

## **Internormative Family Conflict “Mediation” within Belgian Muslim Families<sup>1</sup>**

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### **Abstract**

*With the global trend towards the privatization of family justice, the interest for family mediation is growing. However, the relationship between family conflict resolution practices and cultural and/or religious diversity remains an under-researched domain. In Belgium, very little is known about the (para)legal practices of Muslim families. This paper presents empirical findings from a research concerning family conflict and family-law related disputing and dispute resolution practices of Muslim families living in Belgium. It focuses on the role different types of normativity involved in these practices, and of religion and religious actors in particular, and proposes a reflection on what these research findings may mean to the field of (family) mediation. It concludes that there is a need for innovative approaches that dare to engage more with power differentials and different types of normative issues, including religious norms, in family mediation.*

### **Résumé : La « médiation » internormative de conflits familiaux au sein de familles belges musulmanes**

*Avec la tendance globale à la privatisation de la justice familiale, l'intérêt pour la médiation familiale s'accroît. Cependant, la relation entre les pratiques de résolution de conflits familiaux et la diversité culturelle et/ou religieuse reste un domaine peu étudié. En Belgique, nous savons très peu de choses sur les pratiques (para)juridiques de familles musulmanes. Cet article présente des conclusions tirées d'une recherche empirique concernant les conflits familiaux et les pratiques de résolution de ces conflits*

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*au sein de familles musulmanes vivant en Belgique. L'article est centré sur le rôle de différents types de normativité impliqués dans ces pratiques, et de la religion et des acteurs religieux en particulier, et propose une réflexion sur les implications des résultats de recherche pour le domaine de la médiation (familiale). Il conclut notamment qu'il est nécessaire de développer des approches innovantes, qui permettent de davantage tenir compte de différentiels de pouvoir et osent s'engager davantage dans des questions normatives d'ordres différents, en ce y compris celles liées à des normes religieuses.*

*If two parties among the believers fall into a quarrel, then make peace and reconciliation between them; but if one of them oppresses the other, then fight against the one that oppresses until it complies with the ordinance of God; then if it complies, make peace between them and reconcile them on the basis of justice and fairness; for God loves those who are just and equitable.*

*Quran 49:*

## **Introduction**

### **A. The research context**

The structure and organization of Western families have undergone profound changes, especially since the sixties. Significant trends such as a decrease in the number of marriages, an increase of the number of unmarried couples and of celibacy rates, a drop in fertility rates and an explosion of divorce rates characterize this evolution<sup>2</sup>. Belgian policy- and lawmakers have attempted to keep up, at an increasingly rapid pace, with these important societal evolutions, and with the resulting increased diversity of family models<sup>3</sup>. At times, they have also attempted to trigger or hasten particular societal changes through family law reforms<sup>4</sup>.

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<sup>2</sup> P. RONFANI, « La déjudiciarisation du contentieux familial », in *Familles et Justice. Justice civile et évolution du contentieux familial en droit comparé*, M.-T. Meulders-Klein (ed.), Brussels, Bruylant/LGDJ, 1997, p. 47-48.

<sup>3</sup> D. LUYTEN, H. VAN CROMBRUGGE and K. EMMERY (ed.), *Het gezin in Vlaanderen 2.0. Over het eigene van gezinnen en gezinsbeleid*, Antwerpen-Appeldoorn, Garant, 2017 ; J. FIERENS,

Curiously enough, most of the well-documented legal doctrine on the evolution and diversification of family models remains silent about the room left for cultural diversity in this enshrinement of pluralism and family liberalism<sup>5</sup>. Discrepancies, or even conflicts, may appear between the social model conveyed by Belgian family law and different cultural standards, such as those that may be valued in some families with a migrant background<sup>6</sup>.

With the global trend towards the privatization of family justice, alternative modes of dispute resolution, and family mediation in particular, are of growing interest to researchers and practitioners alike. Nevertheless, at the same time, some authors have expressed concerns that alternative modes of dispute resolution might be detrimental to vulnerable disputants, particularly women and minorities<sup>7</sup>. Recently, the topic of religious arbitration, particularly in family matters, and especially when Muslim communities are concerned, has sparked intense controversies, for instance in the Canadian province of Ontario<sup>8</sup> and in the United Kingdom<sup>9</sup>, mainly based on gender equality concerns. This relates to the fact that such religious arbitration, as a rule-based dispute resolution process, could settle disputes on the basis of Islamic norms, considered by some to be inherently incompatible with (Western) conceptions of gender equality, and would therefore endanger women's equality and autonomy. It remains unclear how these concerns precisely relate to family mediation(-like) practices within

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« Photo de famille. L'image de la famille à travers les mutations récentes du droit civil belge », *Journal du droit des jeunes*, vol. 278, 2008, p. 23-31.

<sup>4</sup> J. FIERENS, « Photo de famille », *op. cit.*, 23-31. FIERENS refers for instance to the reforms concerning the regime of joint parental authority and the principle of equal shared residency of children after divorce or separation of the parents.

<sup>5</sup> J. FIERENS, « Les évolutions du droit de la famille en Europe au cours du dernier demi-siècle : Le couple ou méditation sur le même et le différent », in *Regards sur la famille, le couple et la sexualité : Un demi-siècle de mutations*, Paris, Academia-L'Harmattan, 2014, p. 2.

<sup>6</sup> K. LECOYER and C. SIMON, « The multicultural family in conflict: Legal and socio-anthropological perspectives on child residency », *Journal of Legal Pluralism and Unofficial Law*, vol. 47, 2015, n° 2, p. 190-207.

