance Act*. Those not pursuing a divorce would rely on the *Family Law Act*, the Child Support Guidelines and the *Family Responsibility and Support Arrears Enforcement Act*.

5.2.1 Method of calculation

The amount of support to be paid is governed by child-support guidelines that set levels of support based on the income of the person paying the support and the number of children.

5.2.2 The 40% rule

The child-support guidelines are applied differently when the parents share the custody of the children relatively equally (the "40% rule") and when some children reside primarily with each

parent. In each case, a different method is used to calculate how much support is to be paid (sections 8 and 9 of both the federal and provincial child-support guidelines).

5.2.3 Extraordinary Expenses

The parent receiving child support can apply for additional support when s/he can establish special or extraordinary expenses (section 7 of the guidelines). Such expenses include:

- child-care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment
- health-related expenses for the child, such as orthodontic treatment, counseling, physiotherapy, speech therapy, prescription drugs, etc.
- educational expenses required to meet the child's special needs
- post-secondary school expenses
- extraordinary expenses associated with extracurricular activities.

5.2.4 Undue hardship

The parent paying support may be able to have the level of child support reduced if s/he can show s/he would suffer undue hardship if required to pay the full support amount (section 10). The court will consider circumstances such as:

- The spouse is responsible for an unusually high level of debts reasonably incurred to support the family prior to separation.

- The spouse has unusually high expenses in relation to exercising access (for example, the access parent lives far from the custodial parent and children).
- The spouse has other support obligations.

5.2.5 Domestic contracts

Both the *Divorce Act*, section 15.1, and the *Family Law Act*, section 31(4), allow courts to recognize support amounts other than the guideline amounts that have been agreed to by the parents (such as in a separation agreement) as long as those support amounts benefit the children and do not result in “unconscionable circumstances.” Where the court is not satisfied that the support amount is appropriate, it can refuse to accept it and can order that a different amount of support be paid.

Both the Divorce Act, section 15.1, and the Family Law Act, section 31(4), allow courts to recognize support amounts other than the guideline amounts that have been agreed to by the parents (such as in a separation agreement) as long as those support amounts benefit the children and do not result in “unconscionable circumstances.”

5.2.6 Taxation

Child-support payments are not tax-deductible for the payer and do not constitute taxable income to the recipient.

5.2.7 Changing an order

Either parent can make an application to court to have the amount of child support changed where there has been a significant change in circumstances. Most often, this change is an increase or decrease in the income of the payer, in which case, the amount of support will be increased or decreased as appropriate.

5.2.8 How long child support is paid

Generally child support is paid until the child reaches the age of 18. Support may end earlier if the child has removed herself or himself from parental control, has married or has had a child of her or his own. Support may continue past the age of 18 if the child remains enrolled full-time in school or is disabled and unable to become self-sufficient.

5.2.9 Enforcement

In Ontario, child-support orders, whether under the *Divorce Act* or the *Family Law Act*, are enforced by the Family Responsibility Office (FRO), which operates under the authority of the Ministry of Community and Social Services. Child-support orders are registered with the FRO, which then collects the money from the payer and pays it to the recipient. Among other things, the FRO has the authority to garnish pay cheques and bank accounts, seize GST and income tax returns or suspend a payer’s driver’s or professional licence when the payer is in arrears.

All the provinces have reciprocal enforcement agreements with one another, as does Ontario with most U.S. states and some other jurisdictions, allowing enforcement of a child-support order even if the payer leaves the province in which the order was made.

Despite these considerable powers, many payers are able to stay beyond the grasp of the FRO. Currently in Ontario, child-support arrears are in the amount of \$1.3 billion.

5.3 CHILD PROTECTION

While not directly related to issues arising from the breakdown of a marriage, child-protection issues do arise from time to time in this context, especially when there has been violence in the family.

Children considered “in need of protection”

Examples of children considered “in need of protection” are:

- The child has suffered physical harm inflicted by the person who is responsible for the child or because that person has failed to protect the child from such harm or there is a risk of the child suffering such harm.
- The child has been sexually molested or exploited or there is a risk of such activity.
- The child has suffered or is at risk of suffering serious emotional harm.
- The child has been abandoned.
- The child is less than twelve years old and has been involved in serious criminal activity.

