

CHAPTER 9

No-Fault Talaq:

Islamic Divorce in Canadian Immigration and Family Law

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Since you are a scholar of Roman law, you belong in the heaven of legal concepts. There you will meet again with all the legal concepts which you busied yourself with so much when you were still earthbound. But now you will meet them not in their imperfect form, in the crippled shape which has been given to them on the earth by legislators and lawyers, but in their perfect, unsullied purity and their ideal beauty. [...] The unfaltering belief in the supremacy of concepts and abstract principles is common to all those whom you will meet here. By this, they are protected against the temptation to worry about the practical consequences of the principles, which, as a rule, do not happen to them, anyway, but to others.

Rudolph von Jhering, In the Heaven of Legal Concepts: A Fantasy¹

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1. Von Jhering (1951, 678).

Prologue

Samir and Leila were married according to Islamic law in Morocco, their country of origin. Instead of living happily ever after, the two divorce after Samir utters the “*Talaq*”. Having complied with the waiting period prescribed by Islamic law, Samir registers the divorce with the authorities in Morocco, which allow for *talaq* divorces. Leila moves to Canada, studies in Montreal, finds a job and applies for citizenship. On a trip back home she decides to get married and sponsors her new husband to come to Canada. Samir also immigrates to Canada and marries a woman in Ontario, and everyone lives happily ever after. Unfortunately, best case scenarios such as this seldom appear in contemporary Muslim life in the West, the complexity of which this chapter will attempt to grasp.

I. Introduction

In the “heaven of legal concepts”, *talaq* clearly does not exist in Canada. For instance, the use of religious arbitration in family law matters sparked public outcries and led to its ban in the province of Ontario. In 2003, a retired lawyer and Muslim activist, Syed Mumtaz Ali, had announced plans to establish a body called the *Islamic Institute of Civil Justice* which would carry out arbitrations in the province of Ontario according to the *sharia*, as then allowed by Ontario’s *Arbitration Act* (1991). However, Mr. Ali’s announcement caused a political uproar. In the ensuing public debate, many advocated a complete ban on religious arbitration in family law matters,² often presenting religious law as a form of systematic oppression towards women and civil law as a locus of gender equality which needs to be preserved.³ In the end, family law arbitration was indeed banned, and Ontario Premier Dalton McGuinty then made his famous statement that “there will be one law for all Ontarians” (Simmons, 2010). In reaction to this, the Quebec National Assembly passed on 26 May 2005 a unanimous motion initiated by MNA Fatima Houada-Pépin which “opposed the implementation of Islamic tribunals in Quebec and Can-

2. See in general Manji (2004). See also submissions reported by Marion Boyd: *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*. Toronto: Government of Ontario, 2004, at 29-34: < <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/> >, accessed 3 October 2011.
3. See Stopler (2003, 27), Rahnema (2006: 21) and Hogben (2004).

ada”,⁴ notwithstanding the fact that the religious family arbitration which the motion so vehemently condemned was already prohibited by article 2639 of the *Civil Code of Quebec*.

In parallel to these recent political outbursts concerning arbitration, Canadian family law continued to barely leave room for the substantive application of *sharia* law. The federal *Divorce Act* applies to all with no regards to religious affiliation or lack thereof. It gives jurisdiction to provincial courts to hear all divorce cases as long as one of the parties to the divorce has been residing (but not necessarily domiciled) in the province for at least one year prior to the start of proceedings (s.3(1)). Furthermore, in a private international law context, the *Divorce Act* trumps all other potentially applicable legal systems (Castel, 1958: 15; Emanuelli, 2006: 292),⁵ regardless of a party’s eventual nationality or domicile in a Muslim state. Thus, in no Canadian provinces can there be application of Islamic law to residents like there can be in Germany and France, where the *lex patriae* (law of nationality) is applied to all foreigners including immigrants from Muslim countries (Mezghani, 2003: 733; Rohe, 2003-2004: 184). Furthermore, as just outlined, the residents of Ontario and Quebec, two thirds of the total Canadian population, do not know religious arbitration like there is in some countries such as the UK.⁶ What then can there be to say about Islamic law and *talaq* in Canada?

This article will explore, taking the *talaq* as a case study, the manifold ways in which the *sharia* makes its way back into the Canadian legal system regardless of its official non-applicability in the heavenly world of legal uniformity. It will show that *sharia* and *talaq* are alive and well in the earth-

4. Québec, National Assembly, *Journal des débats*, 37th Parliament, 1st Session, vol.38, no.156 (26 May 2005) < http://www.assnat.qc.ca/fr/travaux-parlementaires/assemblee-nationale/37-1/journal-debats/20050526/2773.html#_Toc104971753 >, accessed 3 October 2011.
5. This rule is argued to make for more judicial certainty (North, 1993: 70). By virtue of Canadian conflict of laws rules, the *lex domicilii* governs the validity and the effects of marriages (Baer *et al*, 2003: 119). The various provinces, having jurisdiction over these aspects of marriage, thus render their legislative regimes applicable to immigrants as soon as they acquire domicile in the province. Even civil law jurisdiction Québec applies the *lex domicilii* to matters of personal status and the effects of marriage: *Civil Code of Québec*, articles 3083, 3088, and 3089.
6. On Britain’s religious arbitration, see the fascinating fieldwork of Gillian Douglas *et al.*, “Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts” < <http://www.law.cf.ac.uk/clr/Social%20Cohesion%20and%20Civil%20Law%20Full%20Report.pdf> >, accessed 3 October 2011.