<sup>7</sup> See for instance M.F. BRINIG, « Does mediation systematically disadvantage women », *Wm. & Mary J. Women & L.*, vol. 2, 1995, p. 1 ; R. DELGADO, « The Unbearable Lightness of Alternative Dispute Resolution: Critical Thoughts on Fairness and Formality », *SMUL Rev.*, vol. 70, 2017, p. 611.

<sup>8</sup> See for instance A.C. KORTEWEG, « The Sharia Debate in Ontario: Gender, Islam, and Representations of Muslim Women's Agency », *Gender & Society*, vol. 22, 2008, n° 4, p. 434-454 ; C. CUTTING, « Faith-based arbitration or religious divorce: What was the issue? », in *Debating Sharia: Islam, Gender Politics, and Family Law Arbitration*, A.C. KORTEWEG and J.A. SELBY (ed.), Toronto, Buffalo, London, University of Toronto Press, 2012, p. 6687.

<sup>9</sup> S. BANO, « In Pursuit of Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the "Sharia Debate" in Britain », *Ecclesiastical Law Journal*, vol. 10, 2008, n° 03, p. 283-309 ; R. SANDBERG and S. THOMPSON, « The sharia law debate: the missing family law context », *Law & Just.-Christian L. Rev.*, 2016, vol. 177, p. 181.

Muslim communities, that would not be rule-based, but would instead entirely be based on parties' consensus, within the boundaries of prevailing state law.

Furthermore, making accredited, professional family mediation services accessible to all in super diverse societies remains a challenge<sup>10</sup>. Particularly, the modern individualistic underpinnings of mediation as a professional model for conflict resolution seem to constitute an obstacle to families anchored in relational connectedness and/or more traditional or conservative family values<sup>11</sup>.

The relationship between family conflict resolution practices and cultural and/or religious diversity remains an under-researched domain<sup>12</sup>, particularly in continental Europe. Apart from the focus on religious arbitration and Britain's so-called "Sharia councils"<sup>13</sup>, very little is known about the (para)legal practices of European Muslim families<sup>14</sup>, and no empirical research has yet been conducted on the topic in Belgium.

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<sup>10</sup> B. BASTARD, « Médiation familiale : une profession qui peine à trouver son public », *Informations sociales*, 2012, n° 2, p. 66-73.

<sup>11</sup> D. D'URSEL, *La médiation, entre tradition et modernité familiales : le défi de la médiation pour tous, par une prise en compte des modèles familiaux des valeurs et des cultures*, Louvain-la-Neuve, Presses universitaires de Louvain, 2010, p. 2.

<sup>12</sup> Notable exceptions are D.W. AUGSBURGER, *Conflict mediation across cultures: Pathways and patterns*, Louisville, Kentucky, Westminster John Knox Press, 1992 ; J.P. LEDERACH, *Preparing for peace: Conflict transformation across cultures*, Syracuse, Syracuse University Press, 1996 ; S.N. SHAH-KAZEMI, « Cross-cultural mediation: a critical view of the dynamics of culture in family disputes », *International journal of law, policy and the family*, vol. 14, 2000, n° 3, p. 302.

<sup>13</sup> See, for instance, S. BANO, « Islamic Family Arbitration, Justice and Human Rights in Britain », *Law, Social Justice & Global Development Journal*, 2007, n° 1, p. 1-26 ; S. BANO, *Muslim Women and Shariah Councils: Transcending the Boundaries of Community and Law*, Basingstoke, Hampshire, Palgrave Macmillan, 2012 ; J.R. BOWEN, *On British Islam: Religion, Law, and Everyday Practice in Shari'a Councils*, Princeton, Oxford, Princeton University Press, 2016.

<sup>14</sup> But see M.M. KESHAVJEE, *Islam, Shari'a and alternative dispute resolution : mechanisms for legal redress in the Muslim community*, London, I.B. Tauris, 2013 ; L.G.H. BAKKER *et al.*, *Sharia in Nederland: een studie naar islamitische advisering en geschilbeslechting bij moslims in Nederland*, Instituut voor Culturele Antropologie en Ontwikkelingsstudies, Instituut voor Rechtssociologie, Radboud Universiteit Nijmegen, WODC, 2010, online, <http://wodc.nl/onderzoeksdatabase/sharia.aspx> (last accessed 30 December 2019) ; M. JARABA, « The Practice of Khul' in Germany: Pragmatism versus Conservatism », *Islamic Law and Society*, January 2019, vol. 26, n° 1-2, p. 83-110 ; A. LIVERSAGE and T.G. JENSEN, *Parallele retsopfattelser i Danmark: Et kvalitativt studie af privatretlige praksisser blandt etniske minoriteter*, Copenhagen, Denmark, SFI, 1<sup>st</sup> November 2011, p. 191, online, [https://pure.vive.dk/ws/files/236765/1137\\_Parallele\\_retsopfattelser.pdf](https://pure.vive.dk/ws/files/236765/1137_Parallele_retsopfattelser.pdf) (last accessed 30 December 2019).

Belgium counts an estimate of about 450.000 to 500.000 Muslims, representing around 4 to 5% of the total Belgian population<sup>15</sup>. As a result of the Belgian history of “guest labour”, the largest Muslim communities in Belgium are of Moroccan and Turkish descent. Within these communities, a strong identification with the Islamic religion is common<sup>16</sup>. While the separation of state and religion seems evident to a majority of Belgian Muslims<sup>17</sup>, very little is known about their legal practices and how internal conflict is handled, including when related to religious questions in family and other matters<sup>18</sup>.

### **B. Content and structure of the article**

This paper presents a number of findings from a research concerning family-law related conflict and dispute handling practices of Muslim families living in Belgium<sup>19</sup>. In this article, my focus lies on the role of religious actors and/or religious normative references in these practices. Based mainly on interviews with members of Belgian Muslim families on the one hand, and with a dozen of mosque imams on the other hand, this paper focuses on “internormativity”<sup>20</sup> in (in)formal conflict facilitating processes, i.e. how the intermingling and hybridization of social, legal and religious norms plays out in conflict handling processes in the domain of family matters.

