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MUSLIM LAW IN THE WEST

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Abstract

This paper examines the complex interaction between Islamic law and Western legal systems, focusing on how Muslim normative practices are negotiated within liberal, rights-based jurisdictions. It analyses the operation of religious arbitration, the role of informal *sharia* councils and the constitutional and statutory frameworks that shape accommodation in the United Kingdom, Canada and the United States. While commercial and financial applications of *Sharia*, particularly Islamic finance, have been readily integrated through contractual autonomy, family law related practices raise significant concerns regarding gender equality, child welfare and procedural fairness. The paper explores human rights considerations under domestic law and international instruments, including the European Convention on Human Rights and evaluates legislative and judicial responses to the perceived tensions between religious freedom and public policy. Through comparative analysis, it argues for a regulatory approach that prioritises transparency, informed consent and robust protection of vulnerable parties rather than blanket prohibitions of religious dispute resolution. The study concludes that nuanced, rights-sensitive pluralism offers the most effective means of reconciling Muslim legal practices with the foundational values of Western legal orders.

Introduction

The encounter between Islamic law (commonly referred to as *Shariah*) and Western legal systems raises difficult theoretical, doctrinal and policy questions. For diasporic Muslim communities the question is practical as well as philosophical: how far can or should Muslim normative practices on marriage, divorce, inheritance, arbitration, corporate and financial dealings be accommodated within pluralist, rights-based, secular legal orders in Europe, North America and Australasia? The answers have varied across jurisdictions, shaped by histories of immigration, constitutional structures, family law regimes, arbitration statutes and the political salience of religion in public life. This paper traces the principal sites of interaction, evaluates legal responses in the United Kingdom, Canada and the United States of America, examines

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human rights and gender equality tensions and concludes with policy recommendation that seek to reconcile with core liberal values.

Conceptualising "Muslim Law" and Legal Pluralism

'Muslim law' is not a monolith. Academics distinguish *Shariah* i.e. the religious ideal from *fiqh* i.e. the jurisprudential interpretations by scholars and from the practices of informal Muslim tribunals and arbitration panels operating in diasporic communities.[1] Legal pluralism describes the coexistence of multiple normative orders within the same social field: state law, religious normative orders, customary rules and transnational regulatory norms. In the West, pluralism manifests predominantly in two forms:

a) Private ordering-voluntarily agreed arbitration and mediation invoking Islamic norms;
b) Parallel non-state dispute resolution-informal *shariah* councils or religious tribunals which settle family and personal status disputes within communities. Both operate against the backdrop of the state's monopoly over legally enforceable adjudication and its constitutional commitments to equality and human rights.

Private Ordering: Arbitration, Contracts and the Courts

The legal basis for Religious Arbitration

One of the most prominent legal mechanisms for the incorporation of Islamic law in the West is private arbitration. Modern arbitration statutes in England, Canada and many US states permit parties to choose the governing law or the rules to resolve commercial and civil disputes, subject to limits of public policy and statutory mandatory rules. This framework permits parties to include religious law as the applicable substantive law for a contract or for the norms governing a private dispute.[2] The key legal question is therefore whether awards or agreements grounded in Islamic norms are enforceable and whether they run afoul of mandatory public-policy protections e.g., equality guarantees in family law.

Canada: Statutory Arbitration and Debates

Canada's Arbitration Act and common law tradition have made religious arbitration awards generally enforceable, subject to public-policy review. The Ontario debates of the early 2000s culminating in the controversial *Shariah* arbitration discussions, illustrate tensions; proponents

[1] See M S Berger, '*Understanding Sharia in the West'* (2018) Journal of Law, Religion and State 236-280
[2] See FAUS Law: *Examining Ontario's Arbitration Act and its Impact on Women* (2004) (analysis of how arbitration statutes facilitate religious arbitration) 12-24

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argued arbitration increased access to culturally appropriate dispute resolution; critics warned that religious arbitration, particularly in family law, risked disadvantaging women by enforcing unequal norms.[3] Quebec and some provinces constrained enforcement where provincial civil codes or family law rules are mandatory and legislative fixes were proposed to clarify separations between private religious ordering and the state's family law regime.