bound *law in action* and that they contribute to shape the lives of Canadian Muslims in myriad ways. In attempting to grasp religious law's "multiple networks, constant transitions and mixing of legal spaces" (Van Praagh, 1996: 214), this chapter will examine *talaq* in different contexts, as it is brought to Canada through immigration and as it already stands in Canada, whether recognized and enforced by legal authorities or brought forth and used by Muslims in informal bargaining relations. By weaving together Canadian law, administrative decisions, court cases, Islamic law, and testimonies from Muslim women gathered through field work in Canadian Muslim communities,⁷ this chapter will examine the ways in which *talaq* migrates to the Canadian legal system and springs from within it, flying in the face of heavenly representations of civil law purity.

II. Just Visiting: Talaq and Immigration in Canada

Let's start our story again. Leila and Samir were married in Lebanon. They are both of Muslim faith. Instead of living happily ever after, Samir says "*Talaq*", and the two divorce. The divorce is recognized as being valid in Lebanon even though Samir doesn't have it registered with Lebanese civil authorities. Leila moves to Canada, studies in Montreal, finds a job and applies for citizenship. On a trip back home, she decides to get married and sponsors her new husband to come to Canada. However, because her religious divorce was never registered with the authorities of her country of origin, she is not considered to be officially divorced. Her new husband is therefore not considered to be her husband for the purposes of Canadian immigration and is denied a visa.

As Samir and Leila show, immigration law can bring many complications to the field of family law. As such, the strict definition of family law conventionally adopted by legal scholars can be misleading, and looking for Islamic family law and *talaq* only within traditional family law can leave out an important part of the picture. Not only can norms of family law be found outside

7. This research is part of the project entitled "Jewish and Muslim Women Negotiating Divorce in Western Europe and Canada" which examines the ways in which religious women navigate the interplay of legal systems and religious norms in various multi-dimensional social and legal contexts. It does so through formal interviews with Jewish and Muslim women in Canada, France, Germany and the UK. This article is based on our fieldwork with Muslim women in Canada, specifically in Toronto, Montreal and Ottawa.

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civil codes (Leckey, 2009), but they should also be looked for outside of “family law” itself. As put by Halley and Rittich:

For us, the foreground rules of family law (marriage, divorce, the parent/child relationship) were of course important for studying how families and households would come to important distributive decisions; but we knew that these rules had been artificially segregated from other rules, lying in the background, that could, and often did, play an equally important distributive role in particular settings (2010: 761).

Thus, the idea that “the law governing [the family] should be distinct from the law of the market and the law of the state” (Halley, 2011: 83) has occluded the occurrences of *talaq* in other fields of the law and the immigration legal rules which shape the family life of Muslims. Whether this stems from a particular ideological context or from law itself and its disciplinary “insularity” (Webb, 2006: 122) is up for debate. Nevertheless, this section aims to navigate some of the forgotten meeting points between the family law of *talaq* and immigration law.

One way of “managing” Muslim families is through immigration laws that set standards for entry into Canada. In the case of *talaq*, it would be through the definition of its prerequisite: marriage. Indeed, a sponsorship application for a spouse relies on the validity of a marriage as dictated by the *Immigration and Refugee Protection Regulations [Regulations]* (2002), enabled by the *Immigration and Refugee Protection Act [IRPA]* (2001).

Under section 117(9)(c)(i) of the *Regulations*, which comes up repeatedly in the context of *talaq*, a person is not considered a member of the family class if the marriage was celebrated while their spouse was still married to someone else. The family class designation is one under which permanent residents or citizens can apply to have their spouses receive permanent residence, or sponsorship based on their legal relationship to the sponsor (*IRPA*, ss.12(1) & 13(1)). There is a staggering amount of cases from Canada’s Immigration and Refugee Board regarding invalid permanent residency applications due to a violation of this article, usually because of *talaq*.⁸

8. All of the following are Immigration Appeal Division cases: *Abbas v. Canada (Minister of Citizenship and Immigration) [M.C.I.]* 2008; *Ahmad v. Canada (M.C.I.)*, 2008; *Ali v. Canada (M.C.I.)*, 2008; *Anjad v. Canada (Minister of Citizenship & Immigration)*, 2005; *Barna v. Canada (M.C.I.)*, 2008; *Bhatti v. Canada (M.C.I.)*, 2003; *Bhayat v. Canada (M.C.I.)*, 1999; *Butt v. Canada (M.C.I.)*, 2010; *Din v. Canada (M.C.I.)*, 2004; *Ghosh v. Canada (Minister of Citizenship & Immigration)*, 2006; *Gill v. Canada (M.C.I.)*, 2003; *Hazimeh v. Canada (M.C.I.)*, 2010; *Hussain v. Canada (M.C.I.)*, 2008; *Malik v. Canada (M.C.I.)*, 2004; *Mehkari v. Canada (M.C.I.)*, 2008;

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The reasoning generally adopted by Canadian authorities to *talaq* divorces is best summed up by the Immigration Appeal Division of the Immigration and Refugee Board in *Butt v. Canada (Minister of Citizenship and Immigration)* [M.C.I.] (2010):

While the Talaq, performed in accordance with customary requirements, is sufficient in and of itself to establish the validity of the divorce in Shariah law, it does not contain a civil law component. Consequently, for valid public policy reasons such as its ease of abuse, Talaq divorces under Shariah law are not recognized as valid divorces in Canadian law (paras.24-25).

