Chapter 27

Canadian Muslim Women and Resolution of Family Conflicts: An Empirical Qualitative Study (2005–2007)

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This chapter 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 2005, in the province of Quebec arbitration of family disputes was prohibited in general (art. 2639 al. 1 of the Quebec Civil Code: ‘Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration’).

At that time, 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 as an important part of the informal legal landscape in Western societies such as Great Britain, the United States and Canada. For instance, in Great Britain, ‘Shari’a courts’ can pass arbitration awards through the use of the arbitration act of 1996 and some research has addressed this phenomenon although not its actual process.

1 Arbitration Act, L.O. 1991 C. 17 was amended in 2005 by the Act to amend the Arbitration Act, the Child and Family Services Act, the Family Law which specified that only Canadian law can be used for family arbitration.


3 See I. Yilmaz, ‘Muslim Alternative Dispute Resolution and Neo-Ijtihad in England’.
Law and Religion in the 21st Century

The aim of the project was to comprehend the ways that Montreal Muslim women in particular seek to resolve the family problems they encounter. 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 direct experience of negotiating family conflicts while six expressed opinions. Furthermore, we sought to establish a broader picture through interviews with a number of different agents who are involved in family conflict resolution. A total of 37 persons were interviewed including: five community workers, four social workers, 13 Muslim religious counsellors (five full-time imams of mosques, six part-time or occasional imams, two non-imams), six accredited family mediators, one lay mediator, two judges and six lawyers.

This chapter focuses on two interrelated questions that were at the centre of this research:

1. Does there exist in the Montreal Muslim communities a parallel justice system for the resolution of family disputes?
2. To what degree are the Quebec civil justice system and Muslim dispute resolution processes insular or, on the contrary, overlapping?

In its last section, the chapter examines the way the debate has been framed around faith-based arbitration.

Functions of Agents in Family Disputes According to Women and Religious Counsellors

Many women sought out the help of a number of different agents, but for different reasons. 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 other hand other women wrongly associated accredited mediation with the informal mediations they experienced with religious counsellors, social workers and community workers.

4 Three of them had been married religiously in Canada, three in their country of origin.

5 Amongst the 18 women interviewed, 13 dealt with lawyers (nine dealt with legal aid lawyers).
or community workers and therefore did not see the use of it. Also, one woman
had been divorced in Tunisia (her father represented her) and another one had been
in contact with the Algerian consulate in Canada in order to divorce.

Dissimilarity of Functions with Some Rare Overlap between Civil Agents and
Religious Counselors

The functions attributed to civil and religious agents by the women respondents
are presented in Table 27.1.

It is worth noting that there exists a correlation between frequenting mosques
and consulting a religious counsellor since five out of the six women who consulted
an imam say they have a more ‘integral’ relationship to religion. However the
fact that the majority of the religious counsellors characterize their clientele as
essentially ‘less practising’ Muslims, rarely seen in mosques, leads one to think
that ‘selective and discrete’ Muslims also have recourse to them.6

Regarding recourse to the official legal system,7 it appears that a number of
Muslim women were not intending to use the Quebec tribunals but were ‘pushed’
to do so. For instance, a legal aid lawyer we interviewed mentioned that a
substantial number of their Muslim clientele were referred to them by the social
welfare organizations. 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 requests 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 her right to alimony. Another avenue by which Muslim women

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and G.R. Woodman (eds), People’s Law and State Law: The Bellagio Papers, Dordrecht and
Cincinnati, 1985, pp. 207–16.
are directed towards the tribunal is through cases of domestic violence. In those
cases, social services will strongly push women to end their marriage.
The religious counsellors confirm what the women participants assert as to their
main functions of advisor and conciliator. A minority (six out of 13) add mediation
of separation agreements, which represents 2 per cent to 30 per cent of their cases
and deals with: mahr, child custody, alimony, division of family assets.

‘Adjudication’?

Religious counsellors presented themselves as the advisors to both spouses or
as a neutral party. When they play the role of mediator in the context of divorce
agreements, a few religious counsellors 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 counsellor 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 neither the religious counsellor nor the
parties recognize in the counsellor an adjudicatory authority that can replace the
state judge.

Furthermore most of the religious counsellors admit openly that clients
(including women) ‘shop for’ the solution most advantageous to themselves by
comparing the opinions of different imams. In addition, some religious counsellors
mentioned that many Muslim women know their 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.

