DRAFT/ WORK IN PROGRESS

Sharia in Canada
Family Dispute Resolution among Muslim Minorities in the West:
Analysis of a Case Study of Muslim Women,
Religious Counselors and Civil Actors in Montreal

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(this is a revised version of a draft paper presented at Mesa conference in Montreal)
Introduction

This paper is based on data collected from a qualitative research project conducted between 2005 and 2007. The project was born in the context of the debates in Canada surrounding religious arbitration of family disputes. While in the province of Ontario faith-based arbitration was recognized by the state until recently, in the province of Quebec all family-related litigation must pass before a judge. To our knowledge, no research had yet been undertaken to explore the reality on the ground, particularly within the Muslim communities, even though alternate dispute resolution is documented to be an important part of the informal legal landscape in Western societies such as Britain, the United States and Canada. The aim of the project was to comprehend the ways that Montreal Muslim women in particular seek to resolve the family problems they encounter. In fact, during the aforementioned debates many people in the media spoke in the name of Canadian Muslim women but the latter were rarely if ever given the chance to speak for themselves. More precisely the research sought to examine the alternative dispute resolution mechanisms and resources solicited by Muslim women. Some of the issues examined in the research were: the reasons that motivate their choice of resources to resolve family disputes; the functioning of the dispute processes and the extent to which any of the actors involved work together. A further objective was to stimulate a dialogue amongst professionals in the legal system and social services, religious counselors and community workers in Muslim communities and Canadian Muslim women in order to find common grounds for conflict resolution that are seen as beneficial by the latter.

We therefore sought out, through semi-directive interviews, the experience and opinions of 24 women, representative of a variety of geographic and ethnic origins and immigration histories and who also reflected different relationships to Islam as a religion. Eighteen of the 24 women had had direct experience of negotiating family conflicts while 6 expressed opinions. Furthermore, we sought to establish a broader picture through interviews with a number of different actors who are involved in family conflict resolution.

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1 See article xx Civil Code
A total of 37 persons were interviewed including: five community workers, four social workers, 13 Muslim religious counselors (imams and others), six accredited family mediators, one lay mediator, two judges and six lawyers.

The main focus of this paper is on two interrelated questions, partly and only indirectly examined in our research reports\(^3\): does there exist in the Montreal Muslim communities a parallel justice system for the resolution of family disputes? Furthermore, to what degree are the Québec civil justice system and Muslim alternative dispute resolution processes led by religious counselors insular or open to each other? In order to answer these questions, we will look more closely - in part 1 of this paper - at the functions attributed to the existing faith-based and state-related dispute resolution mechanisms by the Muslim women participants and the actors of the institutions themselves; in part 2 of this paper, we will examine how the actors of each set of institutions carry out their functions in particular situations to determine whether and in what way they let considerations related to the other set of institutions influence their own dispute resolution process (either in terms of procedure or in terms of substantive norms). This is a qualitative case study of discourse enabling us to illustrate the diversity of relevant perceptions and experiences. Our findings tend to show that, despite the recourse by Muslim women to faith-based resolution of family disputes, these processes do not tend to form a parallel justice system in Montreal. Rather, different and sometimes complementary functions are attributed by the participants to the existing dispute resolution mechanisms, and the recourse by Muslim women to one or more of these depend on the goals and other expectations they assign to them. When we turn to the discourse of the civil actors and religious counselors, we see that norms other than their own are sometimes acknowledged as an important element of the context of the parties but that nevertheless they are not recognised as having any independent force inside their own system or tradition. Finally, while most of the religious counselors apply a rather patriarchal reading of Islamic law which shows little signs of influence from Quebec law, a minority of them refers to more equitable Muslim norms be they constructed internally without reference to Quebec law or in reference to such law. As well, the insularity of most of the religious counselors does


occur as often regarding their view of divorce as process. Indeed the majority of religious counselors expressly recognize in the civil legal system an at least complementary role to theirs, that is once the Islamic substance of the divorce itself or the settlement is ensured, the expected approval by the civil court judge can guarantee better recognition and enforcement.

Part 1: The functions attributed to the state-related and Muslim faith-based family dispute resolution institutions

A) The functions-mandates of the Quebec state justice system in family law-related disputes and the expectations of Muslim women

1. According to Quebec Law

In Quebec, family matters are under the jurisdiction of both the provincial and federal parliaments. While the federal Divorce Act, regulates the divorce and its consequences on the family (custody, alimony), the Quebec civil code contains a number of provisions policing family life⁴ and putting forward a number of values and principles. Amongst them are: individualism, substantive equality between men and women (both can ask for the divorce, etc), children as vulnerable persons and whose best interest is a public matter. Marriage is seen as an economic partnership in which both parties contribute in different ways and whose contribution should be taken into consideration as well as an institution to be protected or at least respected (for instance it is very difficult to argue for the nullity of a marriage). As far as family is concerned, it is envisaged as nuclear family (for instance the grand-parents cannot be sued for alimony by the children) and family solidarity prevails over solidarity based on a welfare state⁵. These provisions root themselves in a Christian heritage as well as in a neoliberal tradition. They are secular in the sense that one cannot interpret them by referring to religious texts⁶.

Schematically, because the family cell is often seen as one of the founding cell society, the autonomy of the individual within the family is limited. Not only, a number of family law provisions are of public order, but also the recourse to the judge in case of family disputes is mandatory. One cannot divorce in Canada through another forum than the judge; one

⁵ See Droit famille
⁶ See on this aspect the debate on the federal legislation on same sex marriage.
cannot resolve family disputes through arbitration in Quebec. Furthermore, any foreigner who has been living for more than a year in Canada has to divorce in Canada. The judge as an officer of the State is in charge of ensuring that the values contained within the Civil code are respected in the outcome of the family conflict. He/she can use his/her discretion to ensure that no one was forced to relinquish one's rights, that the outcome is just and equitable, that the best interest of the child is duly protected. In family matters, the role of the judge does not consist in saying the law (“dire le droit”) and automatically applying it; rather he/she is in charge to find a concrete and adequate solution for a family in crisis while making sure that they abide by the State's values. However in a number of cases, divorce is uncontested since the parties have agreed with the help of lawyers on the divorce settlement. Most of the items dealt within that settlement concern pecuniary matters and in that respect, in most of the cases, the exercise is a very technical one as accountancy skills are required as well as the capacity to characterize correctly family assets in order to know whether or not they fall within the family patrimony.

**Adjudication of family matters in Quebec**

In Quebec, judges are lawyers who have at least worked as lawyers for 10 years. Visible minorities are not yet well represented in this profession (only two black superior court judges). Most of them have not been exposed during their legal studies to critical legal studies such as race theory or feminist theories which would have equipped them and help them contextualize within the family dynamic and society dynamic the family issues they have to deal with. Regarding specific skills, they receive a number of trainings concerning the law as well as the skills needed to handle family law disputes. Even though, it is stipulated in the *Divorce Act*, that they should try to encourage the “conciliation” most of the time their role consist in giving the divorce, when the parties have agreed on the consequences of the family breakdown, checking whether the divorce settlement they have negotiated with the help of their lawyers on these points is within the parameters of the law or if the parties cannot agree, finding a solution that is legal and equitable.

The management by the court system of the disputed divorce has been criticized. It was said that the procedure gearing towards litigation only aggravated the dispute and that one could never be sure that the judgment in family matters would be efficiently enforced, since it was imposed on the parties.
Conciliation, mediation

In order to provide a response to these criticisms and as well as reduce the cost of family conflicts (judges are paid by the State, alternative dispute resolution (ADR) actors are mostly paid by the parties), and alleviate the load of the tribunals, ADR mechanisms have been put forward. There role was to succeed where the judge could not, that is, favor the conciliation between the parties so that they could reach an agreement that would satisfy both of them and therefore be enforced.