This “ease of abuse” of *talaq* is a recurring issue for immigration officers. This is related to the nature of marriage under Islamic law. Because some countries allow polygamy as espoused by the *Qur’an* in Sura 4, Verse 3, the line between when marriages start and end is not defined in the same way as under Canadian law. Since a husband does not technically need to be divorced from his wife in order to marry another wife, formal divorce procedures are not always immediately carried out. Moreover, the nature of the *talaq* itself and the way in which it can be done as a pronouncement, without any other formalities (Esposito and DeLong-Bas, 2001: 28), is often considered “oppressive”. This lends itself to administrative complications when *talaq* meets a process such as that of Canadian immigration.

Before 2008, the rules surrounding the recognition of *talaq* in immigration cases were a bit more flexible and allowed for the recognition of a religious divorce that was valid in another jurisdiction, even if such divorce was not confirmed through the official civil process of the country. One case decided under the old rule is that of *Bhatti v. Canada (M.C.I.)* (2003), which concerned a marriage celebrated in Pakistan. The appellant, Mukhtar Bhatti, contested the denial of his wife’s sponsorship for permanent residency. Bhatti’s application to sponsor his wife had been denied because the visa officer concluded that at the time of his marriage, he had still been married to his previous wife. At issue in the appeal was whether Bhatti’s *talaq* divorce from his first wife should be recognized by Canadian law, given that Bhatti had religiously divorced his wife in Pakistan in 1996 and then also obtained a civil divorce in Ontario in 2001. Since the Ontario divorce was pronounced after his second marriage, the latter was deemed void. Unlike the recent rule how-

Suleman v. Canada (M.C.I.), 2005. The following is a Federal Court case: *Amin v. Canada (M.C.I.)*, 2008 FC 168. They are almost exclusively about religious divorce and specifically the *talaq*.

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ever, the reasoning of the tribunal led to the recognition of the religious divorce under the conflict of laws principle of the “real and substantial connection test”.⁹ Since Bhatti had substantial ties to Pakistan and the divorce was valid in Pakistan, the immigration tribunal decided to recognize the divorce. In addition, the panel in *Bhatti* stated that “non-judicial” divorces, a category in which the panel placed the *talaq*, had been recognized before in Canada.

However, concern over the lack of formality in the *talaq* procedure led Canadian courts and tribunals to adopt a much stricter approach to its recognition and to overrule the approach taken in *Bhatti*. In the 2008 Federal Court case of *Amin v. Canada (M.C.I.)*, the court dealt with a couple where the husband only registered his first *talaq* divorce with the authorities after marrying his second wife. The Federal Court referred to the England and Wales Court of Appeal case of *Chaudhary v. Chaudhary* (1984), which had voiced concerns about the *talaq*. The Court of Appeal in *Chaudhary* had written:

The essentials of the bare *talaq* are, as I understand it, merely the private recital of verbal formula in front of witnesses who may or may not have been specially assembled by the husband for the purpose and whose only qualification is that, presumably, they can see and hear. It may be, as it was in this case, pronounced in the temple. It may be, as it was here, reinforced by a written document containing such information, accurate or inaccurate, as the husband cares to insert in it. But what brings about the divorce is the pronouncement before witnesses and that alone. Thus in its essential elements it lacks any formality other than ritual performance; it lacks any necessary element of publicity; it lacks the invocation of the assistance or involvement of any organ of, or recognised by, the state in any capacity at all, even if merely that of registering or recording what has been done. Thus, though the public consequences are very different, the essential procedure differs very little from any other private act such as the execution of a will and is akin to the purely consensual type of divorce recognised in some states of the Far East (1031-32).

Drawing from the British Court of Appeal’s scepticism of *talaq*, the Federal Court of Canada redesigned in *Amin* the exigencies applicable to recognition of *talaq*. A clear concern seemed to be the ease with which a man could perform the *talaq* and its implications for “due process and fairness” (*Amin*, para.21). The court seemed to be concerned about the lack of formal procedures – or at least Canadian ideas of formal procedures:

As far as I can tell from the record before me and from relevant legal authorities, the pronouncement of *talaq* is nothing more than a unilateral declaration of divorce made by the husband, usually in the presence of witnesses, and sometimes recorded in a private divorce

9. See the Supreme Court of Canada case *Beals v. Saldanha* (2003).

deed. Such a process is clearly insufficient to fulfil the requirements of section 22(1) of the Divorce Act (*Amin*, para.19).