The aim is to provide an empirically grounded insight into the following questions:

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<sup>15</sup> Precise estimates are hard to obtain in the absence of national statistics on religious affiliation, but see N. FADIL, « Belgium », in *Yearbook of Muslims in Europe*, 3, J.S. Nielsen (ed.), Leiden, Boston, Brill, 2011, p. 69-91 ; H. BOUSETTA and L.-A. BERNES, *Muslims in the EU: Cities Report - Belgium. Preliminary Research Report and Literature Survey*, New York, London, Budapest, Open Society Institute, 2007, [p-2](#).

<sup>16</sup> C. TORREKENS and I. ADAM, « Pratiques religieuses des Belges de confession musulmane », *La revue nouvelle*, 2019, n° 6, p. 61-75.

<sup>17</sup> *Ibidem*.

<sup>18</sup> M. EL KAROUNI and M.-C. FOBLETS, « Les conflits et leur résolution au sein de la communauté musulmane en Belgique. Ebauche d'une analyse qui reste à faire », *Recht van de Islam*, vol. 20, 2003, p. 29-49.

<sup>19</sup> This paper is based on data stemming from a larger research project called BEPLULEX (2011-2014), funded by the Belgian Science Policy Office (Belspo). It aimed to study pathways to justice in family disputes within families with a migrant background. Given the importance of Muslim identity and Islamic normativity that was found in the research, the focus in my related doctoral work shifted to Muslim families. My doctoral research studied the extent to which particular underlying legal, social and religious norms are, or not, mobilized in and/or inform and regulate these practices; How these practices are understood and experienced, in particular by female family members involved in them; And, finally, what this entails in terms of protection and promotion of women's rights.

<sup>20</sup> This has also been called « interlegality » by SANTOS, B. DE SOUSA SANTOS, « Law: A map of misreading », in *Toward a new common sense: law, science and politics in the paradigmatic transition*, London, Routledge, 1995, p. 456-473. I use both terms interchangeably.

(1) Which (informal) family-law related conflict handling practices are taking place among Muslim families living in Belgium?;

(2) What is the role of religion in these practices, as compared to other sources of normativity, such as Belgian State law, foreign legal systems, and various social norms?;

(3) What is known about the role of different professional actors in this particular landscape?;

(4) And what is the role of religious actors? How are religiously inspired “informal” family mediation-like processes operating? And how are these practices understood and interpreted by the involved religious figures, as well as by users of such services?

Below, after a short methodology section, the rest of this article will present and discuss relevant empirical research findings, following the questions enumerated above. The concluding section proposes a critical reflection on the implications of these findings for the broader field of family justice and mediation and attempts to answer the fifth and final question: *can mediation and internormativity be brought together, and if so, how?*

### **C. Methodology**

With the aim to gather qualitative research data about (para)legal practices in the field of family law among Muslim families of migrant origin in Belgium, extensive empirical fieldwork was conducted between April 2012 and June 2014. It included visits to various civil society associations and community organizations, discussions and exploratory as well as in depth interviews with various field actors playing a facilitating role in dispute resolution processes, as well as with members of Belgian Muslim families<sup>21</sup>.

On the one hand, about 50 field actors or (non-state) “justice brokers” were interviewed: lawyers and mediators, social workers, psychologists and therapists, as well as Muslim religious actors and (informal) mediators working with families with a migrant background, frequently having a migrant background themselves. Among them were 12 Muslim religious actors, all male, mainly mosque imams. On the other hand, over 70 in-depth interviews and 15 focus groups were conducted with individual members of Muslim families living in Belgium about their experiences with family conflicts and ways to resolve them through the intervention of state and/or non-state actors.

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<sup>21</sup> The field research was conducted by the author and a research assistant, Victoria VANDERSTEEN.

This article is mainly based on the narratives of religious actors. These qualitative interviews were conducted face-to-face, either in the mosque or organization of the interviewee, or more rarely in a public space such as a terrace or café, and lasted between half an hour to more than three hours. Most interviews took place in French or Dutch, two interviews were conducted respectively in Arabic and Turkish with the help of a translator trusted by the interviewee. It has unfortunately not been possible to directly observe faith-based dispute resolution practices.

My overall analysis is informed by the crossing of all relevant collected data. In particular, the findings concerning the role of Islamic normativity in family life and conflict are largely based on the narratives of Muslim families.

### **1. The research findings: a complex and multi-layered landscape**

Muslim families, like other families, make use of different resources in the face of family conflict. Besides having recourse to state courts, other options for instance encompass direct and indirect negotiations between parties, possibly with intervention from friends and/or family members, professional psychological or psycho-social counselling or family mediation services. The research found that for Belgian Muslims recourse to official, accredited, family mediation services is rather exceptional, whereas family and community members, among which local imams and (volunteer) mosque workers, tend to quite often take on a facilitating role in family disputes. Below, I will further develop these main findings stemming from narratives about conflict handling practices in Belgian Muslim families, following the questions enunciated above.

#### ***A. Which (informal) conflict handling practices are taking place within Belgian Muslim families?***

Conflict handling practices often differ according to the stages of conflict. Prevention and (early) reconciliation are largely in the hands of (extended) families and religious actors; Once conflict is manifest and needs resolution and/or legal settlement, different (state and non-state) instances may be mobilized, often in a “profit maximizing” approach, sometimes beyond the borders of our Kingdom; though obviously, only state judges can actually enforce decisions<sup>22</sup>.