In Quebec, since 1997, it is possible for families to benefit from 6 meetings with a mediator that are paid by the State if they have a child. Mediators can be lawyers, social workers, notaries, psycho educators, etc. Once again, visible minorities are not very present within this profession (for instance to our knowledge there is only one Muslim lawyer who is a mediator). Built around two key myths : the impartiality of third parties and the autonomy of the participants, the family mediation process in view of reaching an agreeable settlement regarding family matters follows strictly the norms of practices of the “Guide des normes de pratiques en médiation familiale”, the provisions of the Civil Code and of the Code of Civil Procedure. Whether or not the mediator fulfills one of his other role that is to support the parties, to empower them, and to reinforce their capacity to make decisions depends on each mediator. Mediation can also occur during the trial when the judge requests it which raises questions about its “voluntary” aspect.

Intermediate actors

For couples in distress, there exist a number of civil society actors that can help them: namely accredited mediators, lawyers, social workers, and community workers. These actors fulfill a number of roles: vent emotions, clarify priorities, give information to the person on the law, institution, practices and values of the province or rather explain them how the local culture is different from the culture of their country of origin, provide advice, offer support, negotiate in the name of their client (for social workers with lawyers of the adverse party). Regarding conciliation, they help the parties find points of agreement; explore new areas of compromise and possible solutions. Rarely however, will these actors provide a space where the couple is free to bring out and examine openly their pain and their disappointments with regard to their own and their spouse’s failure to fulfill expectations, its impact on their life within their extended family, community in Quebec and abroad and social network in Quebec and abroad.
Most of the civil actors dealing with Muslim couple are either non Muslim persons born in Quebec or persons of Muslim background that have immigrated during their adulthood. In respect with the lawyers, that might explain why there is, to our knowledge, no Muslim lawyers association while such associations exist in Toronto and in the USA for instance. Even though Asian immigration (Pakistan, Bangladesh) exists since the 70s, it seems that most of the children went to live in English speaking cities. Furthermore, it might explain why there is not yet some demand of incorporating religious specificities in the Quebec legislation.

2. **According to the Muslim women participants**

We sought out, through the interview process, the experience and opinions of 24 women, representative of a variety of geographic and ethnic origins and immigration histories and who also reflected differing relationships to the Muslim religion (some of them being Quebec born converted). Six of the 24 women expressed opinions while 18 had direct experience of negotiating family conflicts. Most of these women encountered a number of family problems associated with the culture shock that normally accompanies immigration to a new and different culture, in particular changes in the dynamic of the married couple, shifts in gender identity and economic realities that push women into paid employment where previously they had worked in the home. Financial difficulties were an aggravating factor in family conflicts, as could be the role of the family-in-law and extended family. Family conflicts resulted also sometimes when spouses adopted different religious paths causing conflicts in connection to the religious education of children or difficulties in managing the interactions of children with the new culture.

It seems from the interviews that women participants assign to the judicial system the role of giving them a civil divorce and adjudicating the consequences of the breakdown of family life by applying the law to a number of relevant issues (child custody, support payments, division of assets, and allocation of the family residence). Therefore some of them were unsettled by the lack of automaticity in the judgments. In relation to Canadian and Quebec family law women enjoyed their right to initiate divorce proceedings and assumed they would almost automatically to be granted custody of their children. They also were puzzled by the fact that alimonies for their children is calculated according to the

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7 The Quebec Human rights commission recently studied the religious profile of the person filing complains and noticed that most of them were Christians.
resources of the husband and not just the needs of the children as they think it is in their country of origin (Lebanon, Tunisia).

Many women sought out the help of a number of different actors, but for different purposes. For example, amongst the 18 (of 24) women interviewed who had experienced family conflict, five consulted with both a religious counsellor and a lawyer, while one woman consulted solely with a religious counsellor. Amongst the women interviewed most had used the services of a social worker or community worker and some had consulted lawyers, mainly from legal aid clinics. None of them had seen an accredited family mediator. Two reasons would appear to account for this: on the one hand accredited mediators did not speak their mother tongue or come from their ethno-cultural community and on the hand other women wrongly associated accredited mediation with the informal mediations they experienced with religious counsellors, social workers or community workers and therefore did not see the use of it.

Women respondents were sensitive to a number of other significant factors in the choice of actors, namely: being able to speak their mother tongue; understanding of their culture of origin; sharing similar values; services offered free of charge; availability of the actor and respect for confidentiality. According to Muslim women and civil actors interviewed most of the women dealing with family conflict needed a personal approach, for them, problems dealing with intimacy had to be addressed in a convivial atmosphere without any bureaucracy, or technicalities.

Regarding the recourse to the official legal system, it appears that some a number of Muslim women were not intending to use the Quebec tribunals but were “pushed” to do so. For instance, the legal aid lawyers we interviewed mentioned that a substantial part of their Muslim clientele was referred to them by the social welfare organisations. Indeed in Quebec, social solidarity (social welfare) only intervenes when family solidarity does not exist or does not work. Hence a married or divorced woman who asks for social welfare needs to prove that her husband or ex-husband is unable to pay her any alimony and therefore will need to go in court to exercise their right to alimony. Another avenue by which Muslim women are directed towards the tribunal is in the case of domestic violence. In those cases, social services will strongly push women to end their marriage.

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8 Amongst the 18 women interviewed, 13 dealt with lawyers (9 dealt with legal aid lawyers).
B) The functions of the religious counselors in family disputes

1. Introduction: the changing role of imams in the West

Differences in the organization of Muslim communities in the West and shifts in religious authority in the Muslim world have contributed to giving mosque prayer leaders (imams) in the West far more importance than their counterparts in majority-Muslim societies. In fact, in the latter there exists a strict hierarchy and administrative division of roles which – at least on a formal level - limits the functions of the imam to leading the congregational prayers and the giving the sermon, while generally the mufti (juristic advisor) and the qadi (judge) respectively answer questions relating to shari’a / fiqh (Muslim law / jurisprudence) and resolve interpersonal conflicts. In Western countries however, because of the institutional weakness of Muslim communities, the often informally-trained imam has taken on many added functions, such as religious counselor, arbitrator, representative of the congregation in official ceremonies, etc.9

It must be noted that the functions and roles of the imam are different in the Twelver Shi’i and Sunni traditions. There is a form of clerical hierarchy in the former composed of scholars (‘ulama’) who designate the imams of Shi’i mosques, often from the countries of origin. The Lebanese, ’Iraqi and Iranian Shi’ites have their own associations connected to particular high-ranking scholars (ayatollahs)10. While in the case of Sunnis, in principle any believer who is recognized as having sufficient knowledge of Islam can lead the prayer.

In Montreal, notwithstanding the increased importance of the imam, his religious authority seems relatively limited, be he Sunni or Shi’i. In a rare study of Muslim leaders (including mosque imams) in the province of Québec, ‘Ali Daher underlines the relative absence of charismatic and knowledgeable religious figures and the resulting competition that ensues between a multitude of leaders 11.

2. According to the Muslim women participants

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9 Cesari, L’islam, 191-2; 183-190; see also, Yvonne Y. Haddad and Lummis, Islamic Values in the United States, 58-9; Aida Othman, And Sulh is Best : Amicable Settlement and Dispute Resolution in Islamic Law. Doctoral Dissertation. Boston: Harvard University, 2005, 266, n.482.
10 Ibid., 148.
Religious and other factors in Montreal Muslim women’s resorting to a religious counselor

Most participants said they identify with the Sunni or Shi‘i branches of Islam and consider themselves to be believers and to practice Islam to varying degrees. None of them identify with any particular school of jurisprudence or current of thought. It is possible to distinguish two main types of relationship to religion: the majority of participants have a more selective and “private” type of practice (a varying adherence to the four practical pillars of Islam, no obvious appearance of religiosity in their clothing and discreetness in the workplace) while a strong minority see Islam more as a way of life and practice the outward aspects of the religion more openly and “integrrally” (adherence to the four pillars, headscarf, regular attendance of Friday prayer at the mosque). If we consider the marriage situation of the participants, we find that 2 were single but that 19 out of 24 had a religious marriage in their country of origin. Three married in Montreal in front of an imam who presided over both the religious and civil marriages. Six had family-arranged marriages and 3 did not know their future husband before the offer of marriage. With regards to their children’s religious education, 14 out of the 15 participants who expressed their views on the matter said they valued the transmission of Islamic values to their children.