The result of *Amin* was that the recording of a *talaq* or a confirmation of its validity was no longer enough for it to be valid under Canadian law. It also had to be registered with the authorities under the civil requirements prescribed by the country of origin.¹⁰ This insistence on civil registration is quite peculiar considering that in many countries the civil requirements in question are administrative formalities which have no incidence on the validity of the religious marriage itself.¹¹ Why is it that this “methodological nationalism” (Shah, 2009: 74) fails to regard Islamic law as a full-fledged legal system with its own marriage validity rules? Coming from courts supposed to approach foreign legal systems according to the principle of “international comity” (*Beals v. Saldanha*, 2003, para.20), this non-recognition is quite intriguing, especially given that the harsh consequence of disqualifying an applicant as a spouse under the *Regulations* is often the denial of the resident visa application.¹² In the “heaven of legal concepts”, it seems that *talaq* and religious laws are veiled, dismissed as marginal and *irresponsible*, much like Ralph Ellison’s seminal *Invisible Man* (1982).

III. “Stranger in a Strange Land” Home-grown Talaq in Canada

This time, let’s imagine that Leila and Samir meet and get married in Canada. They are married civilly, having filed the paperwork required by, say, the province of Quebec, and they are also married by the imam at their mosque.

10. The Immigration Appeal Division applied this reasoning a few months later in the case of *Hussain v. Canada (M.C.I.)* (2008) and denied an applicant a permanent resident visa because his second marriage took place in the short time between the pronouncement of the *talaq* and the reception of the confirmation certificate from the civil authorities in Pakistan. The Appeal Division panel came to the same conclusion in *Ali v. Canada (M.C.I.)* (2008), a case where, again, a *talaq* which was pronounced before the husband married his second wife, but which was not registered until after he married his second wife, was excluded as per s.117(9)(c)(i).
11. Such is the case in Lebanon, which does not know civil marriage (Abiad, 2008: 56; Janin & Khalmeyer, 2007: 147). The conditions of validity are thus prescribed by Islamic law, see Nasir (2002: 45).
12. Moreover, several cases such *Ali v. Canada (M.C.I.)* (2008) state that in addition to being excluded from “regular” immigration procedures, applicants who are not considered members of the family class will be precluded from making requests for immigration under humanitarian and compassionate grounds under the *IRPA*.

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But instead of living happily ever after, Samir says “*Talaq*” and the two divorce under *sharia* law. Samir does not file any paperwork to initiate the civil divorce process under the Canadian *Divorce Act*, and he marries Selma, again through an imam at the mosque. Under Canadian law, Leila is not legally divorced from Samir, and Selma is not legally married to Samir. They have “fall[en] between the cracks of the civil and religious jurisdictions” (Shachar, 2008: 576). However, Leila’s lawyer, who specializes in Muslim family law, knows a few legal tricks to get a civil court to intervene into Samir and Leila’s religious affairs, much to Leila’s relief.

A. Institutional Recognition of *Talaq*

This section will outline the ways in which *talaq* surfaces in Canadian family law cases, without direct application of Islamic law. It will start with the institutional recognition of *talaq*, outlining first Canadian courts’ approach to religious matters and then analyzing two provisions of the *Divorce Act* which incorporate the *talaq* into cases governed by Canadian law and which shatter the portrayal of Canadian law as a unified “system” coherently bestowing (non-) recognition upon *talaq*.

In 1986, the federal Parliament of Canada relied on its constitutional jurisdiction over “marriage and divorce”¹³ to enact the *Divorce Act*, which lays out the grounds and procedure for divorce in Canada. The introduction to this chapter has presented accounts of the *Divorce Act* as staunchly civil. However, religion is not wholly excluded from this civil/public sphere and there are significant contact points between minority religious norms and Canadian civil law (Bosset & Eid, 2007, 513) which are fostered by a legal context which is not hostile to religious claims. To start with, Canada has no official separation of church and state.¹⁴ Also, unlike countries such as France, whose radical republican model highly discourages differential identities and the formation of minority “communities” (Safran, 1991; Leruth, 1998), Canada

13. As provided by s.92(26) of the *Constitution Act, 1867*. In Canada, the federal Parliament and provincial legislatures share jurisdiction over family law. S.92 (13) of the *Constitution Act, 1867* granted to the provinces the general legislative power over the family as a matter of “property and civil rights.” The federal *Divorce Act* is thus restricted to the grounds and procedure for divorce as well as various ancillary issues such as child and spousal support claims, custody, and access to children. Provincial laws govern all other family law matters, such as separation (as distinct from divorce) of married or unmarried couples, custody, access, support, division of property, restraining orders, and related issues of child protection and enforcement of orders.

14. Indeed, the *Canadian Charter of Rights and Freedoms*’ preamble states that “Canada is founded upon principles that recognize the supremacy of God and the rule of law.”

has constitutionally enshrined its commitment to “multiculturalism” in section 27 of the *Canadian Charter of Rights and Freedoms*. Furthermore, the *Supreme Court of Canada* has often stressed the importance of freedom of religion, which became “the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise” (*R. v. Big M Drug Mart*, 1985: 351). Religious freedom is closely allied with the *Charter’s* commitments to religious equality in section 15 and to the preservation and enhancement of Canada’s “multicultural heritage” in section 27. “An important feature of our constitutional democracy”, the Supreme Court of Canada suggests in the opening remarks of *Syndicat Northcrest v. Amselem*, “is respect for minorities, which includes, of course, religious minorities” (2004, para.1). The concept of equal religious citizenship has recently been extended beyond the traditional realms of freedom of belief to include the right to engage in religious practices without interference (Ryder 2008). In addition to those public manifestations, religion is also expressed as a private matter through affiliation in the family, a phenomenon which is not ignored by the state like it might be in other polities. In fact, Canadian courts, precisely on the basis of the constitutional value of “multiculturalism”, have accepted to enforce and recognize the *mahr*, the Islamic dower so tied to the *talaq* divorce. In *Nathoo v. Nathoo* (1996) and *M.(N.M.) v. M.(N.S.)* (2004), two cases from the British Columbia Supreme Court, *sharia* and *mahr* are enforced and treated as the religious and cultural expression of the Muslim minority group.¹⁵ This commitment to respecting and giving force to the religious “values” and customs of minorities has led courts to go beyond strict secularism and enforce religious legal institutions. This bridging of the religious/secular gap can also be effected through the channels of s.21.1 and s.22 of the Divorce Act, provisions which we now turn to.

