

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 2005,¹ 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.² 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.³

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.

2 See A. Quraishi and N. Syeed-Miller, *No Altars: a Survey of Islamic Family Law in the United States*, www.law.emory.edu/IFL/cases/USA.htm (downloaded 7 December 2004), pp. 35–7; J. Cesari, *L’islam à l’épreuve de l’Occident*, Paris, 2004, pp. 94–6; W. Menski, ‘Muslim Law in Britain’, in *Journal of Asian and African Studies* 62 (2001), pp. 155–8; S. Bano, ‘Islamic Arbitration and Human Rights in Britain’, in *Journal of Law, Social Justice and Global Development*, Special Issue, 1 (2007) available at www2.warwick.ac.uk/fac/soc/law/elj/ugd/2007_1/bano/, (downloaded 11 October 2008); I. Yilmaz, ‘Muslim Alternative Dispute Resolution and Neo-Ijtihad in England’, in *Alternatives. Turkish Journal of International Relations* 2:1 (2003) available at www.alternativesjournal.net/volume2/number1/yilmaz.htm (downloaded: 24 February 2005). For Ontario, Canada, see M. Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, attorney general report 2004, available at www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/.

3 See I. Yilmaz, ‘Muslim Alternative Dispute Resolution and Neo-Ijtihad in England’.

1 The aim of the project was to comprehend the ways that Montreal Muslim 1
 2 women in particular seek to resolve the family problems they encounter. We 2
 3 therefore sought out, through semi-directive interviews, the experience and 3
 4 opinions of 24 women, representative of a variety of geographic and ethnic origins 4
 5 and immigration histories and who also reflected different relationships to Islam 5
 6 as a religion. Eighteen of the 24 women had direct experience of negotiating 6
 7 family conflicts while six expressed opinions. Furthermore, we sought to establish 7
 8 a broader picture through interviews with a number of different agents who are 8
 9 involved in family conflict resolution. A total of 37 persons were interviewed 9
 10 including: five community workers, four social workers, 13 Muslim religious 10
 11 counsellors (five full-time imams of mosques, six part-time or occasional imams, 11
 12 two non-imams), six accredited family mediators, one lay mediator, two judges 12
 13 and six lawyers. 13

14 This chapter focuses on two interrelated questions that were at the centre of 14
 15 this research: 15

- 16 1. Does there exist in the Montreal Muslim communities a parallel justice 16
- 17 system for the resolution of family disputes? 17
- 18 2. To what degree are the Quebec civil justice system and Muslim dispute 18
- 19 resolution processes insular or, on the contrary, overlapping? 19
- 20 20
- 21 21

22 In its last section, the chapter examines the way the debate has been framed around 22
 23 faith-based arbitration. 23

24 24

25 26 **Functions of Agents in Family Disputes According to Women and Religious** 26 27 **Counsellors** 27

28 28

29 Many women sought out the help of a number of different agents, but for 29
 30 different reasons. For example, amongst the 18 (of 24) women interviewed who 30
 31 had experienced family conflict, five consulted with both a religious counsellor 31
 32 and a lawyer, while one woman consulted solely with a religious counsellor.⁴ 32
 33 Amongst the women interviewed, most had used the services of a social worker 33
 34 or community worker and some had consulted lawyers, mainly from legal aid 34
 35 clinics.⁵ None of them had seen an accredited family mediator. Two reasons 35
 36 would appear to account for this: on the one hand accredited mediators did not 36
 37 speak their mother tongue or come from their ethno-cultural community, and on 37
 38 the other hand other women wrongly associated accredited mediation with the 38
 39 informal mediations they experienced with religious counsellors, social workers 39

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41 _____ 41
 42 4 Three of them had been married religiously in Canada, three in their country of 42
 43 origin. 43

44 5 Amongst the 18 women interviewed, 13 dealt with lawyers (nine dealt with legal 44
 45 aid lawyers). 45

1 or community workers and therefore did not see the use of it. Also, one woman
2 had been divorced in Tunisia (her father represented her) and another one had been
3 in contact with the Algerian consulate in Canada in order to divorce.

4 5 *Dissimilarity of Functions with Some Rare Overlap between Civil Agents and* 6 *Religious Counselors*

7
8 The functions attributed to civil and religious agents by the women respondents
9 are presented in Table 27.1.