The attachment of the participants to Muslim religious and ethical values emerges in the interviews with regards to their choice of a particular mode of resolving family conflict. Indeed, many of the participants give a high priority to marriage as a sacred bond and see divorce only as a last resort - not prohibited in Islam but not encouraged. The participants exhibit a determination to maintain the marital bond on the one hand and an apprehension with regards to the status of divorcee and the negative perception attached to it (by themselves, the family or the community). The risk of losing their children to their husband following the divorce is also a determining factor for many of the respondents. Finally, certain women perceive the prospect of a civil lawsuit as a waste of precious time and energy which they prefer to channel towards their work and children. These facts corroborate other studies which indicate that Muslims in the West don’t seem to use the formal court system very often to settle disputes. The low number of published relevant

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court decisions in the United States and Britain may point to a high level of informal dispute resolution which never reaches the courts.\(^\text{13}\)

There is conflicting evidence concerning the relationship between a participant's degree of religiosity and her calling upon a religious counselor. Five out of the six women who did consult one have a more 'integral' relationship to religion (see women's sample), while the sixth has a more selective and discrete practice. The importance of this connection is underlined by the professionals interviewed, including some religious counselors. However, according to the majority of the religious counselors, most of their clientele does not practice Islam ('they don't do their prayer', 'they are not living according to Islam’) except for certain important acts such as marriage, divorce and inheritance. Although the discrepancy can be partly blamed on differing appraisals of what constitutes a ‘practicing (and non-practicing) Muslim’, it does seem to point to the fact that not only ‘integral Muslims’ but a great deal of ‘selective and discrete’ Muslims seek advice from imams.

Significantly, there is a high correlation among the participants between frequenting mosques and consulting an imam or religious counselor. This is the case for the six women who did contact a religious counselor (3 were married in Canada by an imam and 3 had religious marriages in their country of origin). Among the women who would not consult a religious counselor all except one do not frequent mosques and only one was married in front of an imam in Canada.

The relatively low numbers of participants who contacted a religious counselor can be explained at least partly by their perception of religious counselors. Certain participants do not think or simply never conceived of imams playing a role in the resolution of family conflicts, either because he is not considered a legitimate representative of Islam or his role is believed to be limited to leading the congregational prayer and advice concerning ritual practices. The participants are almost evenly split between those who feel they can and cannot trust them. Many from the latter group perceive the imam as biased in favor of the husband and as tending to overemphasize the obligation for women to bear their husbands’ excesses with patience. There is also the fact that some women do not perceive the imams as having the requisite authority to ensure that the spouse will follow any agreement resulting from conciliation or mediation.

\(^{13}\) Quraishi and Syeed-Miller, 22; Menski, “Muslim Law”, 158.
Other reasons put forward by all the participants for the resort to religious counselors are ethnic and cultural proximity, low cost, ease of access and confidentiality of the process.

Functions of religious counselors according to Muslim Women

The vast majority of the participants turned to family members or friends from their community to help conciliate the couple. However, in the absence of key family members which is often the norm in Quebec Muslim immigrant communities, women would sometimes obtain the help of a social worker, a community worker or a religious counselor. This can be explained in some cases by the fear of being judged by their immediate circle of family members and friends, as expressed in an interview with a community worker.

The majority of women who sought the help of a religious counselor or who said they may seek such help in the future affirmed that they see the religious counselor's role as essentially that of a religious advisor and conciliator. According to them, Muslim women will call upon a religious counselor first of all in order to obtain authoritative religious guidance concerning either the behavior to adopt vis-à-vis their spouse, the desired behavior of the spouse vis-à-vis herself or the conformity with the shari’a of certain hypothetical acts. For example, a participant mentioned that her husband had told her that to obtain a divorce, they had to go in front of the imam and she wanted to confirm this. Another asked an imam if according to Islam it was permitted for her to claim part of the family home under the Quebec legal distribution of family assets.

Second of all, in the many cases where the family is absent, the religious counselor is perceived as a third party who can exercise a positive moral influence on the spouse. One participant compares the imam to an important member of the family. Another tried to get the imam to influence her husband to become a better Muslim, in the hope that he would stop beating her. A third mentions that an imam, due to his ability to quote relevant religious texts, can better influence a husband than if the wife just confronted the latter telling him about her rights. However, as previously mentioned, the authority of the imam or religious counselor cannot be taken for granted and varies according to the context and the people involved.

Third, for reasons enumerated above in section A and in many cases to remain true to their religion and be able to remarry within the bounds of Islam, some women will
contact the religious counselor in order to obtain a religious divorce. However, the only two women in our sample who attempted this failed either because the husband refused to contact the imam or because the imam insisted that the wife remain in her marriage. Another underlines the importance of the two spouses consenting in order for the divorce to go through.

Finally, although most women interviewed wished that religious counselors had more authority to pronounce religious divorces, it is also a majority of women who pronounced themselves against the idea of official faith-based arbitration and hence against an adjudicatory role for imams, because this would create a parallel justice system in Canada.

3. According to Muslim religious counselors

The profiles of the religious counselors

The term ‘religious counselor’ refers here to religious figures who are involved in one way or another in the resolution of family disputes. The sample consists of thirteen religious counselors, including five full-time imams of mosques, six part-time or occasional imams who are in full-time educational or other community-leadership positions, and two who are religious counselors without being imams (including one woman). Their clientele represents most of the Muslim community of Montreal in confessional (Sunni - Twelver Shi‘i) and ethnic terms (with Eastern Africa and Turkey underrepresented). They are from different age groups (from 35 to 60 plus years of age) and also represent various schools of law and religious movements14 (i.e. traditionalism or adherence to one of the five main legal schools; Salafism, Sufism, Tabligh). The type and length of their religious education varies considerably: six have university or seminary education ranging from 1 to 15 years (the three Twelver Shi‘i imams have between 7 and 15 years) ; three had master-student one-on-one training ranging from 5 to 15 years (intermittent), and 2 are autodidacts.

14 The religious counselors said they belong principally either to a school of jurisprudence (8, of which 3 are Hanafites, 2 Shafi‘ites et 3 Ja‘farites) ; or they identify with all schools or no school in particular, in which case 2 said they identified with the reformist movement, 1 with Sufism, 1 with the Tablighi jama‘at and 1 with ‘Sunnism’ broadly speaking.
Religious Advice and Reconciliation

The religious counselors confirm what the women participants assert as to their main functions of advisor and conciliator. Furthermore, they underline that their expertise is primarily religious and that their clientele does not come to them for advice on secular law.

Mediation of divorce agreements

Many religious counselors help couples to negotiate divorce agreements regarding the payment of the dower (mahr, owed to the wife by the husband as per the religious marriage contract), as well as child custody, alimony and the division of family assets. However, in the context of resolution of family disputes, they fulfill such functions rarely: actually, seven counselors (a majority) never had such a case or refer them systematically to the state justice system when divorce becomes inevitable; for the others the ratio varies between 2% and 30% of their cases.

In such cases where the counselor takes the initiative or the couple asks him to mediate between them, his role will vary depending on the circumstances: he can be an advisor to both spouses at a time, a neutral third party or an active advocate. In these cases, the religious counselor expects or encourages the couple to have their agreement approved by the civil court judge taking care of the divorce. Two religious counselors have gone so far as to follow up on cases until such approval was obtained and one of them does this on a regular basis.

‘Adjudication’?