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<sup>22</sup> This was already observed by M. El KAROUNI and M.-C. FOGLETS, « Les conflits et leur résolution au sein de la communauté musulmane en Belgique. Ebauche d'une analyse qui reste à faire », *op. cit.*, p. 37-45.

Generally speaking, the mobilization of state justice occurs at a time when other options, such as appealing to extended family, one's social network or a religious advisor, have not allowed (all members of) the family to solve the conflict and/or to rearrange family life in a satisfactory way. However, especially in matters of separation and/or divorce, the use of "private" resources prior to – and sometimes at the same time as – state family justice, often reflects the great difficulty of ending a relation or marriage, rather than a disavowal of court instances. These private resources are often considered as places of reconciliation, whereas resorting to the court will permit to legally recognize the dissolution of the relation or marriage and order the consequences thereof, particularly with respect to the children. Illustrating this trend of the law coming in at a later stage, a female disputant for instance said:

“As I am Muslim, I look at what the religion says (...) [it's important to] look at the religious [law], and also at Belgian [law], but that [Belgian law] is for later, if ever we would start the divorce.”<sup>23</sup>

In many conflicts, the often complex combination of psycho-social, as well as legal matters, with questions relating to the religious legitimacy of certain actions, explains why families turn to different professionals as well as to more "informal" actors for advice and support in handling the conflict they are going through. Concerning divorce or post-divorce, frequent questions of Muslim women are for instance: what is best for my child(ren) from a child psychology standpoint and from a religious viewpoint? Is asking for a divorce in my case religiously licit and, if so, what is the "legal" <sup>24</sup> procedure? And what financial and other consequences will I have to face?

Precise expectations towards interveners are manifold though: Some are seeking the electroshock that will "wake-up" the other party and/or make

<sup>23</sup> Interview in Brussels on 12/09/2012 with ANISSA (pseudonym), age 26, a woman of Moroccan origin married to a man of Moroccan origin. At the time of the interview, she considered divorcing but had not made a decision yet.

<sup>24</sup> For a number of Muslims, though certainly not a majority, the dissolution of marriage requires, besides the legal procedures putting an end to civil marriage, additional formalities to dissolve the marriage in the eyes of God and the community. In many Muslim majority countries, Islamic divorce is dissolved by (state) officials holding judicial power. In Belgium, no Islamic authorities were found to deliver Islamic divorce decrees, contrary to the United Kingdom or Germany for instance. Muslim women wishing to obtain a religious divorce will therefore frequently push their husband to privately utter an Islamic unilateral divorce or *talaq* or may remain "captive" of their religious marriage. For more information on Muslim divorce practices in Belgium, see K. LECOYER, « Protecting Women against Marital Captivity. An Analysis of Insiders' Perspectives on Muslim Divorce in Belgium », in *Marital Captivity. Divorce, Religion and Human Rights*, S. Rutten, B. Deogratias and P. Krüninger (ed.), The Hague, Eleven International Publishing, 2019, p. 93-135.



him (or her) aware that something needs to change in their attitude or behavior<sup>25</sup>; some are seeking an intervention that will facilitate dialogue and communication, and may hope that an imam will be viewed as trustworthy enough to take on this role; some are looking for an arbiter who will decide “who is right” and “who is wrong”, but are generally not willing to be bound by such decisions, unless in their favor. Yet, most noteworthy is that for many interviewed disputants, the religious dimension is said to be of major importance.

The interviews with members of Muslim families confirm that religious advice and “mediation” services from imams, mosque volunteers or other religious actors operate as “private resources”, providing interpretations of Islamic normative orderings, without binding authority however. Religious figures mainly act as providers of authoritative religious discourse, more or less empowering or disempowering parties in dispute, and generally reinforcing existing – gendered – power relations within the family<sup>26</sup>. This regularly causes frustration and rarely results in a lasting resolution of family conflicts. Nevertheless, the demand for this type of “service” seems very important.

In situations of family conflict, people thus turn to different types of actors, based on a variety of needs and expectations. In order to fully understand the role played by different actors in this landscape, it seems useful to clarify the respective role of law and religion in Muslim family life and conflict.

### ***B. What is the role of religion and of other sources of normativity in Muslim family life?***

Within the Belgian legal framework, any purely religious rules or norms will be disregarded by the Belgian (family) judge who shall only apply Belgian law to domestic legal cases. For Muslim citizens holding a foreign

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<sup>25</sup> Research has found the “relational” mobilization of state justice (more particularly the former office of the peace judge) to be particularly important in families with a migrant background, see C. SIMON and B. TRUFFIN, « La diversité culturelle en procès: L'expérience de la justice belge par les familles à composante migratoire, quels enjeux pour le pluralisme juridique? », *Anthropologie et sociétés*, vol. 40, 2016, n° 2, p. 107-129.

<sup>26</sup> Existing gendered power relations produce social norms and are at the same time (re)produced by them. Specific matters such as (equal) access to divorce for women, polygyny and inheritance are examples of issues in which dominant gender-unequal religious interpretations frequently play an additional role. It is noteworthy, as I have analyzed elsewhere (see *supra* n. ~~Erreur ! Signet non défini.~~), that even when religious interpretations may offer solutions to women, some religious actors show reluctance to apply, or even mention, these norms out of fear of “social unrest”. Hence, the unwillingness of those religious actors to undermine male dominance and privilege maintains such gender imbalances.

nationality, religiously inspired legal rules that form part of their foreign national legal system could find application through private international law. In this research, such cases are rare, given that most of the Belgian Muslims who participated in the research were holding Belgian nationality. In theory, contracts, as well as mediation agreements, could be concluded between parties based on or inspired by Islamic norms, but these will only be considered legally valid and binding provided they respect all legal requirements of Belgian law. The research found that the practice of concluding such Islam-based contracts or mediation agreements in Belgium is not common though, perhaps even inexistent. This does not mean that Islamic normativity is irrelevant in the lives of Belgian Muslim families, rather, it does not take legally recognized, nor recognizable, forms in the Belgian context. Islamic norms thus play out in private orderings, through complex negotiation processes within the family and community. Legal arrangements, in turn, are either court ordered or reached by agreement between parties, and not through faith-based mediation, arbitration or adjudication. Such arrangements respect rather than circumvent Belgian family law<sup>27</sup>.