Section 21.1: Disciplining the Religious

The *Divorce Act* recognizes that it is possible for a spouse, usually male, to use his position within religious law to extort concessions in return for a religious divorce. Section 21.1 of the *Divorce Act* was adopted in 1990, after much lobbying from Jewish women’s groups who were concerned about Jewish men’s ability to withhold a religious divorce under Jewish law.¹⁶ This

15. See Fournier (2009: 13).

16. The federal Minister of Justice of the time, Doug Lewis, thus justified the amendments: “I am concerned about protecting the integrity of the *Divorce Act* and preventing persons from avoiding the application of the principles contained in the act. [...]

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section of the *Act* was conceived to put pressure on a spouse withholding a religious divorce; it does not actually order the granting of a religious divorce.

Under section 21.1(2) of the *Divorce Act*, a spouse can file an affidavit with the court about any barriers to religious remarriage. If the barrier to religious remarriage has not been removed after the serving of the affidavit, s.21.1(3) allows the court to dismiss applications made under the *Divorce Act* filed by the withholding spouse and to “strike out any other pleadings and affidavits filed by that spouse under [the] *Act*” (ss.21.2(3)(c) and (d)). The only recourse that the withholding spouse will have at that point is to file an affidavit or satisfy the court that there are “genuine grounds of a religious or conscientious nature for refusing to remove the barriers” (ss.21.2(4)(a) and (b)).¹⁷ Whether or not these genuine grounds are accepted is at the court’s discretion (ss.21.1(3) and (4)). The section does not apply to situations where the barrier to religious divorce is in the hands of a religious body or official (s.21.1(6)).

Although a scan of the case law indicates that this section has been used primarily in the case of Jewish divorce, other religious divorce cases are meant to fall within the purview of the section as well. Under Islamic law, only a man can use the *talaq* divorce method. Moreover, even with *khul* divorce which a woman can initiate, the man can still refuse to grant the divorce (Esposito, 2001, 28; Syed, 2004, 69). While a woman can ask a religious authority to grant her a divorce through the *faskh* method, traditionally the grounds for doing so have been narrow (Esposito, 2001, 32). And while a Muslim man could remarry without a religious divorce given the religious acceptance of polygamy, a wife cannot at any time have more than one husband (El Alami and Hinchcliffe, 1996: 16).¹⁸ Thus, a Muslim woman could

Without a *Get* [Jewish divorce], a Jewish woman cannot remarry in her own faith. Children of a subsequent civil marriage suffer religious disabilities. [...] The government is moving where it can and where it is brought to the government’s attention to eliminate sexism and gender bias in the law” (House of Commons Debates, 1990: 8375-8377).

17. Notably, the 2002 British “*Get* bill”, the equivalent of s.21.1, does not contain such an exception. See the *Divorce (Religious Marriages) Act 2002* (UK), c.27, which amends the *Matrimonial Causes Act 1973* (UK) c.18, to allow the court to suspend the decree absolute of divorce until each party produces a declaration to the court “that they have taken such steps as are required to dissolve the marriage in accordance with those [religious] usages” (s.10(2)).
18. Sura 4, Verse 3 of the Qur’an has been interpreted to allow men to marry up to four wives: “The schools and sects are unanimous in agreeing that it is not necessary for a man to obtain any sort of permission before he marries a second or subsequent wife;

be in a position where a religious divorce is being used as a bargaining chip during a civil divorce. The religious divorce could be withheld by her husband until she concedes on various financial or custody issues. In that situation, s.21.1 of the *Divorce Act* could be of use. However, its use for cases involving Muslims has been minimal. In one of the few cases in which it is mentioned, the Alberta Court of Queen's Bench case of *S.A-T. v. A.A-T* (2004), a party asked for a religious divorce under section 21.1 of the *Divorce Act*. The court clarified that the provision did not give him the power to grant any religious divorce and that it only gives the discretion to dismiss the withholding spouse's (civil) procedures. The judge added:

There is no clear relationship between religious and civil divorces in any event, and any involvement with an individual's religious beliefs and practices could be quite difficult and problematic (para.181).

In the Ontario Superior Court of Justice case of *Ghahrai v. Mohammad* (2006), in a variation request for spousal support involving a Muslim couple, the judge mentions in passing that the wife has had trouble obtaining her Iranian divorce, but that no section 21.1 argument was submitted to the court. These cases indicate that section 21.1 would be more effective if it allowed for judges to suggest and impose its application when required. Nevertheless, the very existence of this provision attests that the parties can mix and intertwine the civil and religious spheres when their situation so requires.