When they play the role of mediator in the context of divorce agreements, a few religious counselors mention that they sometimes give a decision or shift their role to that of arbitrator when the parties cannot come to an agreement on their own. However, the result is never considered obligatory or final by either the counselor or the parties, and the mutual consent of the parties must always be obtained regarding the content of the agreement itself (which can be oral or written). Thus nor the religious counselor nor the parties recognize in the counselor an adjudicatory authority that can replace the state judge. It seems that the decision to follow the advice or agreement proposed by the counselor, to present the post-separation agreement to a notary or the divorce agreement to a judge depends entirely on the choice and consent of the two parties.
As was alluded to in the previous section, the authority of the religious counselor is quite relative, be he imam or not, Sunni or Twelver Shi‘i. In this regard, most of the religious counselors admit openly that clients including women shop the solution most advantageous to themselves by comparing the opinions of different imams. On the other hand, many counselors believe that the couples who conclude agreements under their care in fact respect such agreements while others admit to their ignorance of the ensuing events.

**Religious divorce**

Here as in other cases, perceptions and practices vary considerably. The majority of counselors encourage couples to obtain a religious divorce in addition to the civil divorce so to ensure that the husband has given his consent and that the wife may remarry. Most counselors agree that a religious divorce cannot be pronounced by them independently of the spouses, especially the husband. That is why most counselors act only as a witness to the agreement of the spouses to divorce, affixing his signature or the stamp of the mosque to the written document. Three of them will give a divorce to the wife while the husband is absent in certain exceptional circumstances (the husband abandons the wife and disappears, does not pay maintenance, ill-treats her). Two do not consider themselves competent to give a religious divorce but consider that a civil divorce has the same religious effects. Some counselors give religious divorces before the civil one, others give them insist on doing it in tandem with or following a civil divorce. Two imams deliver certificates of divorce officially recognized in Lebanon.

In conclusion, it seems that the main functions both Montreal Muslim women and religious counselors attribute to Muslim dispute resolution processes is first that of religious advice, second that of conciliation (divorce prevention), and third various kinds of support in the amicable settlement of the religious divorce. The last two types of practices are known in the Islamic legal tradition as *sulh*. Indeed, recent research shows that *sulh* has historically been a key institutional method of dispute resolution in the Muslim world alongside adjudication (*qad‘a*) and arbitration (*tahkim*), and that it is still highly esteemed in Muslim minority communities such as in the United States.

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15 In addition, some religious counselors mentioned that many Muslim women know they rights under Quebec law and that on several occasions women referred to and argued on the basis of Quebec law in negotiations with their husbands.

16 Othman, And Sulh is Best. See also Bogaç A. Ergene, Local Court, Provincial Society and Justice in the Ottoman Empire: Legal Practice and Dispute Resolution in Çankiri and Kastamonu (1652-1744), Leiden; Boston: Brill, 2003.
Part 2: How these actors and institutions exercise their functions according to the specificities of the context

A- Clear or unclear interaction between norms in the state justice system  (DRAFT STAGE!!! 🎉)

1. Possible models of interactions between religious norms and state norms

When “describing” law and more specifically its criteria of formal validity, legal academics usually tend to choose between two theories: legal positivism on the one hand and legal pluralism on the other hand. As far as material validity is concerned (or more precisely the legitimacy of legal norms and their adequacy to society), many scholars refer to one or more current of critical legal studies.

The theory of legal positivism labels as law, the norm that is validated according to some precise formal criteria. Indeed, according to this theory, « le droit en vigueur est un ensemble de règles de conduite, qui, directement ou indirectement, sont formulées et mises en valeur par l’État »17. Law is hence an « espace clos, enserré dans des limites précises qu’énoncent, par exemple, les principes de validité et de légitimité. »18.

Outside of the legal realm, according to legal positivists, norms are facts. To be recognized as legal norms, these norms would have to come from a normative order which would be recognized by the State as having the same capacity to deliver justice as itself which is not the case19.

Nevertheless, one cannot deduct from this lack of equal dignity, that normative orders are not recognized as such by legal orders. On the contrary, in a number of States there are rules that stipulates that religious societies are insular to state norms at least when it concerns the rules that apply to a purely religious matter. This situation demonstrates that the State legal order recognizes the existence of a religious normative order and coexists with it by ignoring it20. Another type of situation is when a state legal order recognizes the existence of a religious order and acts in complementarity with the latter. For instance, state

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20 « [la] coexistence, au sein d’un même ordre juridique national ou international, de règles de droit différentes s’appliquant à des situations identiques, ou encore la coexistence d’ordres juridiques distincts prétendant régler une même situation » André-Jean Arnaud et Maria José Farinas Dulce, Introduction à l’analyse sociologique des systèmes juridiques, p. 214
regulations regarding marriage can defer to religious norms regarding the validity of such marriage. Furthermore, this recognition can be the recognition of a religious norm in order to ensure some kind of harmonization between state norms and religious norms as well as it can be the recognition of the effects of religious norms in order to ensure some kind of coordination between state norms and religious norms. In both cases, the avoidance of limping situations (“situations boîteuses”) is at stake, that is, avoiding that a situation that is valid in one system (for instance a divorce) is considered invalid in the other system of norms therefore creating great injustice for the individual concerned.

Another type of relationships between state legal orders and religious normativities is the one in which, the state legal order does not recognize the normativity of religious orders, per se, but enables individuals to presents their claims with reference to religious norms be them defined by a religious order (France with its objective version of freedom of religion) or by their own understanding (Canada with its subjective version of freedom of religion). In those cases, the individuals become the agents of a certain pluralism that the State receives through the work of its judges as its laws do not expressly refer to any religious norms. Translating the religious norm into the legal language that can be presented in court is then the key issue. A comparison between France and Canada, enabled us to demonstrate that different tools can be used, be them a general principle of civil law (principes généraux du droit), a fundamental right (such as freedom of religion), or even some civil law rules. In this view, the legal system is not closed but can be opened. The judges faces then another task: not only does they have to say the law (« dire le droit ») but by doing this they states what is relevant or not for they legal system. This goes with the idea of exclusivity of legal orders, indeed as Ago mentioned, in this case « l’ordre juridique est nécessairement exclusif au sens où il exclut le caractère juridique de tout ce qu’il ne réintègre pas en lui-même ».

21 Anne Saris thesis + article in Themis
22 For an example of a definition of law as a closed system see André-Jean Arnaud et Maria José Farinas Dulce : « Le droit est un système clos, enserré dans des limites précises qu’énoncent, par exemple, les principes de validité et de légitimité » (André-Jean Arnaud et Maria José Farinas Dulce, Introduction à l’analyse sociologique des systèmes juridiques, p. 167).
23 Roberto Ago, « Règles générales des conflits de lois » (1936) 58 Rec. cours acad. dr. internat. La Haye, 243 à la p. 302. Poursuivant sur cette idée, Gunther Teubner dresse le parallèle entre la juridiction nationale qui n’applique pas authentiquement le droit étranger en droit international privé et le discours juridique qui utilisant des arguments non juridiques n’agit pas pour autant de manière authentiquement morale, éthique, scientifique ou politique. « Dans les deux cas, s’opère une reconstruction radicale du matériau sémantique étranger. Dans les cas présentant un élément d’extranéité, le droit national des conflits construit depuis la perspective du for propre un mélange de règles nationales et étrangères, c’est-à-dire un corps hybride de type national, se distinguant significativement du corps de règles qu’appliquerait la juridiction étrangère » (Gunther
2. Legal positivism in Quebec

In Canada, including Quebec, the legal system is based on legal positivism, a theory that postulates that law is independent from morality and religion (Bentham, Austin). Most jurists (lawyers, judges, notaries) have a vision of the legal system as a very formal and normativist one which means that for them law is comprised of texts that have been enacted through the procedures of the State, and which obey a certain sense of hierarchy with the Constitution and the Charter at the top of the pyramid. The State through various mechanisms has the monopoly of the production of the legal norms (sovereignty and centrality). These norms are the only ones applicable by judges and moreover they can only be interpreted in a way that is independent from religion and morality. In family law, due to the ideological importance of what is characterized as an “institution” in the civil law system, the judge is recognized as having the monopoly of some acts in the family life. Indeed a divorce can only be pronounced by a judge. Furthermore contrary to Ontario, no privatization of family conflict resolution is possible in Quebec since arbitration in family matters is prohibited.