Ensuring that children are safe in their families is a matter of provincial law in Canada. The Ontario legislation is called the *Child and Family Services Act*.

Part III of the *Act* deals with child protection and gives authority to approved agencies to operate as children’s aid societies to protect children under 16 years of age. Where the society has concerns, it can investigate, provide guidance, counselling and other services to families, supervise children and, in extreme cases, remove children from their parents and provide care for them in another setting (section 15).

Children’s aid societies are responsible for protecting the physical and emotional needs of children. Section 37 sets out a long list of circumstances under which the society can find a child to be “in need of protection.”

Children who are exposed to violence in the home, even if they are not directly involved in it, are now considered to be children at risk of harm. In serious cases, the child-protection authority will become involved with the family and may even remove the

children from the parent until it is satisfied that the parent has left the abusive situation and is taking all reasonable steps to ensure the children will not be exposed again. This can create a difficult situation for women with abusive partners who are not able to leave their partners but do not want the child-protection authorities to become involved with their family.

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6 SPOUSAL SUPPORT AND DIVISION OF PROPERTY

6.1 SPOUSAL SUPPORT

Spousal support is money paid by one spouse to the other for that person's support after the end of the cohabiting relationship.

Under the Family Law Act, for the purpose of spousal support, "spouse" is defined as either of a man or a woman who are married to each other or who have cohabited continuously for not less than three years or who have cohabited in a relationship of some permanence if they are the parents of a child.

6.1.1 Who can get spousal support?

Under the *Divorce Act*, only married, opposite-sex spouses can apply for spousal support. Anticipated legislative reform to reflect the legalization of same-sex marriage will extend the right to seek spousal support to same-sex spouses.

Under the *Family Law Act*, for the purpose of spousal support, "spouse" is defined as either of a man or a woman who are married to each other or who have cohabited continuously for not less than three years or who have cohabited in a relationship of some permanence if they are the parents of a child. The *Family Law Act* extends the right to seek spousal support to same-sex partners – persons of the same sex who have cohabited continuously for a period of not less than three years or who have cohabited in a relationship of some permanence if they are the parents of a child.

6.1.2 Factors to be considered in determining spousal support

Both pieces of legislation require consideration of similar factors (*Divorce Act*, section 15.2(4), and *Family Law Act*, section 31(9)):

- length of cohabitation
- functions (for example, child rearing, contributions made by the dependent partner to the career potential of the other partner) performed by both partners during that time
- any agreements entered into by the partners (e.g., marriage or cohabitation agreements)
- the parties' current assets and means, as well as likely future assets and means
- the dependent partner's capacity to contribute to her/his own support
- the parties' ages and physical and mental health.

6.1.3 Calculation of spousal support

The federal government has just released spousal-support guidelines to try to standardize the amount of spousal support awarded. Unlike the child-support guidelines, these guidelines have no legislative authority. They really are guidelines and are intended to assist parties, lawyers and judges when calculating

spousal support. They provide two models – one to be used when child support is also being paid and one to be used when there is no child support.

6.1.4 How long after the marriage will spousal support be paid?

Typically, in 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. 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 or, 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.

It is not uncommon for a spousal-support agreement or order to specify that support to be discontinued when the recipient spouse remarries.

6.1.5 Relationship of spousal support to child support

Priority is given to child support over spousal support, where child support is also to be paid (*Divorce Act*, section 15.3(1)).

6.1.6 Taxation

Spousal support is deductible for the payer and must be declared as taxable income by the recipient.

6.2 DIVISION OF PROPERTY

The division of property upon marriage breakdown is governed by Ontario's *Family Law Act* and, in other provinces, by similar provincial legislation. Property division is not dealt with in the federal *Divorce Act*, so even couples who are divorcing will have to deal with provincial legislation if there is property to be divided between them.