Section 22: Recognition of Foreign Divorces

Muslim women who were previously divorced through *talaq* in a country which recognizes Islamic law and who want that divorce recognized in Canada can also have recourse to section 22 of the *Divorce Act*. This provision allows for the recognition of a foreign divorce which has taken place according to the laws of the other jurisdiction. In addition, s.22(1) also states that one of the former spouses must have been ordinarily residing in the country of divorce the year before the beginning of the divorce proceedings. Finally, s.22(3) provides that section 22 as a whole does not prevent any other law regarding the recognition of divorces from applying.

Recognition of a *talaq* divorce from another jurisdiction in non-immigration cases is slightly different as the criteria of the *Immigration and*

his right to marry polygamously is absolute, and he is legally free to exercise it at will provided he does not exceed the maximum number at any one time" (El Alami & Hinchcliffe, 1996: 16).

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Refugee Protection Regulations are eliminated, and the focus is on the requirements of the *Divorce Act*. A religious divorce which is valid in a foreign jurisdiction will be recognized under Canadian law, even if it was not in accordance with Canadian “public policy”. In one Ontario case, a woman who was a Canadian landed immigrant was denied a request to re-divorce under the Canadian *Divorce Act* as she was already divorced in Iran, even though she stated that her Iranian divorce was done under duress and that its economic consequences were particularly unfavourable to her (*Jahangiri-Navaneh v. Taheri-Zengekani*, 2003). Interestingly, the judge in the case pointed out the similarities between civil divorce and *talaq* divorce, stating:

Consent to marry is one thing, but consent to divorce is not particularly relevant. It takes only one person to undo the mutuality of minds that keeps a marriage intact. It takes two to marry but only one can cause a breakdown of the marriage. Even in Canada, a party may secure a divorce *unilaterally* after a year's genuine separation -- and it is irrelevant whether the other party consents (para.25).

Finally, even when Canadian courts refuse to recognize a foreign divorce, they can still intervene in aspects related to divorce, for example by allowing parties to divide their assets as if they were common-law partners following the break-up of a marriage that was not recognized in Canada (see *Hassan v. Hassan*, 2006).

We see that the *Divorce Act* and Canadian case-law have elaborated several institutional avenues for *talaq* to be recognized, considered and integrated into the applicable civil law. Uncovering these legal mechanisms, in addition to belying the idea that Canadian law is in any way purely secular or impervious to religion, provides practitioners with challenging and inspiring new routes to explore religious subjects' resistance, struggles, and power bargains.

B. Underground Divorce: Informal Occurrences of *Talaq*

Going beyond formal legal recognition, this section investigates through field *work* and legal analysis how legal subjects *themselves* shape the legal manifestations of *talaq* in Canada.¹⁹ Our interview participants indicated that Mus-

19. This part draws inspiration from *critical legal pluralism* (Kleinbans & MacDonald, 1997), whose main impetus is, as put by one legal pluralist scholar, to analyze “how apparently marginalized actors [...] might at once be both influenced by and pivotal in shaping the normative frameworks by which they live” (Campbell 2008: 123). See also von Benda-Beckmann & von Benda-Beckmann (2006), Griffiths (1986) and Merry (1988).

lim wives and husbands often value Islamic family law more than the civil law. For instance, some husbands used the parallel religious avenues to inflict economic and social penalties on their wives. Indeed, the apparent potential for extortion of the *talaq* divorce has long been recognized in the literature on Islamic divorce (Wegner, 1982: 17; Anisah, 2003: 41). Interestingly, some Muslim women also indicated that the Islamic family law could in some instances be more favourable to them than the civil law, as the formally unequal rules of *talaq* play out differently in practice depending on the amount attached to *mahr* in the marriage contract. What comes with the unlimited “freedom” of the husband to divorce at will through *talaq* is the (potentially costly) obligation to pay *mahr*, the Islamic dower, as soon as the third *talaq* has been pronounced (Fyzee, 1974: 133). The dower becomes a powerful limitation on the possibly capricious exercise of the *talaq* as well as a form of compensation to the wife once the marriage has been dissolved.²⁰ Thus, Islamic law can be invoked advantageously by *both* women and men, in the shadow of civil law:

Participant #2

He said “*Talaq, talaq, talaq*” three times and I said “What’s that?” He said “Well, I divorce you; that’s all it takes you know, I’m divorcing you”. I said “No it’s not; you know in Islam there are conditions, there are reasons and there should be attempts of reconciliation.” I said “How can we be divorced?”, so he said “No, that’s it, islamically we’re divorced.” Then we suddenly found ourselves, you know, um, having to sell the house and basically going to a separation. I found out two months later, in June, [...] that he wanted me to be his second wife and I said “Well, forget it.” I just laughed out loud and said “You got to be joking; I cannot be a second wife, I’m still married to you, we’re not legally divorced!” So anyway he did marry. He was married religiously to this second woman. [...] The tradition is very clear that you should actually ask for permission of your other wives or your first wife before you marry another so by all accounts everything that my ex did, the divorce and the second marriage, was not aligned with the *sharia* at all, but he invoked *sharia* to say that he was doing these things according to it.

Participant #3

It took about two years but he never came to court. He said “I do not recognize the court and this system here.” To him this [civil] divorce is not divorce. Only religious divorce is important to him.