While the theory of legal positivism and more specifically the ideology of legal centralism has been duly criticized, notably by authors contending that the State does not have the monopoly of production of legal norms since other communities were producing such norms and that “lawyers but also social scientists, have suffered from a chronic inability to see that the legal reality of the modern state is not at all that of the tidy, consistent, organized ideal so nicely captured in the common identification of “law” an “legal system”, but that legal reality is rather an unsystemic collage of inconsistent and overlapping parts, lending itself to no easy legal interpretation, morally and aesthetically offensive to the eye of the liberal idealist”. Nevertheless the fact that the official legal system has no pluralistic discourse does not mean automatically that unofficial legal systems do not exist. However as we will see in the section dealing with women it is doubtful that such an unofficial legal system exists in the eyes of the Muslim women we interviewed.


24 Certains mêmes parlent de sa vocation totalitaire. Voir Jacques Vanderlinden, « Vers une nouvelle conception du pluralisme juridique » (1993) 2 Rev. de la recherche juridique 573. Il estime que le droit est un système totalitaire en ce sens qu’il organise tous les éléments qui l’entourent en référence à lui-même. La question de la souveraineté de l’État face aux populations autochtones et à leur droit a fait couler beaucoup d’encre.

Quebec law shows also a gap between a population full of diversity (at least in Montreal) be it cultural or religious and its monocultural legal system. Arguably the legal system has been based on color blindness, gender blindness and blindness to differences of sexual preference.

To address these gaps, the policy of multiculturalism, interculturalism in Quebec, has enabled cultural and religious diversity to be taken into consideration. The principle of multiculturalism has enabled judges to interpret differently the scope of application of legal rules that had been elaborated by the majority. It does not create different systems of norms though. In this respect the jurisprudence regarding the mahr (Muslim dower) is interesting. While the Ontario judges characterize it as a religious institution which requires the application of religious norms by the judge and hence refuse jurisdiction on that matter, for the British Columbia judges, the mahr included in a marriage contract can be enforced by them while applying the family law provisions. For them multiculturalism explains why they would recognize such a foreign institution, though applying civil provisions. In essence, in Canada, as long as the mahr is characterized as a cultural institution it is accepted by the courts, while if it is characterized as a religious institution necessitating the application of religious norms, it is not. One could easily deduct from this that in the provinces where mahr will not be recognized by judges, the Muslim women will have to use another forum for their claim and that from this need an unofficial legal system could be created. However that does not seem to be the case in Quebec maybe because most of the Muslim immigrants come from the Maghreb where the amount prescribed for the mahr is usually very low in contrast to the usual one year salary value of the mahr in south Asian communities.

To pursue on the conditions triggering the creation of an unofficial legal system, it seems that that the statement of several English scholars\(^\text{26}\) that the discrimination against Muslims, coupled with a lack of recognition of Muslim norms by the State legal system is at the foundation of the creation of an unofficial Muslim system embodied in shari’a courts is not applicable to Quebec. Indeed, none of the Muslim women mentioned a will to be treated according to some Muslim personal law. Rather they seemed to recognize both legitimacy and moral standing to the State court system. However, with regards to accredited mediation, they expressed the will to use unofficial systems rather than the official one. Indeed all Muslim women expressed the view that accredited mediators lacked the qualities

needed to help the couple mainly because of lack of cultural sensitivity and knowledge of their specific situation. Furthermore, the whole idea to ask someone foreign to them in a different sense did not seem to appeal to them. Indeed, for most of them, mediation should be done by friends, cousins, grand mothers but not by a public servant (as accredited mediators are sometimes portrayed erroneously) or by paid professionals.

2. The Perceptions of the Muslim Women Participants

Amongst women participants, four different perceptions of family norms can be noted. First, some women will choose the norm that has the best outcome for themselves: they are result oriented. Second, other women will have internalized the idea that the State legal system is the prominent system while comparing it to other legal systems (religious or state). Third some women will still give a prominent place to the State system while criticizing it for not being fully adapted to their profile and requiring that such adaptation should be done. Fourth and finally one woman put above all the religious normative system. In the latter case, this was an Algerian woman who wanted to make sure that following the Quebec rules would not go against the precepts of her faith.

Regarding the first category that is the “pragmatic approach or result-oriented approach”, it seems that most as many immigrant Muslim women wanted to get a divorce that would be recognised in their country of origin be it completely religious (talaq or unilateral divorce by the husband given in front of the religious counselor) or not (divorce done through a consulate). Indeed, they wished to return with their children to their country of origin for holidays, but feared they might be prevented from returning to Canada or even lose custody of their children due to the actions of their former spouses. When a Muslim country does not recognize a Canadian civil divorce a woman is considered still to be married and requires the permission of her husband to leave the country. Furthermore the law of that country may grant child custody to the father. In these cases women either turn to the consulate of their country of origin or a religious counselor to obtain a divorce that will be recognized in that country. It is interesting to note that almost all women mentioning the need for a talaq referred to this reasoning and not to the need to be able to remarry religiously (only two referred to the talaq in that capacity). It appeared also from the interviews of civil and religious actors as well as those from women that a number of Muslim men share this result orientated approach. For instance, one woman mentioned the
fact that her husband wanted to divorce amicably through the consulate of Algeria in order not to share the family assets nor pay alimony.

Regarding the third category that is the women asking for the adaptation of Quebec and Canadian law, this was the case of Quebec born converts and of second generation immigrants or immigrant who had arrived in Quebec at a very young age. These women demonstrated in their discourse that individual autonomy and freedom of religion are completely compatible.

Finally, most women also considered that Muslim religious norms were compatible with Canadian law due to the equitable rights which Islam accords women. Those who found the two systems incompatible were of the opinion that shari’a or Muslim religious law placed women in a subordinate position and also thought Muslim religious norms should be adapted to the Canadian context.

3. The Perceptions of the Civil Actors

Most of the civil actors describe their work with Muslim couples as requiring adaptation to their cultural diversity as well as an understanding of their religious values. For them however the values of the Charter and of the civil Code are not negotiable. For instance, all of them mentioned that they would not take into consideration religious norms that would not be in the best interest of children. Furthermore, according to the large majority of them, there is no room for legal pluralism in the sense of an explicit recognition and application of religious norms by the State legal system.

Cultural diversity

Most of the civil actors dealing with family dispute resolution postulated that one has to make every effort to integrate into Quebec which means subjecting oneself to the law of the land where they live (representation). A large number of them argued that they would, themselves, do the same in Muslim countries, that they would adapt. So for them, it is acceptable to take into account the client’s desire, his/her background but at the same time it is crucial to respect “what is happening here”. It seems that sometimes these actors acted as an intercultural intermediary whose role was to explain differences so both the
judge and the parties would be able to better understand the context. All the 5 women that had to deal with judges felt respected throughout the process.

In relation to cultural sensitivity it appears that a good number of lawyers have not had the benefit of training in this domain. Nonetheless, like other civil actors, lawyers have developed certain practices, for example, putting the accent on respect for their clients. Most of the civil actors focus on the specific personality of their clients rather an essentialist vision of their culture or of their religion. Their goal is therefore to start from the point of view of their client who often reaches for them when vulnerable and in a period of difficult time, from the perception of their client of the world they live in and the problem they are facing. Subjectivity here is the key word. This approach is coupled with a discourse of expressing the need of lack of prejudice, respecting the person as she is, the goal being to obtain a result helping the person. In order to achieve this, most of the civil actors will ask the person to explain her situation, her background, etc.