Clear or Unclear Interaction between Norms/Agents

According to Canadian Muslim Women

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: their motivation is result-oriented (no hierarchy between systems). 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 foreign state). Third, some women will still give a prominent place to the
State legal system while criticizing it for not being fully adapted to their profile
and requiring that such adaptation should be done (Quebec-born converts and
second-generation immigrants or immigrants who had arrived in Quebec at a
very young age). Fourth and finally, one woman put above all the religious
normative system. She was Algerian and wanted to make sure that following
the Quebec law would not go against the precepts of her faith (she made a clear
1 distinction between Shari’a and the Algerian legislation referring to the first).  
2 She nevertheless used the Quebec Court.  
3 Most women considered that Muslim religious norms were compatible with  
4 Canadian law due to the equitable rights which Islam accords women. Those who  
5 found the two systems incompatible were of the opinion that Shari’a or Muslim  
6 religious law placed women in a subordinate position and that Muslim religious  
7 norms should be adapted to the Canadian context.  
8 Regarding the contemporary debates relating to religious tribunals, most of  
9 the women said they had not followed closely these debates (seven said that they  
10 were not aware of them). The majority were against the creation of such religious  
11 tribunals because they thought that women would not be protected in such  
12 institutions or because they did not see the use of such tribunals since according  
13 to them the decisions of Canadian courts were not contrary to Islamic values. Two  
14 women thought that this was not the time for creating such religious tribunals.  
15 Two other women favoured the creation of such tribunals as they would take into  
16 account the specificities of the Muslim community.  
17 Finally, we noted that in the eyes of these women there did not exist an  
18 unofficial Muslim legal system in Montreal (that is, an organized, coherent and  
19 complete set of norms, processes and institutions).  
20  
21 According to Civil Agents  
22  
23 Non-negotiable norms and insularity  Most of the civil agents describe their work  
24 with Muslim couples as requiring adaptation to their cultural diversity as well as  
25 an understanding of their religious values. For them, however, the values of the  
26 Canadian and Quebec Charters and of the Quebec Civil Code are not negotiable.  
27 For instance, all of them mentioned that they would not take into consideration  
28 religious norms that would not be in the best interest of children. Furthermore,  
29 according to the large majority of them, there is no room for legal pluralism in the  
30 sense of an explicit recognition and application of religious norms by the State  
31 legal system.  
32  
33 Plurality of norms  While the large majority of civil agents share a view of  
34 their legal system as being insular to any other norms, a minority seems to think  
35 otherwise, enabling to some extent a certain inter-normativity that is a certain  
36 encounter between religious norms and civil norms within the civil forum. Indeed  
37 a social worker, based on her knowledge of the laws of the country of origin of  
38 her client, mentioned that she makes sure that the husband agrees in the interim  
39 divorce settlement to give the religious divorce. When asked what the reaction of  
40 the Quebec judge has been to this clause, she replied that once she has explained  
41 to the judge the importance of getting this religious divorce, usually the judge will  
42 agree to homologate the interim divorce settlement. It seems that in her mind,  
43 since the settlement was applicable only in the interim, the issue of enforceability  
44 would not be raised.
Other agents dealt with Muslim norms but in an implicit manner. For instance, an accredited mediator gave us the example of the payment of a lump sum (without mentioning the word *mahr*) being included in a separation agreement.

Another way to deal with the matter is to use such a settlement as proof of the husband’s intent to grant the religious divorce, proof that might be of some use before the foreign tribunals or religious bodies. It seems that it is with this idea in mind that Judge Rousseau, in a family law case, specifically mentioned in her judgment the fact that the *talaq* had been given by the husband during the hearing.8

According to Religious Counsellors

All religious counsellors mentioned that Shari’a makes it obligatory for Muslims to obey the laws of the country in which they live. Certain religious counsellors give more particular attention to Canadian laws and legal procedures than others. When it comes to divorce, five out of the 13 religious counsellors either equate the civil divorce process with the Islamic one, or at the very least, attribute a defective character to a divorce which is not sanctioned by the state legal system. The other religious counsellors do not give any particular weight to the civil divorce which is why they insist on the ‘Islamic’ divorce instead, whether effected before or after a civil one. The latter would not conduct a marriage for a Muslim woman who did not have divorce papers from an imam even if she had a civil divorce.

In the case of the divorce settlement, two religious counsellors 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 reach 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, some religious counsellors occasionally help to negotiate such agreements. Two have contacted the lawyers of the parties to revise the agreement and had it presented to the civil court dealing with the divorce for approval. Another suggested his clients have a post-separation agreement notarized, while most religious counsellors leave the following steps (outlined in Table 27.2) entirely up to their clients.

<table>
<thead>
<tr>
<th>Table 27.2 Reading of Shari’a</th>
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<tr>
<td>Majority of religious counsellors</td>
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<td>Access to divorce limited for wife</td>
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<tr>
<td>Child custody rules: age and gender</td>
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<td>Dower, limited maintenance</td>
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<td>Each spouse keeps own assets</td>
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</tbody>
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8 S.I. c. E.E., Cour supérieure (C.S.), Laval, 540-12-006295-992, AZIMUT/SOQUIJ, AZ-50331796. 65 & 66.
Cases of Insularity vis-à-vis Quebec Legal Norms

Although many religious counsellors apply a rather patriarchal reading of the Shari’a, as illustrated by the table above, certain religious counsellors are conscious of the harm they could cause if they narrowly applied it and therefore refer to more equitable norms or allow the parties to negotiate on the basis of such norms. In some cases, the norm is constructed endogenously and applied without any reference to Quebec law (emphasis on consensual divorce; divorce of the wife without consent of the husband; principle of the best interest of the child with multiple criteria, appreciation in concreto, discretion in evaluating; division of assets). In other cases, Quebec law is more clearly brought to bear on the substance of the resolution of the dispute within a 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).