It appears from the interviews conducted with community and religious actors that they are seldom mobilized as third-parties in relation to child residency or inheritance matters and that both families and non-state “justice brokers” consider these matters as quite naturally being the resort of state courts. In fact, although many Muslim families, especially very observant ones, turn to religious actors for guidance and religious advice on various family-related issues, including inheritance or residency of children after separation or divorce, it is generally mere spiritual guidance and information about religious principles with regard to acceptable attitudes and behavior between relatives that is sought in this regard. Especially in the face of family conflict, they may want to assure they are not violating any religious prescriptions and/or draw other family members’ attention to any religious obligations they are failing to respect<sup>28</sup>.

Islamic normativity plays a role in daily family life and family conflicts of Belgian Muslim families in various ways and to various extents. It does not imply that Muslims want to apply “Islamic law” or “sharia” in the sense of

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<sup>27</sup> BERGER observed a similar trend in the Netherlands. M. BERGER, « Sharia in Nederland is vaak keurig Nederlands », *Mens en Maatschappij*, vol. 56, 2007, n° 6, p. 506-510.

<sup>28</sup> Examples from the research are for instance: A (divorced) woman may inquire whether she does or does not need her parents’ consent for (re)marriage, or whether she is entitled according to religious norms to request sole custody in case of divorce; spouses in conflict may seek information about when divorce is religiously “acceptable”, or about what constitutes “acceptable” or “faulty” behavior between spouses according to Islam.

implementing an alternative legal system. Rather, for many, but certainly not for all Muslims in the research, the question of how to live an Islamically “good” life in a secularized society is an important concern, to which Islamic figures of authority are expected to bring a response. However, what this “correct” lifestyle precisely entails may vary much from one interpretation to another. Islamic normativity, often referred to as “sharia”, functions as a “virtuous abstraction” for many Muslims around the world, i.e. something that is “good”, “perceived as virtuous and necessary”<sup>29</sup>. At the same time, they rarely know precisely what that means in practice though<sup>30</sup>. This very vague, positive connotation of “sharia”, together with a vision of Islam as an individual orthopraxis, where ethics and practice are equally important<sup>31</sup> probably contributes to an overemphasis of Islamic motives in the narratives of Muslims. Actions and decisions in daily life situations are likely to be much more contextual than (merely) motivated by religious considerations. In other words, while religious principles and norms are considered important at a general level, there is a lot of variation in the concrete interpretation and practice of Muslims in daily life.

Obviously, bargaining processes between parties in conflict do not operate in a normative vacuum, they are instead strongly influenced by both state law and religious norms, each acting as a “shadow”<sup>32</sup> on each other. This becomes clear when looking at how marriage is concluded and ended in Muslim communities. Normative standpoints uttered by local and transnational religious actors and authorities influence how members of Belgian Muslim families consider a valid marriage is to be contracted and how civil, religious and traditional marriage practices relate to and interact with each other. To most interviewed members of Muslim families, the conclusion of a civil marriage is self-evident. The legal requirement of prior civil marriage is well known and largely respected<sup>33</sup>. In the same way, for the dissolution of marriage, a Belgian civil divorce is the most obvious option to

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<sup>29</sup> M. BERGER (ed.), *Applying shari’a in the West: facts, fears and the future of Islamic rules on family relations in the West*, coll. Debates on Islam and society, Leiden, Leiden University Press, 2013, p. 9.

<sup>30</sup> *Ibidem*.

<sup>31</sup> N. FADIL, « Individualizing Faith, Individualizing Identity: Islam and Young Muslim Women in Belgium », in *European Muslims and the secular state*, J. Cesari and S. McLoughlin (ed.), Aldershot, Ashgate, 2005, p. 146.

<sup>32</sup> Bargaining “in the shadow of the law” refers to private orderings influenced by state law, acting as a “shadow” on them. M. GALANTER, « Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law », *Journal of Legal Pluralism*, vol. 19, 1981, p. 1-48.

<sup>33</sup> Belgian law requires concluding a civil marriage before any religious one can take place. This rule is enacted in the Belgian Constitution (art. 21) and in Belgian criminal law (art. 267) and prohibits religious clergy from marrying couples who are not married according to civil law.

most research participants. However, interviewees indicate that it is important for them to gather information about Islamic opinions and prescriptions and that they frequently turn to imams and Islamic centers for this, as well as to the Internet. The relationship between Islamic norms concerning family life and the applicable state family law is also influenced by other factors, such as the legal system and legal culture in the country of origin. For many Muslims, mainly of Turkish origin, Islamic norms are largely conceived of as ethical and personal norms, in a view in which religion and law are of a totally different nature. For others, frequently, though not necessarily, of Moroccan background, things are a little more complex, as law and religion become intertwined to various extents<sup>34</sup>. Family law practices thus appear to be shaped by complex processes of internormativity in which both state law and religious norms become intertwined.

As a consequence, family members turn to different types of actors for these matters. The next question therefore concerns the role of “formal” and/or “professional” actors in conflict handling practices of Belgian Muslim families.