The law of property division has developed significantly over the past fifty years. Before significant reforms to the *Family Law Act* in the 1960s, women had few rights with respect to property accumulated over the years of their marriage. At that time, it was most common for property to be owned by the husband (that is, the deed to the house would be in his name only, the car would be registered in his name, the bank account and credit card would be in his name, and so on), who was often the only breadwinner. When such marriages ended, women had no automatic right to share in this property, which was viewed as belonging to the husband, because he had paid for it.

Objectives of spousal support

Both the *Divorce Act*, section 15.2(6), and the *Family Law Act*, section 31, set out similar objectives of spousal support, although the language used in each is somewhat different. The basic objectives are:

- to recognize any economic advantages or disadvantages arising from the relationship or its breakdown
- to apportion between the parties any financial consequences arising from the care of children
- to relieve economic hardship arising from the breakdown of the relationship
- to promote, as much as is reasonable, the economic self-sufficiency of each partner within a reasonable period of time.

...property acquired over the course of the marriage was to be shared equally between the spouses upon marriage breakdown.

Eventually, the law was changed to reflect the partnership nature of most marriages and to acknowledge the important role played by women, whether or not they worked outside the home. Under the *Family Law Reform Act* (now the *Family Law Act*), division of property was based on this principle, and it no longer mattered in whose name the property was owned or who had contributed financially to its purchase – property acquired over the course of the marriage was to be shared equally between

the spouses upon marriage breakdown. Of course, there were (and still are) exceptions to this general principle, which are outlined below, but this change in the law began the important process of recognizing women's rights in family law.

6.2.1 Married vs common-law couples

The *Family Law Act* applies only to the division of property between spouses, who are defined as “either of a man and woman who are married to each other” (section 1). This excludes common-law couples (any two people who live together without being married) as well as married same-sex couples, although the Ontario government has recently introduced legislation to adapt the *Family Law Act* and other statutes to reflect the recognition of same-sex marriage. Common-law couples must rely on common law for the division of their property – this is discussed below under section 6.2.11.

6.2.2 Property division in polygamous marriages

Ontario legislation also governs the division of property in polygamous marriages: In the definition of “spouse,” the reference to marriage includes a marriage that is actually or potentially polygamous if it was celebrated in a jurisdiction whose system of law recognizes it as valid (section 1(2)). This ensures

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

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

The legal issues relating to the breakdown of polygamous marriages – whether that be property division, spousal support, issuing a divorce or even the criminal issue – are extremely complex. Courts, judges and lawyers have little experience in this area. We strongly urge any woman leaving a polygamous marriage to seek legal advice from a lawyer with expertise handling these kinds of cases to ensure that her rights are respected and that she protects herself as much as possible from potential criminal charges.

6.2.3 Domestic contracts

As with other matters associated with relationship breakdown, property division can be dealt with by way of a domestic contract. A cohabitation agreement or marriage contract can stipulate how the parties will handle their property during the relationship and when that relationship ends. A separation

agreement can set out how the parties have agreed to divide their property. Either party can turn to the court for enforcement if necessary. If one party has been intimidated or coerced into signing the agreement, a party can apply to the court to have it overturned.

6.2.4 Family property

Put simply, family property is any property accumulated by the spouses during their years of cohabitation. It includes both assets and debts.

6.2.5 Net family property

This is the property that remains once the debts have been subtracted from the assets. This is what must be shared equally between the spouses.

6.2.6 Equalization of family property

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.

6.2.6.1 Excluded property

Some property is excluded from equalization (section 2(2)). This includes, among other property:

- most property acquired by either spouse before the date of marriage
- property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of marriage
- damages or rights to damages for personal injuries or any part of a settlement for such damages
- proceeds or a right to proceeds of a life insurance policy that are payable upon the death of the insured
- property that the spouses have agreed by domestic contract is not to be included in the spouse's net family property.

6.2.7 Valuation date

This is the date upon which the value of the family property is calculated. It is defined (section 4) as the earliest of the following dates:

- the date the spouses separate and there is no reasonable prospect they will reconcile
- the date a divorce is granted
- the date the marriage is declared a nullity
- the date one of the spouses brings an application based on improvident depletion by the other spouse, if that application is subsequently granted
- the day before the date on which one of the spouses dies.