20. Schacht (1982: 167), Coulson (1964: 207-208) and Tucker (1985: 54). If *mahr* is very high, chances are the husband will hesitate before repudiating his wife. As put by Hoodfar, “the larger the sum of the *mahr*, the more effective the wife’s leverage” (1996: 131). In most cases, this constitutes a source of security for wives who do not want to divorce.

III. “Stranger in a Strange Land” Home-grown Talaq in Canada

Participant #1

I didn't care about Town Hall, I didn't want just a civil marriage. I wanted a marriage, a contract that respects the laws of my religion. For the woman there are more advantages in the religious contract than in the civil contract, because for instance I have a right to a dowry. So I have the right to claim, to impose conditions, to demand the sum of money. I know some women who have been able to demand ten thousand, twenty thousand dollars, and the husband pays it right away. It's like a clause in the contract, even the day where he decides to divorce, he is obligated to pay what is included as the dowry.²¹

This parallel religious process can sometimes interact with the civil procedures, leaving some women divorced civilly but not religiously. Without a religious divorce, many cannot remarry within their faith. The withholding of the religious divorce then represents a bargaining tool for the husband, as evidenced by the Quebec Superior Court case of *S.I. c. E.E.* (2005). In that case, the judge noted the husband's ability to use the religious divorce in this fashion, also outlining that what is initially considered strictly religious law can yield serious civil consequences:

It was clear that for Mr. E., the granting or not of a religious divorce was an important bargaining tool: he knew a religious divorce was important for Ms. I. not only for religious reasons, but also for civil reasons, as it would affect her civil status in Country A,²² where all her family lives, i.e. father, siblings, cousins, etc., whom she had not seen for many years (para.56).

One of our interview participants also attested to the importance of this phenomenon. Given the intertwinement of civil law and religion in such instances of “legal transplants”,²³ religion becomes, rather than a mere “private” phenomenon, a matter of “public” status for the woman:

Participant #3

[...] every time I wanted to get my Persian passport, I either had to show my divorce paper or my husband had to sign the application, because a woman cannot leave a country like Iran or a Muslim country without her husband's permission. So when you go to apply for a passport, you either have to say “I'm single” or divorced and prove that you are divorced, or your husband has to sign the form for you. [...] A lot of people [in the Iranian communi-

21. Translated from French.

22. The name of the country has been redacted from the judgement to protect the parties' identities.

23. The term “legal transplant” was first proposed by Alan Watson to describe what he saw as the migration of legal rules or practices “from one country to another, or from one people to another” (1993: 21).

ty] go for religious divorce. They still do both. I think the reason is because a woman wants to travel to get her passport or whatever, instead of going to her husband all the time.

Eventually the husband in the *S.I. c. E.E.* case changed his mind about granting a religious divorce during the proceedings – perhaps to show the court his good faith – and performed the triple *talaq* in front of the court, though he still had to register it at his country’s consulate (para.66). His promise to register the divorce then formed part of the order of the judgment (paras.117-118), in a strange coming together of Canadian law and Islamic law.

Our interviewees indicated that in addition to being used as a parallel and autonomous normative field, Islamic law is also used as a way to influence and bring internal pressure on the civil law regime. Sometimes, the *talaq* appears tangentially, for example with regard to division of assets. Despite not being formally “applicable”, religious law is then highly relevant to the parties and to the judge pronouncing on civil law petitions. Both legal systems are invoked together and intertwined:

Participant #1

I didn’t talk to him directly. It was my father and I asked him “Dad, please tell him that it is me who is asking for the divorce; I want to exempt my ex from all alimony, I want nothing to do with him. Even the alimony which I have a right to I don’t want, and I want nothing to do with my dower.”²⁴

Participant #4

[He wasn’t paying post-divorce maintenance] because of the dower and because he said that he couldn’t. I let it slide because at the time my youngest son was very young and I was on welfare. [...] He only paid \$200 for the children. 200\$ for an eighteen-month-old child that was still in a crib and the other child who was three years old! [...] Every time I told him it wasn’t enough, he said that’s all he could afford to pay, given that he had paid the dower.²⁵

Participant #2

The most ironic thing about this is that in Islam, you know, whatever the woman brings into the marriage, [...] the woman keeps. Well here he used the civil side, provisions for a division of property, you know, fifty-fifty division of property, to take from the marriage furniture we acquired together the proceeds from the sale of the house, the 50% in lieu of child support payments. So when it was convenient for him, he invoked the civil system, when it was convenient for him he invoked, you know, the religious system.

24. Translated from French.

25. Translated from French.

III. “Stranger in a Strange Land” Home-grown Talaq in Canada

In the British Columbia Supreme Court case *Elkaswani v. Elkaswani*, a husband pronounced the *talaq*, thus divorcing under Islamic law, having previously transferred the property of the matrimonial home to his brother. Upon petition for civil divorce, he came close to successfully arguing that the home should not be subject to the statutory division of property because the transfer of property was done in accordance with the alleged Islamic legal rule according to which the wife has no right to division of property. After conceding that “while Canadian law must govern the outcome of these proceedings, the actions of the parties cannot be considered based solely on Canadian cultural values” (para.5), and that the husband and his brother had indeed acted in conformity with “Islamic precepts” (para.57), the court decided that because the property transfer aimed at depriving the wife of her matrimonial claim, the house should nevertheless fall under the statutory division of assets. The cited passages seem to indicate that the strategy of invoking alleged religious obligations to circumvent the civil regime could have worked and influenced the civil petition.