England and Wales: Contractual Arrangements and Enforcement

In England, the Arbitration Act, 1996 permits parties to choose arbitration and to select principles of law to govern disputes. The English courts have enforced contractual provisions that refer to religious norms where the award does not contravene mandatory rules of English law. However, an important distinction emerges between commercial arbitration, where enforcement is robust and family-related arbitration, where courts are more cautious, especially where public policy concerns about child welfare and gender equality arise. Parallel to formal arbitration are *Shariah* councils which issue religiously framed decisions; while these lack state enforcement powers, their decisions can have social force and influence compliance, raising regulatory and access to justice questions.[4]

Informal *Shariah* Councils and Community Dispute Resolution

Shariah councils range from informal mediation bodies to more structured tribunals commonly advise on marriage, divorce, including religious *talaq* and *khula* procedures), financial settlements and sometimes inheritance and custody. Though they lack formal legal authority, their determinations may be respected within communities and can have significant real-world effects for example, the social and economic fallout when a woman accepts a *shariah*-based divorce without equivalent civil protections). Parliamentary inquiries and academic studies in the UK have documented instances where women were disadvantaged by outcomes of such councils.[5] The normative and policy challenge is to balance the right to religious freedom including to seek intra-religious adjudication with protections against unequal treatment and coercion. Regulatory responses vary from transparency and consumer-protection measures to call for statutory intervention where *shariah* councils purport to deliver legally binding outcomes.

[3] SP Chotalia, *'Arbitration Using Sharia Law in Canada: A Constitutional and Practical Analysis'* (2006) Constitutional Forum (pdf) 5-18

[4] P S Nash, *'Sharia in England: The Marriage Law Solution'* (2017) 6 Oxford Journal of Legal Research 523-542 (discussing the enforcement of religious arbitration and the distinction between commercial and family arbitration)

[5] UK Parliamentary evidence on *sharia* councils documents cases where women were disadvantaged by outcomes; see *Evidence on Sharia Councils (House of Commons Written Evidence)* (2016) paras 3-8

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Constitutional and Public-Law Frameworks in the United States

U.S. Constitutional Doctrines: Accommodation and Limits

The United States of America's constitutional structure-principally the First Amendment, both protects religious exercise and restricts state establishment of religion. US jurisprudence has developed doctrines permitting religious autonomy in specific contexts for example, the ministerial exception, but restricting religious rules where they conflict with civil rights guarantees.[6] Private arbitration invoking religious law is generally permissible; however, courts scrutinize whether such arrangements impose rights-sapping results or violate neutral, generally applicable law. The Hosanna-Tabor decision, while not a *Shariah* case, illustrates how the First Amendment can bar judicial review when disputes concern core internal religious governance, a principle that sometimes operates to protect religious autonomy.[7]

The Politics of "Banning *Shariah*" Statutes

Since the late 2000s a number of US states and political actors have proposed or adopted laws that would prevent courts from applying foreign or "Islamic" law where it would contravene state public policy. Critics argue these laws are unnecessary, redundant since public-policy doctrines already control enforcement of foreign law and discriminatory because they single out Islamic law. Empirical and doctrinal studies, both emphasize that American courts routinely consult foreign and religious law in private law contexts often only to the degree necessary to decide recognition and enforcement questions and that targeted bans risk stigmatizing Muslim litigants and creating constitutional problems.[8]

International Human Rights Debates and the Position of Muslim Personal Law in the West

The Universalist-Cultural Relativist Debate

The placement of Muslim personal law within Western legal systems touches on a deeper theoretical tension between universal human-rights norms and cultural or religious particularity. International human rights bodies increasingly adopt a universalist approach

[6] E J K Kim, *'Islamic Law in American Courts: Good, Bad, and…'* (2014) Notre Dame Journal of Law, Ethics & Public Policy (essay) 45-67 (examining U.S. constitutional constraints and private arbitration)
[7] Hosanna-Tabor Evangelical Lutheran Church and School v EEOC 565 US 171 (2012) (US Supreme Court) (ministerial exception; limits judicial intrusion into internal religious governance)
[8] See W Smiley, *'The Other Muslim Bans'* (2020) Journal of Islamic Law (analysis of state statutes prohibiting courts from applying foreign/Islamic law) 10-25; and analysis of Montana SB 97 debates on limitations and constitutional concerns

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towards gender equality and procedural justice, often bringing them into conflict with aspects of traditional Islamic family law.

In CEDAW Committee, A.T. v Hungary, the Committee emphasised that states have a positive obligation to ensure non-discriminatory family law outcomes, even when private or religious norms conflict with equality guarantees.[9] This principle has influenced domestic courts in Europe and North America, particularly when assessing foreign divorces or inheritance schemes rooted in Muslim personal law.

By contrast, cultural-relativist perspectives argue for contextual recognition of Muslim legal traditions. The Organisation of Islamic Cooperation (OIC) in the Cairo Declaration of Human Rights in Islam maintains that rights must be read within the parameters of *sharia* norms.[10] This principle has influenced domestic courts in Europe and North America, particularly when assessing foreign divorces or inheritance schemes rooted in Muslim personal law.

CEDAW is the most influential treaty in shaping Western judicial attitudes towards Muslim personal law claims. Articles 2 and 16 impose obligations on states to eliminate discrimination in family relations, including marriage, divorce, custody and property.