Variations in the equalization of family property

Just as some property is excluded from the equalization process, there can be exceptions to the requirement to equalize net family property (section 5). Some of the exceptions include:

- failure by one spouse to disclose to the other debts existing at the date of marriage
- if debts incurred to reduce the spouse's net family property were incurred recklessly or in bad faith
- any part of a spouse's net family property that consists of gifts from the other spouse
- a spouse's intentional or reckless depletion of his or her net family property
- where the amount of the equalization would be disproportionate in relation to the period of cohabitation.

6.2.8 Matrimonial home

The matrimonial home is the place where the spouses ordinarily lived during the time they cohabited (section 18). Of course, for the purpose of division of property, one or both of the spouses must have an ownership interest in this property. Both spouses have an equal right to possession of the matrimonial home unless one spouse has received an order for exclusive possession of the home. Possession in no way affects ownership or the right to include the matrimonial home in the calculation of net family property for the purpose of equalization. During the process of property division, neither spouse may dispose of (sell) or encumber (mortgage, place a lien against) the matrimonial home without the consent of the other spouse, unless the other spouse has released all rights through a separation agreement or a court order authorizes the transaction.

6.2.9 Removal of barriers to religious remarriage

The *Family Law Act* allows dismissal of a proceeding for a division of family property and related matters if the party bringing the

application has refused to remove barriers within his/her control to the other spouse's remarriage within that spouse's faith (section 2).

6.2.10 Role of mediation

If the parties so request, the court can appoint a mediator to assist in resolving any matters relating to the division of property (section 3).

6.2.11 Powers of the court

Where spouses are unable to agree on the equalization of their net family property, the court has the power (section 9) to order:

- that one spouse pay to the other the amount to which the court finds the spouse to be entitled (this amount would result in an equalization between the spouses)
- that security be given to ensure that this order will be honoured
- that whatever amount is to be paid be paid in installments during a period of no more than ten years if to pay it in one lump sum would create hardship
- that, where necessary, property be sold or transferred to or held in trust for the spouse.

6.2.12 Property division when there is a will

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

6.2.13 Property division when there is no will

In this case, the surviving spouse can receive her entitlement under the relevant sections of the *Succession Law Reform Act* or under the *Family Law Act* (section 6).

Options for common-law couples

Non-spouses who wish to have their net family property equalized must make an application to the court based on something called a “constructive trust.” The party wishing to receive an equalization (for example, a common-law wife who has contributed to the house payments despite the fact that the deed to the house is in the name of the partner only) sets out what she wishes to receive and provides the court with evidence of her contributions to the property she wishes to have equalized (mortgage and/or tax cheques, proof of payment for renovations and repairs) or of other contributions that allowed the other partner to accumulate property (proof of payment of utilities, groceries, family vacations, proof she provided all the care for the partner’s children, etc.). While common-law couples can receive the equivalent of an equalization of net family property, the courts are very careful to differentiate between people who choose to formalize their relationship and responsibilities to one another and those who do not.

Couples who do not wish to marry can provide some protection with respect to their rights and responsibilities through a cohabitation agreement that can set out how property is to be dealt with both during the relationship and upon its breakdown.

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7 INHERITANCE

The manner in which people can determine what happens with their property after they die is governed in Ontario primarily by the *Succession Law Reform Act* (SLRA). This statute sets out what happens when a person dies “testate,” meaning when that person has written a will, and what happens when a person dies “intestate,” without having written a will. The person with the will is called the “testator.”

Some family laws also make reference to specific inheritance matters – the *Children’s Law Reform Act* and the *Family Law Act*.

Individuals are free to leave instructions, via a will, to have their property disposed of in any way they wish. There is no legal requirement that a will be fair or treat people with equality. For example, a husband can write a will that excludes his wife. She can challenge the will or seek support from the person’s estate on the basis that she was a dependant (see below), but a will is not invalid or void simply because it is unfair.

7.1 TESTATE SUCCESSION

Testate succession is when the person who dies has a will.