A number of social and community workers will choose lawyers from a Muslim country since they will speak the same language, and therefore communicate easier; the contact not being the same with a translator. Moreover some of them will not send women to accredited mediator because of their lack of cultural knowledge, and of the fact that their action is interpreted as being too focused on the legal aspect and therefore not adapted to the needs of their client.

Regarding the cooperation between civil actors such social worker and religious actors (imams), this work relation seemed to some extent triggered by cultural factors. For instance, a social worker mentioned that she would go see an imam to try to get some advice when she was dealing with men who would refuse to collaborate with her. She also mentioned that when a religious divorce was sought she would “negotiate” with imams to help her get this type of divorce.

Plurality of norms

While the large majority of civil actors share a view of their legal system as being insular to any other norms, a minority seems to think otherwise, enabling to some extent a certain internormativity, that is a certain encounter between religious norms and civil norms within the civil forum. Indeed a social worker, based on her knowledge of the laws of

27 Among the 18 women interviewed, 11 dealt with their family problems by resorting to the Quebec tribunal. However only 5 out the 11 had to be physically present during the hearings. The 6 others had their lawyers dealing with the papers.
the country of origin of her client, mentions that she makes sure that the husband agrees in
the interim divorce settlement to give the religious divorce. When asked what the reaction
of the Quebec judge has been to this clause, she replied that once she has explained to the
judge the importance of getting this religious divorce, usually the judges will agree to
homologate the interim divorce settlement. It seems that in her mind, since the settlement
was only for the interim, the issue of enforceability will not be raised.

In respect of the Marcovitz jurisprudence, however it is dubious that such a clause
would be enforceable since the object of the clause being intrinsically religious the fact that
this clause is incorporated in a civil contract does not transform it in a civil obligation.

Another way to deal with the matter would be to use such a settlement as a proof of
the husband intent to give the religious divorce, proof that might be of some use in front of
the foreign tribunals or religious bodies. It seems that is with this idea in mind that Judge
Rousseau in a family law case, specifically mentioned the fact that the talaq had been given
by the husband during the audience. In an interview she expressly mentioned this fact.

C) Application and Adaptation of Muslim Norms by Religious Counselors

Does the way religious counselors exercise their functions make Muslim alternative
dispute resolution practices separate and insulated from the Quebec legal system? Or rather
do they and if so to what degree do they attribute functions to the legal system in the
resolution of the family conflict? Furthermore, to what degree are their constructions of
Muslim norms in conflict with, or rather compatible with or even influenced by Quebec
legislation?

1. Explicit recognition of the Quebec legal system

All religious counselors have mentioned that shari’a makes obligatory for Muslims
to obey the laws of the country in which they live. Nevertheless, in practice we have seen
that certain religious counselors give more particular attention to Canadian laws and legal
procedures than others. When it comes to divorce, we mentioned that two interviewees do
not give religious divorces but that they tell women divorced through the civil court that
their civil divorce is equivalent to an Islamic divorce. An additional counselor agrees with
the religious efficacy of a civil divorce, based on the fact that the husband must sign the
divorce papers. For the three of them, their point of view is justified by the similarity of the two procedures of divorce28.

Two other religious counselors who give religious divorces will either insist that a civil divorce take place first or in tandem with the religious procedure. The interviews reveal that they may do this for different reasons: first, they do not consider themselves to have the jurisdiction to divorce a couple as a judge does (the function of judge can only be delegated by the government), therefore their role cannot go beyond giving religious recognition to the civil procedure; second, to ensure that the spouses have a divorce that will be legally valid in their country of origin enabling them to remarry there (the two imams in question give certificated of divorce recognized by the state of Lebanon); third, because these imams are also certified by the state to conduct marriages recognized under civil law, they may feel an added responsibility towards upholding state law.

To summarize, five out of the thirteen religious counselors either equate the civil divorce process with the Islamic one or at the very least attribute a defective character to a divorce that is not done in the state legal system. Most of the religious counselors do not give any particular weight to the civil divorce from a religious perspective which is why they insist on the religious divorce instead, whether before or after a civil one. These would not conduct a marriage for a Muslim woman who does not have divorce papers from an imam even if she has a civil divorce.

In the case of the divorce settlement, two religious counselors (including one mentioned in the previous paragraph) have in a few rare cases taken part in a meeting between the two spouses and their lawyers (who were not Muslim) in order to help in reaching an agreement concerning child custody. They both mention that their religious advice was actually agreed upon by all present. In the case of financial settlements, many but not all religious counselors occasionally help to negotiate such agreements. Two have contacted the lawyers of the parties to revise the agreement and have it presented to the civil court dealing with the divorce for approval (one of them does this rarely but the other does so on a regular basis)29. Another suggests to his clients to have a post-separation

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28 "Yes. I consider them divorced religiously. Because the civil divorce is procedural, and the way they proceed, it is similar to Islamic ways."

29 "What I do, is mainly to try and reconcile people or to prepare a divorce agreement according to the shar`a (...) Often it is accepted. If both parties accept, it is accepted automatically by the judge (...) if one of the parties has a lawyer, we bring the lawyer or else the latter is shown the document. If there is no point of dispute, to court immediately (...) We draw up a pre-agreement that we present to a lawyer or a notary who will draft it correctly and then we need a lawyer to present it before a judge (...)

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agreement notarized, while most religious counselors leave the following steps entirely up to their clients.

Therefore, almost half of the thirteen religious counselors when it comes to divorce limit themselves to a narrow religious role while more than half expressly recognize in the civil legal system an at least complementary role to theirs, that is once the Islamic substance of the divorce itself or the settlement is ensured, the approval by the civil court judge guarantees better recognition and enforcement.

2. **Cases of insularity vis-à-vis Quebec legislation**

In the case of divorce itself, the husband will usually not have to justify his decision to divorce nor obtain his wife’s consent, while in the case of the wife seeking a divorce, a number of religious counselors will ask for serious reasons and the consent of the husband. This has lead to the result whereby even a wife divorced in a civil court may still have a difficult time obtaining a religious divorce from an imam preventing her from remarrying in the meantime. This is because in some cases the husband refuses even to sign the civil divorce papers and the judge delivers the judgment by default. Some imams may consider that the husband’s consent is lacking and refuse to accord a divorce. In contrast, Quebec law and legal practice does not apply rules specific to gender when it comes to establishing a divorce. The refusal of most religious counselors to give a unilateral divorce to the wife can be attributed not only to their interpretive attitude but to the fact that such an act is adjudicatory and that they do not attribute to themselves such an adjudicatory function.

In the case of ‘mediation’ relating to child custody (*hadana*), according to the majority of counselors, in the absence of a negotiated solution the specific rules of custody apply, which attribute default custody to the mother for young children until these reach a certain pre-established age (varying according the school of jurisprudence). Default custody goes to the father if the wife is non-Muslim. Quebec judges instead are expected to be gender neutral with regards to the parents and the children and utilize a case-by-case approach in their evaluation of the best interest of the child.

There is no strong convergence between Quebec law and arrangements for alimony or the division of property under most constructions of the *shari’a*. In relation to alimony, while according to most religious counselors, it is mandatory for the children, the ex-wife receives from her ex-husband only the amount of her marriage dower that is still pending.

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30 This term is used in a non-technical legal manner to mean when the religious counselor plays the role of helping the two parties reach an amicable and consensual agreement.
The obligation of the husband to maintain his wife lasts only until the expiration of the waiting period (‘idda, generally three months) following the divorce. Under Quebec law, alimony is based on both needs and available resources. Similarly, each spouse keeps his own assets, in sharp contrast with the default rules of family patrimony and the matrimonial regime in the province of Quebec which mandate an equal division of assets.