### **C. What is the role of different professional actors in this landscape?**

Professional actors involved in family disputes may be social workers, lawyers, psychologists, (couple) therapists and others, employed in the social and associative sector, or operating in official state related institutions, in (accredited) family mediation services, or in notary’s offices for instance. Such professional actors by and large adopt a “standard legal response”<sup>35</sup> to unofficial private orderings of religious nature, namely a strict separation between state and religion<sup>36</sup>, confining each to its own separate sphere. As a consequence, they frequently turn a blind eye to any religious aspects of the disputes brought before them, and, at best, refer people to religious authorities or actors to deal with these aspects. Lawyers and other state justice actors, including those with a Muslim background, tend to dismiss

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<sup>34</sup> Whenever respondents consider there is overlap of religious and legal norms, the relationship between both is generally viewed as one of complementarity, rather than of competition. The precise articulation in most cases is that (particular interpretations of) religious norms tend to form the basis of legitimacy and entitlement to certain rights, whereas actual recognition and enforcement of those rights is generally located in the use of the legal system. Likewise, a lack of sense of entitlement may result in non-take-up of rights protected by state law, as may be the case of women who feel uncertain about their religious right to divorce.

<sup>35</sup> A. SHACHAR, « Entangled: state, religion. and the family », *Harvard Int Law J*, vol. 49, 2009, p. 134 and 137.

<sup>36</sup> Shachar refers to this as a “wall of separation” (*ibidem*, p. 145.).

any demands that include religious aspects, such as *mahr*<sup>37</sup> for instance, as “non-legal” and therefore out of the scope of their work. A young lawyer of Turkish origin expressed her surprise when, after having had several divorce cases involving a dispute over *mahr*, she turned to older colleagues within the community to ask them how they dealt with similar demands.

“They said: “We never bring that up, let them solve it amongst themselves.” You can listen and respond to clients’ problems, or you can decide to block it off, because the system does not give me the possibility to solve it. I’m trying to mediate, but I can’t mediate indefinitely.”<sup>38</sup>

I mentioned earlier that professional family mediation services are not very well known within Muslim communities. In this context, it is noteworthy that professional actors sharing the cultural and religious background of Muslim families are frequently over-demanded with regard to family disputes. Lawyers of Muslim background, among which a few were interviewed, are frequently solicited for (legal) advice in family matters even if their specialization lies elsewhere. Muslim psychologists, therapists, and social workers are also very demanded. Research concerning the use of (psycho-)social services by cultural and/or religious minority groups has shown the existence of important obstacles<sup>39</sup>. Globally, in this research, different reasons come forward not to make use of professional services in the field of family justice and mediation or related practices, such as couple therapy for instance. The main reasons evidenced by the interviews are: a lack of familiarity with the existing offer of services; mistrust and fear of unwanted effects and/or loss of control; social control and cultural expectations to “keep problems hidden for outsiders” (this may however also be a reason to consult a professional service rather than someone from one’s own community, to avoid gossip within the community); fear to be misunderstood and/or judged, mainly because of the importance of cultural elements such as sorcery and black magic for instance, or when

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<sup>37</sup> Islamic dower or bride gift. For an interesting review of its treatment in European legal systems see R. MEHDI and J.S. NIELSEN, *Embedding Mahr (Islamic Dower) in the European legal system*, Copenhagen, Denmark, Portland, OR, DJØF Pub., 2011.

<sup>38</sup> Interview in Antwerp on 21/06/2012 with a lawyer of Turkish origin, specialized in labor law but frequently asked by Turkish and other Muslim clients to deal with their family law cases.

<sup>39</sup> See e.g. L. SANNEN, *Drempels naar welzijnsvoorzieningen: de cliënt aan het woord. Literatuurstudie en diepte-interviews bij kansarmen en etnisch-culturele minderheden*, Leuven, Katholieke Universiteit Leuven. Hoger instituut voor de arbeid, 2003, p. 270; A. VAN DEN BROEK, E. KLEIJNEN and S. KEUZENKAMP, *Naar Hollands gebruik? Verschillen in gebruik van hulp bij opvoeding, onderwijs en gezondheid tussen autochtonen en migranten: Verdiepingsstudie diversiteit in het jeugdbeleid*, Den Haag, Sociaal en Cultureel Planbureau, 2010.

(interpretations of) religious norms are involved. Not wanting to confirm a negative stereotype very probably also forms an important obstacle for women suffering from male oppression in the name of Islam, this was however not explicitly mentioned by interviewees.

A number of interviewed professional actors expressed the difficulties they experience to take into account cultural and/or religious elements in their work with Muslim families. A social worker operating in a victim support service<sup>40</sup> narrated a domestic violence case where the wife, to which she was providing support, was reluctant to engage in any protective measures because she believed she was not entitled to leave her husband or divorce him according to Islam. Although this belief is clearly based on an abusive religious interpretation<sup>41</sup>, the social worker seemed unaware of this, or did not know how to deal with it. She had first advised the woman to gain more information from her local mosque and since this did not bring any opening, she felt unable to help this woman. Some people “are trapped in their construction of the world”, she said regretfully.

Although the above mentioned case did not concern mediation, it poses relevant questions for mediation practitioners and others, notably about how to make sure their professional role is made as relevant as possible to families and individuals of different cultural and religious backgrounds, even so, or maybe especially, when this requires assistance in gaining and treating information about (the entanglement of legal and) religious or other norms. In a focus group discussion, the contrast between different female Muslim psychologists illustrates this same tension. One of them said:

“I see several Muslim couples and families, and numerous problems relating to the lack of awareness about women’s rights ... women’s religious rights I mean... and men often take advantage of this.”<sup>42</sup>

Another Muslim psychologist confirmed that questions relating to religious rights are important in her practice as well :

“I have been reading, asked questions [to scholars]... There are couples coming to me in suffering, because he has a second wife and you have to work with these things in therapy... what is said about this

<sup>40</sup> Focusgroup discussion in Brussels on 8/10/2013 with social workers and psychologists.