7.1.1 Form of the will

To be valid, a will must be in writing and properly executed. Most of the time, this means that the will must be signed at its end by the testator and by two witnesses (sections 3 and 4).

7.1.2. Holograph wills

A holograph will is the exception to this rule. When an individual writes her/his will entirely in her/his own handwriting, it is valid as long as it is signed by her/him. Such a will does not require the signature of two witnesses (section 6).

7.1.3 Revoking a will

Generally, a will is automatically revoked by the marriage of the testator unless there is a declaration in the will that it is made in contemplation of the marriage (section 16) as well as by the writing of a new will, by written instructions from the testator stating an intention to revoke or by the testator “burning, tearing or otherwise destroying” the will with the intention of revoking it (section 15).

7.1.4 Termination of marriage

Upon the termination of a marriage, unless the will says otherwise, the contents of the will are revoked (section 17(2)).

Definition of spouse

Spouse is defined as either of a man and woman who are married to each other, although this definition will be changed under a bill presently before the provincial legislature to include same-sex spouses (section 1(1)). In the definition of “spouse,” a reference to marriage includes a polygamous marriage where that marriage was celebrated in a jurisdiction that recognizes polygamy as valid (section 1(2)).

7.2 INTESTATE SUCCESSION

Intestate succession is when the person who dies does not have a will. In this situation, spouses have some protection under the *Succession Law Reform Act*.

7.2.1 Spouse and no children

When a person dies without a will and is survived by a spouse and no children, the spouse is entitled to the property absolutely (section 44).

7.2.2 Spouse and children

When a person dies without a will and is survived by a spouse and one child, the spouse is entitled to one-half of the residue of the property after payment of the preferential share. Where there are two or more children, the spouse is entitled to one-third of the property under the same conditions.

7.2.3 Preferential share

The regulations prescribe the amount of the preferential share to be \$200,000.

7.3 SUPPORT OF DEPENDANTS

Where a deceased person, whether testate or intestate, has not made adequate provision for the proper support of his or her dependants, an application can be made to the court for an order to use part of the estate for the support of the dependants.

The *Succession Law Reform Act* also sets out protections for dependants to ensure, where possible, their support. A dependant can be the spouse or same-sex partner, a parent, a child or a brother or sister of the deceased. Child includes biological children as well as grandchildren and “a person whom the deceased has demonstrated a settled intention to treat as a child of his or her family” (section 57).

Where a deceased person, whether testate or intestate, has not made adequate provision for the proper support of his or her dependants, an application can be made to the court for an order to use part of the estate for the support of the dependants. The court must take many factors into consideration in determining the amount and duration of such support (section 62). This kind of situation could arise when

a person with child-support obligations dies without making provision for ongoing child support in her/his will.

7.4 FAMILY LAW

7.4.1 Children’s Law Reform Act

A person entitled to the custody of a child may appoint one or more persons to have custody of the child after her/his death by providing this direction in her will (section 61(1)). Such an appointment

is only effective if that person is the only person entitled to custody of the child. Even when a person who has sole custody of a child makes such an appointment in her/his will, any other person is still permitted to make an application for custody of the child. Most commonly, this would arise if a custodial mother appointed someone other than the father as the guardian of her children in her will. If the father wanted custody, he would apply to the family court, and the family court would make a decision based on what it believes to be in the best interests of the child.

7.4.2 Family Law Act

When a couple has separated and one spouse dies leaving a will, the surviving spouse may choose to take what is offered by the will or to take the property to which she is entitled under the property division sections of the *Family Law Act* (section 6(1)). If the spouse dies without a will, the surviving spouse can receive her entitlement as provided under the *Succession Law Reform Act* or as provided by the *Family Law Act*.

International wills

Ontario is a signatory to the convention that provides a uniform law about the form of international wills. This convention assures proper recognition of wills written in one country by another country if those wills are written in the form of an international will and comply with the provisions set out in the convention:

- the will must be made in writing, in any language
- the testator must sign the will in the presence of two witnesses and a person authorized to write wills (in Canada, a lawyer), who will also sign the will in the presence of the testator.