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

16 Regarding recourse to the official legal system,⁷ it appears that a number of
17 Muslim women were not intending to use the Quebec tribunals but were 'pushed'
18 to do so. For instance, a legal aid lawyer we interviewed mentioned that a
19 substantial number of their Muslim clientele were referred to them by the social
20 welfare organizations. Indeed in Quebec, social solidarity (social welfare) only
21 intervenes when family solidarity does not exist or does not work. Hence a married
22 or divorced woman who requests social welfare needs to prove that her husband
23 or ex-husband is unable to pay her any alimony and therefore will need to go in
24 court to exercise her right to alimony. Another avenue by which Muslim women

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27 **Table 27.1 Function Attributed by Women Respondents**

28 Civil agents	28 Religious counsellors
29	29 Religious advice
30	30 (2 Canadian Muslim Women (CMW))
31 Reconciliation: social and community	31 Reconciliation (divorce prevention)
32 workers (18); lawyers; family abroad	32 and positive moral influence on husband
33	33 (1 CMW)
34 Negotiation of separation agreements	34 Mediation of separation agreements
35 (accredited mediators (2), lawyers,	35 (0 CMW)
36 social and community workers)	36
37 Ending the matrimonial relationship:	37 'Religious' divorce:
38 judges (separation from bed	38 as witness (mainly)
38 and board, divorce);	38 (2 CMW)
39 consulates of country of origin (2)	39

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41 6 J. Cesari, *L'islam à l'épreuve de l'Occident*, pp. 72–88.

42 7 M. Chiba, 'The Channel of Official Law to Unofficial Law in Japan', in A. Allott
43 and G.R. Woodman (eds), *People's Law and State Law. The Bellagio Papers*, Dordrecht and
44 Cincinnati, 1985, pp. 207–16.

1	are directed towards the tribunal is through cases of domestic violence. In those	1
2	cases, social services will strongly push women to end their marriage.	2
3	The religious counsellors confirm what the women participants assert as to their	3
4	main functions of advisor and conciliator. A minority (six out of 13) add mediation	4
5	of separation agreements, which represents 2 per cent to 30 per cent of their cases	5
6	and deals with: <i>mahr</i> , child custody, alimony, division of family assets.	6
7		7
8	<i>'Adjudication'?</i>	8
9		9
10	Religious counsellors presented themselves as the advisors to both spouses or	10
11	as a neutral party. When they play the role of mediator in the context of divorce	11
12	agreements, a few religious counsellors mention that they sometimes give a	12
13	decision or shift their role to that of arbitrator when the parties cannot come to	13
14	an agreement on their own. However, the result is never considered obligatory	14
15	or final by either the counsellor or the parties, and the mutual consent of the	15
16	parties must always be obtained regarding the content of the agreement itself	16
17	(which can be oral or written). Thus neither the religious counsellor nor the	17
18	parties recognize in the counsellor an adjudicatory authority that can replace the	18
19	state judge.	19
20	Furthermore most of the religious counsellors admit openly that clients	20
21	(including women) 'shop for' the solution most advantageous to themselves by	21
22	comparing the opinions of different imams. In addition, some religious counsellors	22
23	mentioned that many Muslim women know their rights under Quebec law and that	23
24	on several occasions women referred to and argued on the basis of Quebec law in	24
25	negotiations with their husbands.	25
26		26
27		27
28	Clear or Unclear Interaction between Norms/Agents	28
29		29
30	<i>According to Canadian Muslim Women</i>	30
31		31
32	Amongst women participants, four different perceptions of family norms can be	32
33	noted. First, some women will choose the norm that has the best outcome for	33
34	themselves: their motivation is result-oriented (no hierarchy between systems).	34
35	Second, other women will have internalized the idea that the state legal system	35
36	is the prominent system while comparing it to other legal systems (religious	36
37	or foreign state). Third, some women will still give a prominent place to the	37
38	State legal system while criticizing it for not being fully adapted to their profile	38
39	and requiring that such adaptation should be done (Quebec-born converts and	39
40	second-generation immigrants or immigrants who had arrived in Quebec at	40
41	a very young age). Fourth and finally, one woman put above all the religious	41
42	normative system. She was Algerian and wanted to make sure that following	42
43	the Quebec law would not go against the precepts of her faith (she made a clear	43
44		44