<sup>41</sup> See e.g. M.B. ALKHATEEB and S.E. ABUGIDEIRI, *Change from within: Diverse perspectives on domestic violence in Muslim communities*, Great Falls, VA, Peaceful Families Project, 2007, p.

<sup>42</sup> Focusgroup in Brussels on 12/11/2013 bringing together professional actors and religious actors, as part of the project’s mid-term conference.

from an Islamic viewpoint?...what are the legal implications? That means the psychologist wears several hats... then we can afford to work on the relational dimension, but this is a clear reference point... I believe religion can be a valuable resource in therapy, an aid in a couple's conflict."<sup>43</sup>

To this, a third participant responded that she wasn't able to position herself as a religious advisor:

"I don't have the jurisprudential tools, so I can't respond, I am incapable [of that]... I can listen to the person, from where she speaks... but I can't position myself."<sup>44</sup>

When religious norms are involved, family members in conflict may thus want to turn to religious actors for support and/or advice. We will now look at the role played by these actors in the handling of family conflicts.

#### **D. What is the role of religious actors in family conflict handling practices? Are they taking part in "mediation-like" processes?**

Interviewed religious actors mainly bring to the foreground religious motives for intervening in family conflicts. Their aim is to bring people closer to God. Moreover, helping people to reconcile is seen as a way to follow the Prophet's example. There seems to be a commonly shared goal to restore harmony within families that call for their help, and a common practice to use religious exhortations and to refer to religious values and teachings for this. Beyond these elements, there however is no commonly shared approach to conflict intervention. Rather, different types of intervention are practiced in mosques and religious organizations : responding to individual religious questions is the most common practice; A few larger religious organizations are able to offer a telephone hotline, and/or a physical first line helpdesk where all kinds of questions can be addressed: psychological, legal, religious, .... In fact, religious actors are seldom in presence of more than one party at the same time. Nevertheless, restoring and/or facilitating communication in conflict situations is an often pursued ideal, although none of them was trained in this field. Some said they call the absent party (generally a husband) and invite them to come to the Islamic center or imam's home for a discussion. If this fails, advice is given about how to adapt one's own communication and attitude in order to calm down the situation. One imam for instance mentioned he offers wives help in writing letters to their husband to address the conflict situation in a tactful manner.

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<sup>43</sup> *Ibidem.*

<sup>44</sup> *Ibidem.*

In the rare cases where the other person does show up, most imams will first talk to each party individually. It appears that in reality conflicting parties rarely sit together with a religious “mediator”.

The wording “religious mediation” or “Islamic mediation” was regularly used by research participants, but the research could not evidence a particular model or format of family “mediation” operated by religious actors within Belgian Muslim communities. Disputant interviews show that the term “religious mediator” or “Islamic mediator” is sometimes used to refer to a religious actor providing religious advice, face-to-face or otherwise, concerning family conflicts, to only one party. The term “mediation” in this particular context is thus being used as a synonym for a broad range of conflict handling mechanisms, including (indirect) negotiation and advice-giving, rather than for a particular form of third-party intervention, as is understood and defined by mediation professionals and academics.

#### 1. *The advice-giving role of imams*

When imams or other religious actors intervene in family conflicts, they tend to view their role primarily as providers of religious teachings. Most frequently, what happens thus is that religious actors provide religious advice to one or more parties in conflict, at their demand<sup>45</sup>.

It is generally understood, and sometimes deplored, both by imams themselves and by individual family members, that such advice bears no binding force. Nevertheless, the contents of these positions may still have important consequences, especially for more vulnerable family members. Several religious actors highlighted the flexibility of Islamic principles and the possibility to select the religious interpretation that is most easily applied in each particular case, a principle called “*al-ikhtiyar*”. Nevertheless, the viewpoints of many religious actors were found to reinforce dominant gender conceptions promoting male privilege and control of female behavior. A few interviewed women explicitly said they did not go to an imam for help, exactly because they did not want to hear an advice that would not be in their best interest. Others did turn to an imam or Islamic center and were disappointed about what they perceived to be a lack of impartiality and/or a

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<sup>45</sup> This amounts to the issuing of “fatwas”. A *fatwa* (Arabic pl. *fatawa*, anglicized pl. *fatwas*) is a non-binding, but generally authoritative, religious opinion or advice. It is an answer from a qualified Islamic scholar, called *mufti*, to an individual petitioner, called the *mustafti*. A *fatwa* may be issued orally or in writing, face-to-face or over the phone, on the radio or television, or via the Internet, such as the many *fatwas* that can be found on Islamic websites and online discussion forums, posted by the *muftis* themselves or community members disseminating *fatwas* published elsewhere.



lack of competence. Many others, though, were not necessarily aware of a gender bias in the proposed religious advice. A variety of religious interpretations generally exists in any particular matter, and believers are not always aware of this.

*2. Multiple religious interpretations... interacting with prevailing law*

Many different normative positions about family related issues in Muslim families are produced and/or disseminated by different actors, echoing important interpretative debates taking place within Muslim communities worldwide.

The dominant type of religious discourse, defending traditional gender roles and relations, clearly is most easily accessible, in mosques, Islamic courses, in bookstores and online. Nevertheless, several interviewed religious actors in mainstream religious institutions feel more or less at unease with it. While stating that their own level of religious knowledge and authority is insufficient to be able to provide innovative answers to social matters so complex, some of them express the hope that more qualified leading Muslim scholars will soon take up this task.