GLOSSARY OF NON-ENGLISH TERMS

<i>Bá'in</i>	"Final"; said of a Muslim divorce in which the man cannot take back his wife and has no rights over her
<i>Bátil</i>	Completely null
<i>Bidah</i>	Innovation contrary to approved <i>sunnah</i> practice
<i>Darar</i>	Harm – such as physical or verbal abuse or not allowing the wife out of the house for normal social visits
<i>Fásid</i>	Legally invalid
<i>Faskh</i>	Judicial divorce
<i>Gharíb</i>	Stranger, i.e., non-relative
<i>Ghiyábí</i> Divorce	Divorce in absentia
<i>Hadánah</i>	Maternal custody
<i>Hadd</i>	Set punishment, a punishment explicitly required by and owed to God
<i>Harám</i>	Forbidden
<i>Huqúq</i>	Ethical or legal rights of each spouse and the duties they owe to each other
<i>Iddah</i>	A waiting period of three menstrual cycles after the divorce before the woman can remarry (different calculations for non-menstruating women and widows)
<i>Ismah</i>	Power of divorce that may be given to wives by their husbands
<i>Kafálah</i>	Tutelage, guardianship
<i>Khástegárí</i>	A man's proposal of marriage (Persian)
<i>Khidmah</i>	A wife's service, especially to her husband
<i>Khitbah</i>	A man's proposal of marriage (Arabic)
<i>Khul'khula</i>	Negotiated divorce

GLOSSARY OF NON-ENGLISH TERMS

<i>Ma'rúf</i>	Fitting manner
<i>Mahr</i>	Marriage dower
<i>Mahr al mithl</i>	Equivalent dower
<i>Makrúh</i>	Morally reprehensible
<i>Misyár</i>	Itinerant marriage
<i>Mu'ásharah</i>	Building a good relationship with one's wife, acting decently
<i>Mustahabb</i>	Recommended
<i>Mutah</i>	Shiite practice of marriage for a fixed period of time
<i>Nafaqah</i>	Maintenance owed by the husband to the wife
<i>Nikahnameh</i>	Marriage document
<i>Qasm</i>	Division of time spent with a plural wife
<i>Rujú</i>	Taking back the wife during the waiting period
<i>Rushd</i>	Age of mental discretion
<i>Shurút</i>	Conditions inserted in the marriage contract
<i>Su' al-mu'ámalah</i>	Behaving badly toward the wife
<i>Tafwíd or tafweez</i>	Delegation of the right of divorce by the husband to the wife
<i>Urfí, sirri</i>	Controversial lesser-contract marriages
<i>Wájib</i>	A necessary religious duty
<i>Wakíl</i>	A marriage agent
<i>Walí</i>	Guardian, including in marriage
<i>Wasiyah</i>	Bequest
<i>Wiláyah</i>	Legal custody, including of children by father
<i>Zina</i>	Sex outside of marriage

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FURTHER RESOURCES

MUSLIM LAW IN GENERAL:

Index Islamicus. Comprehensive, up-to-date listing of books and articles in Western languages on all Islamic subjects. Available at major libraries in printed and searchable CD-ROM forms, as well as online by subscription. In the printed form, search subject areas such as “Muslim Minorities Elsewhere” (subheadings include “Western Europe” and “The Americas”), and “Law” (subheading “Marriage and divorce; family law”). Subject headings may vary between printed issues. Entries in the online version have “descriptors” such as “Muslim minorities in the Americas, U.S.A. & Canada”; click on the descriptor to get a list of items related to that subject.

Encyclopaedia of Islam/ Encyclopédie de l’Islam. Standard academic encyclopedia, available at major libraries in two printed editions and searchable CD-ROM; also online by subscription. This work concentrates on the traditional religion and civilization of Islam.

Encyclopedia of Women and Islamic Cultures. Edited by Suad Joseph, 2003, Vol. II: “Family Law and Politics.” This work includes more modern material.

Bibliographic and ordering information for the above items can be found at www.brill.nl.

A Ford Foundation-supported project on Islamic Family Law at Emory University (at <http://www.law.emory.edu/IFL>) includes legal profiles of individual countries and much other material.