1 distinction between Shari'a and the Algerian legislation referring to the first). 1
2 She nevertheless used the Quebec Court. 2
3 Most women considered that Muslim religious norms were compatible with 3
4 Canadian law due to the equitable rights which Islam accords women. Those who 4
5 found the two systems incompatible were of the opinion that Shari'a or Muslim 5
6 religious law placed women in a subordinate position and that Muslim religious 6
7 norms should be adapted to the Canadian context. 7
8 Regarding the contemporary debates relating to religious tribunals, most of 8
9 the women said they had not followed closely these debates (seven said that they 9
10 were not aware of them). The majority were against the creation of such religious 10
11 tribunals because they thought that women would not be protected in such 11
12 institutions or because they did not see the use of such tribunals since according 12
13 to them the decisions of Canadian courts were not contrary to Islamic values. Two 13
14 women thought that this was not the time for creating such religious tribunals. 14
15 Two other women favoured the creation of such tribunals as they would take into 15
16 account the specificities of the Muslim community. 16
17 Finally, we noted that in the eyes of these women there did not exist an 17
18 unofficial Muslim legal system in Montreal (that is, an organized, coherent and 18
19 complete set of norms, processes and institutions). 19
20 20
21 *According to Civil Agents* 21
22 22
23 *Non-negotiable norms and insularity* Most of the civil agents describe their work 23
24 with Muslim couples as requiring adaptation to their cultural diversity as well as 24
25 an understanding of their religious values. For them, however, the values of the 25
26 Canadian and Quebec Charters and of the Quebec Civil Code are not negotiable. 26
27 For instance, all of them mentioned that they would not take into consideration 27
28 religious norms that would not be in the best interest of children. Furthermore, 28
29 according to the large majority of them, there is no room for legal pluralism in the 29
30 sense of an explicit recognition and application of religious norms by the State 30
31 legal system. 31
32 32
33 *Plurality of norms* While the large majority of civil agents share a view of 33
34 their legal system as being insular to any other norms, a minority seems to think 34
35 otherwise, enabling to some extent a certain inter-normativity that is a certain 35
36 encounter between religious norms and civil norms within the civil forum. Indeed 36
37 a social worker, based on her knowledge of the laws of the country of origin of 37
38 her client, mentioned that she makes sure that the husband agrees in the interim 38
39 divorce settlement to give the religious divorce. When asked what the reaction of 39
40 the Quebec judge has been to this clause, she replied that once she has explained 40
41 to the judge the importance of getting this religious divorce, usually the judge will 41
42 agree to homologate the interim divorce settlement. It seems that in her mind, 42
43 since the settlement was applicable only in the interim, the issue of enforceability 43
44 would not be raised. 44

1 Other agents dealt with Muslim norms but in an implicit manner. For instance, 1
 2 an accredited mediator gave us the example of the payment of a lump sum (without 2
 3 mentioning the word *mahr*) being included in a separation agreement. 3

4 Another way to deal with the matter is to use such a settlement as proof of the 4
 5 husband's intent to grant the religious divorce, proof that might be of some use before 5
 6 the foreign tribunals or religious bodies. It seems that it is with this idea in mind that 6
 7 Judge Rousseau, in a family law case, specifically mentioned in her judgment the fact 7
 8 that the *talaq* had been given by the husband during the hearing.⁸ 8

9 10 *According to Religious Counsellors* 10

11
12 All religious counsellors mentioned that Shari'a makes it obligatory for Muslims 12
 13 to obey the laws of the country in which they live. Certain religious counsellors 13
 14 give more particular attention to Canadian laws and legal procedures than others. 14
 15 When it comes to divorce, five out of the 13 religious counsellors either equate 15
 16 the civil divorce process with the Islamic one, or at the very least, attribute 16
 17 a defective character to a divorce which is not sanctioned by the state legal 17
 18 system. The other religious counsellors do not give any particular weight to the 18
 19 civil divorce which is why they insist on the 'Islamic' divorce instead, whether 19
 20 effected before or after a civil one. The latter would not conduct a marriage for a 20
 21 Muslim woman who did not have divorce papers from an imam even if she had 21
 22 a civil divorce. 22

23 In the case of the divorce settlement, two religious counsellors have in a few 23
 24 rare cases taken part in a meeting between the two spouses and their lawyers 24
 25 (who were not Muslim) in order to help reach an agreement concerning child 25
 26 custody. They both mention that their religious advice was actually agreed upon 26
 27 by all present. In the case of financial settlements, some religious counsellors 27
 28 occasionally help to negotiate such agreements. Two have contacted the lawyers 28
 29 of the parties to revise the agreement and had it presented to the civil court dealing 29
 30 with the divorce for approval. Another suggested his clients have a post-separation 30
 31 agreement notarized, while most religious counsellors leave the following steps 31
 32 (outlined in Table 27.2) entirely up to their clients. 32