Here, the internal diversity of juristic opinions, the flexibility of certain principles and the potential influence of discourses of reform inherent to the Islamic rural tradition are agents crucial to an understanding of how these religious counsellors’ readings of the Shari’a may overlap, or otherwise interact with, Quebec law.

In conclusion, we found there was no such thing as an unofficial and organized Muslim legal system in Montreal that may exist parallel to the state justice system. Rather we noted the existence of a varying set of adaptable processes revolving around individual religious counsellors who, depending on the counselor and the issue, grant varying degrees of authority to Quebec family law norms and courts.

What Lessons Regarding the Issues of Faith-Based Arbitration and the Secularization of Shari’a?

The debates on faith-based arbitration in Canada (Quebec and Ontario), as well as in the United Kingdom, have concentrated on opposing religious systems against state systems (without acknowledging, for instance, the role of the consulates), placing more emphasis on the idea that faith-based arbitration questions the universal principles of justice, of equality before the law, and of common citizenship.

During these debates, some claimed that the state system was inherently good; others proclaimed the same for the religious system. State law was portrayed as being the only one that counted, as being homogenous and objective (reasonable citizen being the standard). Regarding local religious norms, some presupposed that, in time, these norms would be acculturated and secularized and that it was inevitable that religious bodies would seek to use the avenues that State law was offering them (namely arbitration acts) in order to have more power over their ‘clientele’ and, in a very symbolic and formal fashion, by setting up faith-based arbitration boards whose awards could be recognized by State law.
However, the situation on the ground seems far more complex. Indeed, the interaction between state law and religious norms takes on multiple facets, one of which being the implicit normativity we described in this chapter. Indeed there exists a number of ways by which a Muslim can have his/her religious or cultural norms taken into consideration in a separation agreement (see also consent orders in England). Peter Komos, an NDP member of the Ontario Parliament, during the debate relating to the amendment of the arbitration act in Ontario, stated:

Will there still be religious arbitration? You bet your boots. We have public judges who are impartial, neutral in every respect, who don’t bring ethnic biases and religious biases into the courtroom. Mark my words: there will be rabbis, there may well be pastors of any number of Christian faiths, there could be priests from the Catholic faith or the Anglican church, religious leaders from Sikh communities and imams from Muslim communities who will do what’s required to register as arbitrators and who will be conducting arbitrations, who will be purporting to enforce and apply the law of Ontario but will be doing it with the inherent bias of their faith.1

Therefore when one is concerned by the power play at stake during the negotiation of the consequences of the marriage breakdown, one should not only look into the formal text of the separation agreements but also into the process that led to it. Indeed some studies have shown that in mediation often the weaker party is encouraged to accept a settlement considerably lower than if they had gone through an adversarial process.10 This is not to say that all Muslim women are vulnerable in such negotiations as we have seen that some of them practice ‘bricolage’ and forum shopping. In that sense they are agents in a situation of legal pluralism.11

Furthermore, as we have seen in Quebec, not all religious bodies want to be ‘recognized’ by the State. The notion of semi-autonomous social field developed by Sally Moore (‘The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance’)12 is useful here as it enables the conceptualization of relations between a state order and a religious one where the latter does not rely upon state law to determine its power or authority.

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Furthermore, the notion of secularization of Shari’a does not explain adequately the dynamics of the social field in question. Indeed, not only does the discourse of the religious counsellors not conform to the idea of a separation of law, morality and religion, it also shows an internally diverse and fluid picture. This picture reveals to us that when Shari’a converges or overlaps with Quebec law, our analysis gains in depth from moving between the viewpoints of the normative orders concerned. From the perspective of the Quebec legal order, Shari’a may seem to either yield or mutate when the parties and/or the religious counsellor give weight to the former in the family dispute process. But the same phenomenon can also be explained, at least in part, by endogenous agents if we recall the later legal history of the wider Muslim world, which involves the spread of discourses and practices of reform (from the mid-nineteenth century onward) that were influenced by and shaped legal modernization projects there (i.e. the codification and reform of marriage and divorce laws). This eventually led to the wider acceptance among Muslim scholars of selecting rulings from a variety of juristic schools of thought, according to what they deem better to fit modern social conditions, as well as an acceptance of state intervention into rules of evidence and procedure. A number of religious counsellors have quite apparently interiorized this pragmatic and eclectic attitude to the Islamic juristic tradition. However this is not to say that the context has no influence nor that the clients of these religious counsellors do not engage in a discussion with some of them, therefore adding some diversity.

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