Reports by the international organization, Women Living Under Muslim Laws, at <http://wluml.org> may throw light on international and refugee cases.

MANUALS OF LAW:

Bakhtiyar, Laleh. *Encyclopedia of Islamic Law: A Compendium of the Views of the Major Schools*. Chicago: 1996. Includes much material on Shiism. The part of the work on family law is a translation of *al-Ahwāl al-shakhsīyah* by the contemporary Lebanese Shiite scholar Maghniyah. The translator does not mention this, perhaps because some Muslims would not have full confidence in the writings of a Shiite.

Linant de Bellefonds, Y. *Traité de droit musulman comparé*. 3 vols. Paris: 1965-73. Detailed scholarly book; reliable and an important source for this *Primer*. Little attention to Shiism, and inheritance is not covered. Includes information on trends in modern legislation, which is now somewhat outdated.

Traditionalist Muslims from the Indian Subcontinent sometimes refer to the Hanafite works, *Hidāyah of Marghīnānī* (12th century) and *Fatāwā-yi ‘Ālamgīrī* (17th century, also known as *al-Fatāwā al-Hindīyah*). *Hidāyah* was translated as *The Hedaya* by Charles Hamilton and Standish Grady and published in

the late 18th century, with several reprints since. The *Hidáyah* is due to be published in a new translation as *al-Hidáyah: The Guide*, translated with introduction, commentary and notes by Imran Ahsan Khan Nyazee, Bristol, England: Amal Press.

Fatáwá-yi 'Álamgiri is translated as *Futawa Alemgiri* (Calcutta: 1828-35), along with other material, by Neil Baillie as *Digest of Moohummudan Law*, published in the late 19th century, with several reprints since.

MUSLIM LAW IN WESTERN SOCIETY AND COURTS:

Note on Québec and French- language

Although there is a large Québec Muslim population, much less material is available on Muslims in Québec than for the rest of Canada. This will change, as Québec francophone universities have now begun to establish positions in Islamic studies. The Department of Religion at Concordia will shortly begin a comprehensive study of Muslims in Québec, to appear in both French and English.

In the meantime, francophone readers can draw on writings in French about Muslims in France, Belgium, and so on; but these might not be very relevant to the Québec legal system and society.

Your local library: For material immediately available at your local library on Muslims in North America, search appropriate subjects such as “Muslims Canada,” “Muslims United States,” “Muslims North America.” When you find a relevant title, click on the subjects listed in the “subject” line for similar books.

Worldwide Web: Professionals can use the Web to get an idea of current controversies and ranges of opinion about Muslim family law, which can help you to anticipate and understand different views. There are many sites on the Web originating in the West in which issues are discussed openly in relation to real personal problems. There are also numerous sites in which religious questions are answered and *fatwas* archived. The Web is not an authoritative source, but an open forum. The qualifications and authority behind postings on the net are often unclear.

Shiite Muslims can refer to the treatises (*risálah*) of their chosen learned authorities and submit questions to sites set up for that purpose, e.g., www.sistani.org (Ayt. Sistani); www.bayynat.org (Ayt. Fadlallah). Some treatises have been translated into English, French and other languages and are available online. Try searching the ayatollah’s name in various known spellings, in combination with “risalah” or “fatwa.”

Canadian cases taking into account Muslim law: The Canadian Legal Information Institute’s free site at www.canlii.org/index_en.html lets you search decisions of individual courts or all Canadian courts. Try typing terms into the main search box such as “Muslim,” “Islam,” “mahr” and so on. Few claims involving Muslim law have been made in Canadian courts. Every legal case involves different circumstances, and judges do not follow but, rather, build on and interpret previous decisions. Tendencies in legal decisions may also vary between provinces.

Selected list of writings about Muslim law in the West: There is a growing literature on Muslims in Canada, the United States and the West. Most does not concern the law directly but, rather, issues such as identity, social problems, and so on. Reading about Muslim law in similar legal or social systems such as Britain, France and Australia could throw light on Canadian situations. Indexes to law journals may lead to further material.

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