In its General Recommendation No. 21, the CEDAW Committee held that unilateral divorce mechanisms such as *Talaq* inherently violate gender equality because they grant the husband disproportionate power.[11] Western courts frequently cite these standards when denying recognition to foreign *talaq* divorces, as seen in Aleem v. Aleem in the US and Shahnawaz case in Canada.[12]

The European Court of Human Rights adopts a more nuanced approach. Under Article 9 i.e. freedom of religion, states must balance religious autonomy against competing rights. In Serife Yigit v Turkey, the court held Turkey's refusal to recognise an unregistered religious marriage on the grounds that doing so promoted gender equality and protected vulnerable women.[13]

[9] A.T. v Hungary (Decision) CEDAW/C/32/D/2/2003 [9.3]-[9.4]
[10] Organisation of Islamic Cooperation, Cairo Declaration on Human Rights in Islam (1990) arts. 1-2
[11] CEDAW Committee, General Recommendation No. 21: Equality in Marriage and Family Relations (1994) paras 21-23
[12] Aleem v Aleem 947 A. 2d 489 (Md 2008) 496-498; Shahnawaz v Shahnawaz 2013 ONSC 6182 [35]-[39]
[13] Serife Yigit v Turkey App no 3976/05 (ECtHR, 2 November 2010) [78]-[84]

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The ECtHR's jurisprudence thus reinforces the idea that freedom of religion does not justify gender-discriminatory personal-law systems.

Human Rights, Equality and Gender Justice: Core Tensions

At the heart of many controversies is the perceived or real conflict between certain religiously inflected norms and liberal commitments to gender equality and children's rights. Critics maintain that when religious arbitration or *shariah* councils enforce patriarchal norms, for example, unequal spousal obligations, restrictions on women's testimony or unilateral revocation of divorce rights, the state has an obligation to intervene to protect vulnerable members.[14] Proponents reply that religious autonomy and plural dispute resolution expand access to culturally appropriate justice and that the state's proper role is to enforce minimum fairness and informed consent rather than to preclude communal ordering.[15]

A rights-sensitive approach therefore requires procedural safeguards: legal representation, informed consent, the ability to seek civil remedies, appellate review where awards are enforced and specialised transparency requirements for bodies offering religious adjudications. Comparative experience suggests that narrow statutory bans are less effective and more divisive than tailored regulatory frameworks that protect individuals while respecting pluralism.

The European Human-Rights Dimension

The European Court of Human Rights (ECtHR) and Council of Europe instruments shape how member states may reconcile religious freedom with equality norms. Article 9 of the European Convention on Human Rights, freedom of thought, conscience and religion, protects the right to manifest one's religion through practice, but this right is qualified and may be limited to protect the rights and freedoms of others. National courts in the UK and elsewhere have thus navigated tensions by protecting voluntary religious arrangements that do not infringe mandatory personal-status rules or children's welfare rules. Case law demonstrates a high-level principle: religious accommodations are permissible so long as they do not unreasonable impair protected civil rights.[16]

[14] See Parliamentary and NGO reports documenting harms to women; for discussion see CR Lepore, *'Sharia Courts as a Tool of Muslim….'* Washington University Global Studies Law Review (overview) 2010, 79-101
[15] For a balanced argument recommending safeguards rather than prohibition, see *'The Status of Religious Arbitration in the US and Canada'* (SSRN) (analysis recommending limited enforcement with safeguards) 3-21
[16] See Oxford Research Encyclopedia entry *'Shar'ia, Legal Pluralism, and Muslim Arbitration Tribunals'* (2023) (discussing ECHR implications) 4-11

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Islamic Finance and Corporate Law: Accommodation through Specialization

Not all interactions between Muslim law and Western legal systems concern family law. Islamic finance, including *sukuk* i.e. Islamic bonds, profit-and-loss sharing contracts and *murabaha* arrangements, has generated a distinct regulatory path in Western jurisdictions. Here, legal systems have tended to accommodate Islamic norms by permitting contract structures consistent with secular commercial law while achieving *Shariah*-compliant economic results. English commercial courts, for example, have enforced Islamic finance contracts so long as they satisfy general contract and trust principles. This demonstrates an accommodation model in which the courts respect parties' substantive choices while enforcing them under ordinary commercial doctrine.[17]

Selected Jurisdictional Studies

United Kingdom

The UK has seen intense public debate and parliamentary inquiry into *Shariah* councils. Reports highlight both the value of culturally resonant dispute resolution and worrying patterns where women received outcomes that left them legally or economically vulnerable. The UK approach has generally combined judicial review of any attempt to obtain state enforcement with recommendations for community outreach, improved legal literacy and voluntary codes of practice for *Shariah* councils.[18]