Religious counselors will not very often try to convince the wife to change her mind if she renounces a right she has under Quebec family law, but that does not exist under their reading of the shari‘a, such as alimony, a share of the assets or even child custody in certain cases, especially when it is the wife who is asking for a divorce.

In summary, the evidence shows that concerning most issues relating to family dispute resolution, most of the religious counselors apply a rather conservative reading of Muslim jurisprudence which shows no signs of influence from Quebec law.

### 3. Higher convergence or overlap with Quebec legislation

Although many religious counselors apply a rather patriarchal reading of Islamic law, certain religious counselors are conscious of the harm they could cause if they narrowly applied the shari‘a and will favor more equitable practices and interpretations. Many religious counselors although they recognize in principle the right of unilateral divorce by the husband, will resist giving the divorce until the wife consents even if it is the husband who initiates it. This is probably less due to Quebec law per se than to a combination of other factors, mainly: their reluctance to play an adjudicatory role, the non-recognition of unilateral divorce by the husband in most post-colonial Muslim state laws (and the recognition of the potentially ‘abusive’ character of such divorces in juristic discourse). Two religious counselors have even given a divorce to women without the consent of their husband in extreme cases, such as the non-payment of maintenance, abandonment or physical or mental harm. These solutions correspond to recognized rulings in at least four Muslim schools of law (except for the case of harm, which exists only in the Maliki school). The counselors who apply such rulings are younger imams (in their 30s), with assertive personalities who do not shy at exercising the function of adjudication when

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31 According to a religious counselor: "(…) sometimes the civil court will talk about dividing (…) the belongings in half. In Islam, if she is not working she is not part of the building of the properties, the belongings. She’s not supposed to take half. For the civil court it’s like mistreating the woman. But for Islam they consider the other half of dowry, the last one, as protecting the woman. She’s not supposed to take it through properties. (…) For the wife, no she’s on her own. She’s divorced and she’s supposed to look after her own things now.”
they feel that a woman is being excessively harmed by her marriage. These also criticize their peers for refusing systematically to give divorces to women without the consent of the husband.

In the case of mediation relating to child custody (hadana), the religious counselors underline the freedom of negotiation that the couple has in finding an acceptable solution. In the absence of a negotiated solution, a minority of the counselors gives the default rules less importance and feels that children are better with the mother at any age. This is more in tune with Quebec legal practice. Furthermore, religious counselors give much importance to the principle of the best interest of the child as it exists in the shari’a. A similar principle also exists in Quebec law. In the shari’a, custody is not only attributed according to the age of the child, but according to the capacity the parent has to fulfill his or her responsibility. It is up to the judge (or Muslim arbitrator) to exercise his discretion in establishing where the child’s best interest lies. Criteria are many, variable and can overlap, according to what the interviews reveal: these include emotional equilibrium, financial support, education and the presence or not of the extended family.

In the context of mediation relating to financial matters, some religious counselors recommend to the husband to agree to supporting financially his ex-wife after the divorce (beyond the three-month waiting period), in the shape of alimony. Two religious counselors base their calculations loosely on the guidelines of Quebec law. Two counselors make this conditional upon the husband being wealthy and a third limits it to cases where the ex-wife has no other means of subsistence or has no civic status in Canada (according to another). This is also based on precedent, since the Islamic schools of law give varying weight to the institution of mut’a (the sum given by the ex-husband to the ex-wife after the divorce, not to be confused with the institution of temporary marriage). However, the religious counselors do not consider this practice to be an obligation - as alimony is under Quebec law – but only a recommended act, which is the case in most Muslim juristic schools.

One religious counselor (one of the young assertive ones referred to above) rather than to prescribe the “separation of assets” has already asked husbands to take - out of the assets they would normally have kept - an amount for the ex-wife, in cases where the wife worked in the home without compensation and didn’t benefit from proper maintenance or
was abused. This has some similarity with Quebec legislation concerning alimony, which potentially has a compensatory element.

Finally, two counselors in cases where they are helping two spouses to negotiate a settlement, will let the parties divide their assets between themselves as they see fit, even if they choose to negotiate based on Quebec legal norms. Both have admitted that women tend to draw upon the rights they have under Quebec law to negotiate better conditions that they would obtain under default Islamic rules. This is because the shari’a generally allows the parties male and female the freedom to dispose of their property as they see fit during their lifetime.

A minority of religious counselors therefore refers to more equitable Muslim norms or let the parties negotiate on the basis of such norms. In some cases, the norm is constructed internally and applied without any reference to Quebec law (emphasis on consensual divorce, divorce of the wife without consent of the husband, the principle of the best interest of the child, division of assets) but in other cases, Quebec law is more clearly allowed to influence the substance of the resolution of the dispute within the framework of shari’a principles that enable such flexibility (reference to Quebec norms for alimony under the principle of ‘maintenance debts’ accrued during the marriage, or under the institution of mut’a, or the division of assets under the principle of freedom of disposal of one’s property through contractual stipulation).

4. Secularization of the shari’a, hybridization, complex internal dynamics

Jocelyn Cesari and Olivier Roy when writing about Muslims in the West, perceive in their practices and constructions of the shari’a a strong tendency towards secularization, consisting first and foremost in the separation between religion, morality and law. In her book *When Islam and Democracy Meet*, Cesari writes: “It is an unprecedented, but underappreciated, fact that Islamic legal norms are being reconstructed in the West as a function of the principles of dominant European law”. According to Cesari, this

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33 “Especially if she’s helping him. He’s working outside, she’s working at home (...) raising the children, cooking, cleaning, and yet she doesn’t feel like she’s the wife. He doesn’t sometimes buy her makeup, clothes, give her pocket money. He’s not fulfilling his responsibilities so sometimes I decide. (...) Ok you have part of the house, part of his assets. Because in Islam she is not asked to help the husband unless she wants to.”


‘reconstruction” is not done by Muslim scholars but by European and American judges. In addition, and this is more significant, Cesari collapses this phenomenon with the attitudes of the “majority of Muslims who accept the legal and institutional framework of the country where they live”. She later adds: “(...) the connections between religion, morality, and religious law are becoming more and more relaxed, hinting at a secularization of Islamic norms. The codes of behavior traditionally associated with Islamic observance can no longer be a requirement, once the Law of the Prophet has been adjusted to fit a secular code of national laws.”

A different construction of Islamic law may well be taking shape before Canadian courts also, but the question that concerns us is quite different: is this secularization of Islamic law only limited to the secular courts or is it affecting the perceptions and normative constructions of religious authorities on the ground? Religious counselors and for that matter, the Quebec Muslim public at large is not very informed about civil court judgments that concern Islamic law. None of the interviewees knew about the results of any such court decision. On the other hand, most religious counselors have admitted having a general knowledge of Quebec family laws and procedures and many have admitted to phoning lawyers or social workers on occasion in order to receive more precise information on these same topics. The information may trickle down in this way. But information does not necessarily lead to the adaptation of shari’a to national laws.

It is clear that the shari’a faces problems of enforcement in Western secular legal systems. However, this does not mean that Muslim legal categories do not influence Muslim discourse and practice. To know the extent of this influence, more socio-anthropological research needs to be conducted on the process of family dispute resolution, where the discourse as well as behavior of all parties involved can be studied. These studies should be spread out in time in order to detect how the relationship of Muslims with the shari’a is changing.

Beyond the question of enforcement, the claim of the separation of religious law, morality and religion, is plainly invalid (accepting for the sake of argument a contemporary dictionary definition of these terms). In the process of family dispute resolution, religious counselors resort regularly to legal categories (i.e. obligation, prohibition, validity and invalidity) and acts (such as expressing consent, withholding maintenance, pronouncing a divorce). They deal at the same time (and often within the same breath) with moral

36 Ibid., 57.
37 Ibid., 62.
categories and acts such as reprimanding a spouse for acts that are considered blameworthy (makruh; for example, verbal harm on the part of the husband, disobedience on the part of the wife) or encouraging acts that are praiseworthy (mandub; for instance, paying a sum of alimony to one’s ex-wife). All of these categories of acts are part of a single religious taxonomy inherent to the Muslim legal tradition, based on the scriptural texts of the Qur’an and the Sunna and referred to by religious scholars. They are religious also inasmuch as they are tied with express reminders of sin, reward, divine blame and divine praise which have consequences in this life and the afterlife. The discourse of the religious counselors is replete with such references to how God evaluates human action and their consequences.