33 34 35 **Table 27.2 Reading of Shari'a** 35

36 Majority of religious counsellors	Quebec law	36
37 Access to divorce limited for wife	Gender-neutral access to divorce	37
38 Child custody rules: age and gender	Best interest of child	38
39 Dower, limited maintenance	Alimony according to needs and resources	39
40 Each spouse keeps own assets	Equal division of assets	40
41		41

42
43 ⁸ S.I. c. E.E., Cour supérieure (C.S.), Laval, 540-12-006295-992, AZIMUT/SOQUIJ, 43
 44 AZ-50331796. 65 & 66. 44

1 Cases of Insularity vis-à-vis Quebec Legal Norms	1
2	2
3 Although many religious counsellors apply a rather patriarchal reading of	3
4 the Shari'a, as illustrated by the table above, certain religious counsellors are	4
5 conscious of the harm they could cause if they narrowly applied it and therefore	5
6 refer to more equitable norms or allow the parties to negotiate on the basis of	6
7 such norms. In some cases, the norm is constructed endogenously and applied	7
8 without any reference to Quebec law (emphasis on consensual divorce; divorce	8
9 of the wife without consent of the husband; principle of the best interest of the	9
10 child with multiple criteria, appreciation <i>in concreto</i> , discretion in evaluating;	10
11 division of assets). In other cases, Quebec law is more clearly brought to bear	11
12 on the substance of the resolution of the dispute within a framework of Shari'a	12
13 principles that enable such flexibility (reference to Quebec norms for alimony	13
14 under the principle of 'maintenance debts' accrued during the marriage, or under	14
15 the institution of <i>mut'a</i> , or the division of assets under the principle of freedom of	15
16 disposal of one's property through contractual stipulation).	16
17 Here, the internal diversity of juristic opinions, the flexibility of certain principles	17
18 and the potential influence of discourses of reform inherent to the Islamic rural	18
19 tradition are agents crucial to an understanding of how these religious counsellors'	19
20 readings of the Shari'a may overlap, or otherwise interact with, Quebec law.	20
21 In conclusion, we found there was no such thing as an unofficial and organized	21
22 Muslim legal system in Montreal that may exist parallel to the state justice system.	22
23 Rather we noted the existence of a varying set of adaptable processes revolving	23
24 around individual religious counsellors who, depending on the counselor and the	24
25 issue, grant varying degrees of authority to Quebec family law norms and courts.	25
26	26
27	27
28 What Lessons Regarding the Issues of Faith-Based Arbitration and the	28
29 Secularization of Shari'a?	29
30	30
31 The debates on faith-based arbitration in Canada (Quebec and Ontario), as well as in	31
32 the United Kingdom, have concentrated on opposing religious systems against state	32
33 systems (without acknowledging, for instance, the role of the consulates), placing	33
34 more emphasis on the idea that faith-based arbitration questions the universal	34
35 principles of justice, of equality before the law, and of common citizenship.	35
36 During these debates, some claimed that the state system was inherently good;	36
37 others proclaimed the same for the religious system. State law was portrayed as	37
38 being the only one that counted, as being homogenous and objective (reasonable	38
39 citizen being the standard). Regarding local religious norms, some presupposed	39
40 that, in time, these norms would be acculturated and secularized and that it was	40
41 inevitable that religious bodies would seek to use the avenues that State law was	41
42 offering them (namely arbitration acts) in order to have more power over their	42
43 'clientele' and, in a very symbolic and formal fashion, by setting up faith-based	43
44 arbitration boards whose awards could be recognized by State law.	44

1 However, the situation on the ground seems far more complex. Indeed, the 1
 2 interaction between state law and religious norms takes on multiple facets, one 2
 3 of which being the implicit normativity we described in this chapter. Indeed there 3
 4 exists a number of ways by which a Muslim can have his/her religious or cultural 4
 5 norms taken into consideration in a separation agreement (see also consent orders 5
 6 in England). Peter Komos, an NDP member of the Ontario Parliament, during the 6
 7 debate relating to the amendment of the arbitration act in Ontario, stated: 7