All things considered, perhaps the Canadian *talaq*’s greatest strength lies beyond the courtroom, in the unofficial networks created by religious community affiliations. Our participants confirmed the importance of the community in shaping the occurrences of *talaq* in Canada, offering husbands and wives strategic avenues to explore:

Participant #4

Q: Did the community pressure him into fulfilling his religious obligations?

A: People in the community don’t know what women are going through because when the man is in public he is acting all nice. Plus, when men discuss among themselves, the woman is not there. If it’s in the mosque, they’re in the men’s section, and when they come back you have no idea what was said all this time.²⁶

Participant #3

In the community here, the divorce was a big shock, because a lot of people know us and thought we were a respected family. A broken family is not a respected family. Even for me, before when I was married I could easily make friends with men. Go out with men. It was easier. Now, I have to watch it. I was married myself but now his wife may think “Why is she talking to my husband? She is a single woman now.” So I have to sort of watch what I do.

26. Translated from French.

Apart from these interpersonal and informal networks, the unofficial roles played by religious authorities, beyond strict arbitration, also require empirical assessment. Under classical Islamic law, the Islamic court (*qadi*), while it does adjudicate *khul* divorces²⁷ and *faskh* divorces,²⁸ usually does not arbitrate *talaq* divorces.²⁹ However, in the absence of Islamic courts in Canada, imams often act as authorities in religious family law matters.³⁰ This role also seems to extend beyond strictly legal arbitration (now precluded in most of Canada) to informal counselling and interventions. One of our participants offered a glimpse at this phenomenon:

Participant #1

I told him [my father] “Can you look into it, can I have a divorce contract?” Because I called him [my husband] and told him “Please, say to me ‘you’re divorced.’” (laughs) He told me “Don’t be so stupid! Do you think you’re in a movie or what?” He felt that he couldn’t do it. [...] So I am still stuck in this situation, being divorced but not divorced, and that’s where I started trying to get a written document. I said “Ok, if he doesn’t want to say it verbally, maybe he can sign something.” So I took the phone and called my dad, who knew an Imam, one who knows marriage contracts. So this Imam made me swear an oath and I had him prepare this document, this divorce agreement.³¹

This seems to confirm the findings of Prof. Julie Macfarlane, one of the few scholars conducting actual empirical research on Muslim practices in North America. Macfarlane has found that imams often assume roles that go beyond those assigned by classical Islamic law to *qadis*. Some act as informal mediators, while others align with the civil sphere and hold that an Islamic divorce is automatically granted upon civil divorce (Macfarlane, 2011). These informal practices, which we are just beginning to grasp, require sustained empirical study, as they have the potential to considerably enrich our

27. In cases of mutual consent where the wife waives the deferred portion of *mahr*, divorce can be finalized outside the court system. However, in most cases, the parties will disagree as to the amount and file their respective claims with the *qadi*. Also, in some countries such as Egypt, the wife can even obtain a *khul* divorce from the *qadi* without the husband’s consent (Mashhour, 2005: 583).
28. In this case, “a wife who is unhappy in her marriage and who wishes to obtain a dissolution must petition the court but only in so far as she can demonstrate to the court (*qadi*) that the limited grounds under which divorce can be granted have been met” (El Alami and Hinchcliffe, 1996: 29).
29. For instance, a woman in Malaysia can ask the court to declare a *talaq* divorce (Peletz, 2002: 169).
30. See Boyd, *supra* note 2.
31. Translated from French.

comprehension of Muslim life in the West in all its frustrating and inspiring complexity.

IV. Conclusion

This chapter has envisioned *talaq* as a legal transplant which surges from immigration and family law, through official and underground channels created in turn by institutional authorities and the parties themselves. What these fragments and portraits of *talaq* in Canada outline is that any given legal system is “manifestly not as uniform as it claims and is widely perceived to be” (Pearl & Menski, 1998: 67). This is certainly true of the Canadian legal system, which upon first glance left no application to Islamic law and *talaq* but turns out to be confronted to them on a daily basis. In tackling the normativity produced by *everyday life*,³² this chapter has attempted to recentre the debate not on which family law system is designated as exclusively applicable, but on the legal complexities real husbands, wives and judges are confronted with. Exploring the intersections of immigration and family law has helped diversify the sites of regulation of contemporary families, now better envisioned as porous and protean entities. Outlining the institutional pathways created by courts and legislatures has helped better conceive the background rules and strategic options made available to husbands and wives navigating through *talaq* divorce. Finally, the parties’ own perceptions, hopes, strategies, and calculations, analyzed through splinters of case-law and interviews, have helped us grasp Muslim subjects’ travel through “different legal spaces superimposed, interpenetrated, and mixed in [their] mind[s] as much as in [their] actions” (Santos, 1987: 297-298). This empirical knowledge (re)places *talaq* not as the mere object of multicultural recognition but as the complex, multi-dimensional and subjective reflection of “law as a form of experience” (Banakar, 2010).

32. For legal studies using this approach, see Sarat & Kearns (1993), MacDonald (2002), Silbey & Ewick (1998), Merry (1986), and Sarat (1990).

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