We already mentioned that seven religious counselors out of thirteen recognize in the civil legal system an at least complementary role to theirs, that is once the Islamic substance of the divorce itself or the settlement is ensured, the approval by the civil court judge ensures better enforcement. A minority of religious counselors also refer to more equitable norms or let the parties negotiate on the basis of such norms, whether based explicitly on Quebec norms or not. The theory of secularization only considers one side of the equation, i.e. the presumed effect on shari’a of living in a Western society with a secular law. However, no attention is given to the internal dynamics of the shari’a as a discursive tradition. The notion of hybridity offered by Pearl and Menski seems more balanced, but it is still limited because it seems to refer to the combination of two fixed essences while not furthering our understanding of the internal discursive logic by which an external norm may be accepted or rejected by the shari’a. Indeed, many specialists on Islam when they write about the shari’a tend to presume that it is an unchanging code of obligations.

However, the discourse of the religious counselors shows a more internally diverse and somewhat more fluid picture. When there is convergence and overlap with Quebec law, this is due to a number of factors, many of them socio-legal factors not particular to the Western secular context. One of these factors is the pervasive influence of an ongoing discourse of reform in the Muslim world which stretches at least as far back as the mid-19th century and has reacted to and affected local modernization projects (such as the

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38 This interdependence of legal, moral and religious considerations in the discourse of North American imams is also corroborated by Aida Othman’s study of American imams, And Sulh is Best, 267-273.
39 For the concept of discursive tradition applied to Islam, see Talal Asad, The Idea of an Anthropology of Islam, Washington, D.C., Center for Contemporary Arab Studies, Georgetown University, 1986.
codification and the reform of marriage and divorce laws there)⁴¹; this has led to the wider acceptance of selecting rulings from a variety of legal schools that are deemed to better fit modern social conditions as well as an acceptance of state intervention into rules of evidence and procedure. For example, in matters of divorce, often the rulings of the Maliki school (the main school in North and West Africa) have been selected for their relatively more generous provisions to wives. As well, evidence and procedural rules have rendered the unilateral divorce by the husband more difficult to obtain. As illustrated above, a number of aforementioned counselors but not all show signs of having internalized some of these shifts. Furthermore, some provisions and principles of the shari´a are general and flexible enough to allow for overlap with Quebec law: the principle of mutual consent, which renders the civil divorce acceptable in shari´a terms; the best interest of the child, the institution of mut´a (or gift of consolation) which has parallels with alimony, the right of free disposal of one’s wealth through contractual stipulation which enables the sharing of assets are some examples.

To summarize, the practice of the religious counselors as revealed through their discourse reveals a mixed picture. First, with regards to the process, less than half of them give religious divorces in a manner completely disconnected to the civil legal system, while more than half of them see the civil legal system as serving a complementary role to theirs in terms of better recognition and enforcement. This potential complementarity of roles is enhanced by the fact that by far the most prominent functions of the religious counselor are advice and conciliation followed by mediation of divorce. Second, concerning the norms that the religious counselors refer to, in most cases, the use of Muslim norms shows no signs of obvious influence from Quebec law, again crediting the insular trend. Nevertheless, a minority of religious counselors refer to shari´a norms more compatible with or overlapping with Quebec legal norms or let the parties negotiate on the basis of such norms, whether explicitly or not. Here, the internal diversity of Muslim norms, the flexibility of certain shari´a principles and the potential influence of historical dynamics of reform inherent to the Islamic legal tradition are factors as important to the understanding of this phenomenon of compatibility and overlap as is the influence of Quebec socio-legal factors.

⁴¹ For a similar discussion, see Schirin Amir-Moazami and Armando Salvatore, “Gender, Generation and Reform of Traditions: From Muslim Majority Societies to Western Europe”, in Stefano Allievi and Jorgen S. Nielsen, eds. Muslim Networks and Transnational Communities in and across Europe, Leiden; Boston, Brill, 2003, 52-77.
Conclusion

The qualitative empirical research we have undertaken from 2005 to 2007 has enabled us to shed light on the diversity and the complexity of the perceptions and experience related to family dispute resolution within Muslim communities. The analysis of the different sets of interviews has led us to conclude that there is no such thing as an unofficial and organized Muslim legal system in Montreal which may exist parallel to the state justice system. Instead we drew attention to the existence of a varying set of adaptable processes revolving around individual religious counselors and that depend more on his advice as well as the negotiation and the consensus of the couple backed by their good will rather than on any final adjudicatory role of the counselor. In fact, the latter’s authority is relative, since the practice of shopping for convenient solutions between counselors seems widespread among Muslims.

It seems that some Muslim women when facing family conflicts sought the help of a religious counselor in one of or all three of the following capacities: as advisor to obtain proper religious guidance, as conciliator in the absence of important family members, as a figure having the moral authority to pressure the husband into better moral conduct. It seems that that there is here a high correlation among the participants between frequenting mosques and consulting an imam or religious counselor. According to a number of persons interviewed, immigrant Muslim women faced with family conflicts will appreciate the help of civil or religious actors that know their culture, their language, are easily accessible and most importantly are dealing with the matter in a manner devoid of technicalities. Other women will seek the help of the religious counselor or of their consulate in order to obtain a divorce that will be recognized in their country of origin (as they believe sometimes erroneously that the civil divorce will not be recognized). This is extremely important for them as they live both in Canada and in their country of origin at least on a psychological level. The majority of Muslim women interviewed entertain a relationship with norms that is result-oriented.

While most of the actors are aware of the different sets of norms that can rule the life of a Muslim woman: Quebec/Canadian norms, country-of-origin norms, religious norms, the civil actors seem to refuse the idea that the Quebec legal system could recognize such norms. However for a small minority, there is a possibility of internormativity, that is of encounter, within the civil or the religious system, of religious norms and civil norms. On the religious side, some religious counselors have accepted to act as mediators to negotiate
a divorce settlement, and on the civil side, it seems that some social workers have managed to help obtain an interim divorce settlement (to be approved by the judge) including a clause obliging the husband to give a religious divorce.

But again, apart from those specific examples, it seems that for both religious and civil actors norms other than their own are sometimes acknowledged as an important element of the context of the parties but that nevertheless do not have any independent force inside their own system or tradition.

Finally, while most of the religious counselors apply a rather patriarchal reading of Islamic law which shows no signs of influence from Quebec laws, a minority of them refer to more equitable Muslim norms be they constructed internally without reference to Quebec law or in interaction with such law. In this respect, the internal diversity of Muslim norms, the flexibility of certain shari´a principles and the potential influence of historical dynamics of reform inherent to the Islamic legal tradition are factors as important to the understanding of this phenomenon of compatibility and overlap as is the influence of Quebec socio-legal factors. The insularity of most of the religious counselors regarding their Muslim norms does not repeat itself regarding their view of divorce as process. Indeed less than half of them give a religious divorce in a completely disconnected way from the legal reality of Quebec while the majority of religious counselors expressly recognize in the civil legal system an at least complementary role to theirs: that is once the religious counselor ensures the Islamic substance of the divorce itself or the settlement, the approval by the civil court judge guarantees better recognition and enforcement.


Schirin Amir-Moazami and Armando Salvatore, “Gender, Generation and Reform of Traditions: From Muslim Majority Societies to Western Europe”, in Stefano Allievi and Jorgen S. Nielsen, eds. Muslim Networks and Transnational Communities in and across Europe, Leiden; Boston, Brill, 2003, 52-77.


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