

Islamic Divorce in Canada: Religious and Legal Ramifications

Yousef Aly Wahb*

This research brief outlines the findings of a thesis completed in 2021 for the degree of Master of Laws (LLM) at the University of Windsor, along with three journal articles published based on the same thesis. The full thesis dissertation and published articles are listed in the References section of this briefing.

Civil marriages conducted under secular legal systems are deemed to be Islamically valid, provided they align with religious principles. Islamic law gives precedence to legitimizing existing marriages and allows for the retroactive adjustment of an otherwise invalid marriage contract to meet religious validity requirements. Conversely, the religious implications of a civil divorce under a non-Islamic legal system are more contentious. Unlike Canadian law, Islamic divorce proceedings necessitate the husband's consent or the intervention of a Muslim judge. Qualitative data and socio-legal literature illustrate the experiences of Muslim disputants navigating secular and religious divorce processes. In the absence of judicial religious authority in Canada, many Canadian Muslim families turn to imams for informal assistance in resolving marital disputes, resulting in an unregulated ad hoc system of individual mediators and arbitrators making undocumented decisions. My LLM thesis, *Irreconcilable Differences* (Wahb 2021), later developed into three research articles, addresses this dilemma from various perspectives.

The first article (Wahb 2022) examines the understanding and resolution of family law disputes within the Canadian Muslim community, considering both cultural and legal contexts. It draws comparisons between Islamic and Canadian divorce procedures, outlines the judicial applications of Islamic contractual agreements related to deferred dowry (*mahr*) payments, and explores vehicles for opting out of secular law under provincial restrictions on faith-based arbitration and mediation of religious contracts.

The article finds that there is no equivalence between secular and religious divorce proceedings, and a civil divorce or annulment can be considered a religious divorce (*ṭalāq* or *khul'*) only in limited circumstances. In cases where the wife initiates divorce and the husband contests it, a civil divorce is not religiously legitimate as a substitute for obtaining a *ṭalāq* or *khul'* or an annulment (*faskh*) granted by a Muslim judge. The article also demonstrates how contractual agreements involving deferred dowry payments are

* Yousef Aly Wahb is an Islamic Law Instructor at the University of Windsor's Faculty of Law, LexisNexis Canada Family Law Author, and Yaqeen Institute Research Director. He holds a Master of Laws (LLM) degree from the University of Windsor and a Bachelor in Islamic Studies from Al-Azhar University.

enforceable in Canadian courts, whereas faith-based arbitrated awards are only enforceable in select provinces.

The second article (Wahb 2023a) analyzes the forms of Islamic legal authority for granting *faskh* and for mediating or arbitrating corollary relief using religious law. It examines the evolution of Islamic legal theories on judicial authority during periods of Muslim diaspora to determine whether Islamic law allows flexibility in legally characterizing the status of Muslim minorities residing in non-Muslim countries, and to provide alternative family dispute resolution mechanisms in the absence of Muslim judges.

The article examines three Islamic Alternative Dispute Resolution (IADR) procedures that can facilitate religiously acceptable and legally enforceable resolutions for family matters in North America: community-led adjudication (*qadā' al-darūrah*), private settlement (*sulh*), and arbitration (*tahkīm*). It concludes by offering recommendations for a holistic framework to settle family disputes in compliance with Islamic law and in a legally enforceable manner. This includes opportunities for: (1) granting religious divorces or annulments complementing a civil divorce and (2) mediating or arbitrating corollary relief using religious laws and principles.

The third article (Wahb 2023b) documents the perspectives of both researchers and practitioners on whether a secular divorce qualifies as a valid Islamic divorce. This is achieved by analyzing fifteen contemporary legal opinions (*fatāwā*, sing. *fatwā*) issued by institutions and presenting the jurisprudential viewpoints and ministerial experiences of twenty Canadian imams obtained through semi-structured interviews conducted in 2020-2021. Participants were queried on various aspects, including their educational and cultural backgrounds, their understanding of conflicts between Islamic and Canadian law, procedural experiences in facilitating IADR, evaluative views on the enforceability of IADR outcomes, and their recommendations for addressing the gap between religious and secular divorce laws.

The article reveals that while a minority of dissenting opinions aim to confer religious legitimacy on contested secular court-ordered divorces, the majority of contemporary Muslim scholars and Canadian imams, echoing the practice of a significant portion of the Muslim community, do not automatically recognize civil divorces as Islamic divorces. Instead, both groups advocate for the establishment of extra-judicial entities applying IADR procedures in a manner acknowledged by secular authorities.

Collectively, these articles delineate the legal frameworks for secular and religious divorce proceedings, justify the necessity of IADR, and propose recommendations to fortify existing procedures facilitating *ṭalāq* and *khul'* or granting *faskh*.

References

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