Canada

Canada's initial openness to religious arbitration, particularly in Ontario, prompted legislative reform and public controversy. The Law Commission and academic commentators urged caution: while private arbitration can respect pluralism, enforcement of religious family arbitration that contravenes mandatory equality protections cannot stand. Some provinces have therefore set boundaries, notably in areas of family law, to prevent religious norms from supplanting statutory rights.[19]

The United States of America

US courts have treated Islamic law primarily as one of many sources that may inform private

[17] For scholarship on Islamic finance and Western enforcement, see E J K Kim (n 6) 58-67; also comparative studies in commercial enforcement of *Sharia*-compliant agreements
[18] See P S Nash (n 4) 534-540; and UK reports collected in Brill chapters on *'English Law and Sharia Courts'*
[19] Chotalia SP (n 3) 22-30; see also Quebec and Ontario jurisprudence summarised in alternative dispute resolution literature (Wahb YA, 2022)

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contractual expectations or the recognition of foreign judgments. The federal constitutional backdrop (First Amendment) complicates uniform regulation: aggressive bans have been struck down or criticized as unnecessary and potentially unconstitutional. Where claims implicate religious governance, courts have sometimes declined to intrude; in other contexts courts have enforced secular rights regardless of religious preferences.[20]

Policy Options and Regulatory Design

Comparative experience suggests several policy avenues that reconcile religious liberty with liberal rights protections.

1. Regulate for transparency, not prohibition. Instead of blanket bans on religious arbitration, require registries, written agreements in clear language and disclosure of legal consequences before enforcement. This enables monitoring while minimizing stigmatizing minorities.[21]
2. Protect procedural fairness. Make enforceability of religious arbitration contingent on demonstrable informed consent, access to counsel and an ability to appeal or seek judicial review where mandatory norms for example, child welfare, are implicated.[22]
3. Limit state enforcement in mandatory areas. Maintain bright-line mandatory rules in family law and child protection that cannot be contracted away, while permitting religious contractual autonomy in non-mandatory civil and commercial domains.[23]
4. Community engagement and legal literacy. Support outreach programmes and legal literacy among Muslim communities to ensure individuals know their rights and alternatives to religious adjudication.[24]
5. Specialised fora for Islamic finance. Encourage market institutions and specialist judges to handle Islamic finance disputes where technical understanding ensures predictability without importing religious doctrine into public law.[25]

These options seek to balance respect for religious practices with a robust protection of

[20] For US case law and doctrinal analysis see Fallon SM, *'Justice for All: American Muslims, Sharia Law, and Maintaining Comity within American Jurisprudence'* (2013) (overview) 14-33; see also critical accounts of state bans (n 8)

[21] On regulatory transparency models, see FAUS Law (n 2) 40-45; recommendations mirrored in UK parliamentary evidence (n 5)

[22] On the necessity of procedural safeguards in religious arbitration, see SSRN article *'The Status of Religious Arbitration in the United States and Canada'* (n 10) 12-17

[23] For analysis of mandatory family law protections and arbitration limits see Chotalia (n 3) 27-30; and Ontario debate materials (n 2)

[24] Community engagement and legal literacy proposals discussed in CR Lepore (n 9) and UK reports (n 5)

[25] For an overview of how commercial law can accommodate *Sharia* in practice, see Oxford Research (n 11) and EJK Kim (n 6) 60-66

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individual rights. They avoid the polarities of either unfettered recognition of religious law or blanket criminalisation of community adjudication.

Human Rights as a Tool for Muslim Women in the West

Despite critiques, international human-rights norms often empower Muslim women seeking protection against discriminatory personal law practices. Western courts regularly rely on:

- Equality principles
- Procedural fairness
- Access to justice
- Non-discrimination norms to protect women whose spouses invoke unilateral religious privileges.

As observed in Aleem v Aleem, giving effect to unilateral *talaq* would have deprived the wife of marital-property rights under Maryland law; the court emphasised that religious law cannot extinguish statutory protections.[26]

Human rights frameworks thus operate as protective shields, enabling women to benefit from domestic equality standards despite cultural or religious pressure.

Conclusion

Muslim law in the West is not a single project of legal transplantation; it is a plural, contested, evolving set of practices negotiated between communities, markets and states. Western legal orders face the twin tasks of respecting religious freedom while upholding equality, human rights and child welfare. Arbitration and commercial accommodation present fewer doctrinal problems and have produced workable models, for example, in Islamic finance. Family law and informal *shariah* councils pose harder problems because of the vulnerability of parties and the presence of mandatory public-policy norms. Regulatory responses that foreground transparency, informed consent and enforce the state's mandatory protections offer the most promising way forward. Far from a choice between pluralism and protection, a nuanced, carefully calibrated legal architecture can protect individuals while respecting the religious commitments of many Western Muslims.

[26] Aleem v Aleem 947 A.2d 489 (Md 2008) 492-499