8
 9 Will there still be religious arbitration? You bet your boots. We have public 9
 10 judges who are impartial, neutral in every respect, who don't bring ethnic biases 10
 11 and religious biases into the courtroom. Mark my words: there will be rabbis, 11
 12 there may well be pastors of any number of Christian faiths, there could be 12
 13 priests from the Catholic faith or the Anglican church, religious leaders from 13
 14 Sikh communities and imams from Muslim communities who will do what's 14
 15 required to register as arbitrators and who will be conducting arbitrations, who 15
 16 will be purporting to enforce and apply the law of Ontario but will be doing it 16
 17 with the inherent bias of their faith.⁹ 17

18
 19 Therefore when one is concerned by the power play at stake during the negotiation 19
 20 of the consequences of the marriage breakdown, one should not only look into 20
 21 the formal text of the separation agreements but also into the process that led to 21
 22 it. Indeed some studies have shown that in mediation often the weaker party is 22
 23 encouraged to accept a settlement considerably lower than if they had gone through 23
 24 adversarial process.¹⁰ This is not to say that all Muslim women are vulnerable 24
 25 in such negotiations as we have seen that some of them practice 'bricolage' and 25
 26 forum shopping. In that sense they are agents in a situation of legal pluralism.¹¹ 26

27 Furthermore, as we have seen in Quebec, not all religious bodies want to be 27
 28 'recognized' by the State. The notion of semi-autonomous social field developed 28
 29 by Sally Moore ('The semi-autonomous social field has rule-making capacities, 29
 30 and the means to induce or coerce compliance; but it is simultaneously set in a 30
 31 larger social matrix which can, and does, affect and invade it, sometimes at the 31
 32 invitation of persons inside it, sometimes at its own instance')¹² is useful here as it 32
 33 enables the conceptualization of relations between a state order and a religious one 33
 34 where the latter does not rely upon state law to determine its power or authority. 34

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 37 9 www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2005-11-28&Parl=38&Sess=2&locale=en. 37

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 39 10 D. Greatbatch and R. Dingwall, 'Who is in Charge? Rhetoric and Evidence in the 39
 40 Study of Mediation', in *Journal of Social Welfare and Family Law* 17 (1993), pp. 199–206. 40

41 11 As de facto situation: 'the condition in which a population observes more than one 41
 42 body of law'. G.R. Woodman, 'The Idea of Legal Pluralism', in B. Dupret, M. Berger, L. 42
 43 al-Zwaini (eds), *Legal Pluralism in the Arab World*, The Hague and Boston, 1998, p. 3. 42

43 12 S. Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an 43
 44 Appropriate Subject of Study', in *Law & Society Review*, 7 (1973), p. 720. 44

1 Furthermore, the notion of secularization of Shari'a¹³ does not explain 1
2 adequately the dynamics of the social field in question. Indeed, not only does the 2
3 discourse of the religious counsellors not conform to the idea of a separation of 3
4 law, morality and religion, it also shows an internally diverse and fluid picture. This 4
5 picture reveals to us that when Shari'a converges or overlaps with Quebec law, our 5
6 analysis gains in depth from moving between the viewpoints of the normative 6
7 orders concerned. From the perspective of the Quebec legal order, Shari'a may 7
8 seem to either yield or mutate when the parties and/or the religious counsellor give 8
9 weight to the former in the family dispute process. But the same phenomenon can 9
10 also be explained, at least in part, by endogenous agents if we recall the later legal 10
11 history of the wider Muslim world, which involves the spread of discourses and 11
12 practices of reform (from the mid-nineteenth century onward) that were influenced 12
13 by and shaped legal modernization projects there (i.e. the codification and reform 13
14 of marriage and divorce laws). This eventually led to the wider acceptance among 14
15 Muslim scholars of selecting rulings from a variety of juristic schools of thought, 15
16 according to what they deem better to fit modern social conditions, as well as an 16
17 acceptance of state intervention into rules of evidence and procedure. A number of 17
18 religious counsellors have quite apparently interiorized this pragmatic and eclectic 18
19 attitude to the Islamic juristic tradition. However this is not to say that the context 19
20 has no influence nor that the clients of these religious counsellors do not engage in 20
21 a discussion with some of them, therefore adding some diversity. 21

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43 13 J. Cesari, *When Islam and Democracy Meet: Muslims in Europe and in the United* 43
44 *States*, New York, 2006. 44

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