At the same time, discourses that highlight the importance of compliance with Belgian civil law are also extremely common. In the current context of Muslim minorities living in Western countries such as Belgium, most of the interviewed religious actors insist that requirements of civil law need to be taken into account. The need to “respect the law of the land” is said to be an important Islamic obligation, a viewpoint confirmed in many of the disputant interviews. This stance offers a number of pragmatic solutions to current impasses of orthodox Islam with regard to gender equality. Civil marriage conclusion is for instance encouraged by imams to offer protection against potential abuses of “informal”, religious-only, marriage<sup>46</sup>. Likewise, the recognition of civil divorce as being Islamically valid, takes away the need for religious divorce formalities<sup>47</sup>; and with regard to inheritance for instance, families are encouraged, as a default solution, to distribute

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<sup>46</sup> In such “marriages”, a commonly reported issue is abandonment of the, often pregnant, “wife” and subsequent non-recognition of the children. See also K. LECOYER, « Belgian Muslim Women Navigating through Transnational Social Spaces with regard to Marriage Conclusion », *Migration Letters*, vol. 14, 2017, n° 1, p. 11-24.

<sup>47</sup> The recognition of civil divorce as religiously valid is based on a *fatwa* of the European Council for Fatwa and Research. See also K. LECOYER, « Insiders’ Perspectives on Muslim Divorce in Belgium: A Women’s Rights Analysis », in *Human rights encounter legal pluralism. Normative and empirical approaches*, G. Corradi, E. Brems and M. Goodale (ed.), coll. Onati International Series in Law and Society, Oxford, Hart Publishing, 2017, p. 175-202.

property based on Belgian law, equally between brothers and sisters<sup>48</sup>. The framework of civil law may also offer an Islamic ground to limit or prohibit polygynous marriage, as expressed by this imam:

“A good substantiated Islamic judgment always takes into account the surrounding reality. The fact that Belgian law prescribes that it [polygamy] is not allowed is a factor to take into account as a mufti<sup>49</sup>. A fatwa is always formed by two entities, so to speak, a religious and a societal element. And the legislation that prohibits it obliges you as a citizen to comply with the legislation, but also morally, because in fact, it’s the same in Islam.”<sup>50</sup>

The research also found religious actors who approach Islamic norms as a matter of personal spirituality, as ethical guidelines, that need to be given a personal meaning and the interpretation of which should thus not be (solely) in the hands of scholars or Islamic jurists<sup>51</sup>. Also, there are approaches to family law and women’s rights that defend gender equality based on alternative (re)interpretations of Islamic norms, such as those developed by Islamic feminists<sup>52</sup>. Although they endeavor to be “mainstream” from the viewpoint of religious legitimacy, these reformist and feminist approaches tend to be perceived as socially deviant by those in favor of the more dominant traditional gender order. Consequently, their influence on the ground, especially in Belgium as the research found, is still relatively minor, making them rather “marginal” from a social point of view.

### *3. Impartiality in the name of reconciliation and restoration of harmony*

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<sup>48</sup> Inheritance is a complex matter under Islamic law, largely derived directly from Quranic verses, in which patrimony is distributed in fixed shares based on degrees of relationship and gender, for instance awarding (with some exceptions) sisters half of the share of their brothers. The subject of Islamic inheritance generally triggered discomfort in the interviews, probably because it is known to be in conflict with Belgian (legal) standards of gender equality. The few religious actors who talked about it explained that they only accept to consider demands from families concerning inheritance on the condition that all involved family members voluntarily agree to it. A few religious actors mentioned demands from families to help them to draw an Islamic will, knowing that it would not be legally binding in the Belgian context. Such “private wills” are either intended to (attempt to) ensure an (unequal) distribution based on Islamic prescriptions or, on the contrary, to ensure that sisters would *not* be pushed into unofficially donating part of their share to their brother(s) after their parents’ death.

<sup>49</sup> See *supra* n. 45.

<sup>50</sup> Interview on 13/03/2014 in Ghent with a local imam.

<sup>51</sup> See e.g. A. BIDAR, *Self islam*, Paris, Le Seuil, 2017.

<sup>52</sup> See e.g. A.A. HIDAYATULLAH, *Feminist Edges of the Qur’an*, London, Oxford University Press, 2014 ; A. LAMRABET, *Femmes et hommes dans le Coran, quelle égalité?*, Paris, Albouraq, 2012 ; A. WADUD, *Inside the gender Jihad : women’s reform in Islam*, Oxford, Oneworld, 2006.

Muslim religious actors in Belgium thus mainly act as “dispensers” of authoritative religious discourse. In conflict situations, these actors would ideally like to bring together parties in conflict and reconcile them. Some therefore refuse to provide religious advice unless all conflicting parties are present.

“I prefer that they both are present ... we have a rule, do not listen to a single person, if he comes to complain with a broken eye, maybe the other one has lost both eyes.”<sup>53</sup>

Muslims turning to Islamic centers and imams frequently ask for information on Islamic “rights” and “duties” within the family, a practice resisted by many of the interviewed religious actors, especially in cases of marital dispute or divorce, as explained by this imam:

“There are people coming [to ask] “what are my rights, what are my duties?” and I, I often avoid answering... That’s the language of law courts... it’s not the language of the family, it’s not the vocabulary of a home, it’s the vocabulary of lawyers, judges, tribunals... I say, I don’t like the language of law courts in the mosque, the mosque is a place for reconciliation, hum, reconciliation is each one gives up a little of his or her rights, finding a common ground, hum and trying to arrange things, it is a language of compromise.”<sup>54</sup>

As the quote above illustrates, the concern for impartiality, a common feature in the interviews with religious actors, is at the service of an ideology of harmony and reconciliation.

Oftentimes, imams and other religious actors would prefer not to provide religious advice on family matters without hearing all the parties involved, not (so much) because they fear to compromise neutrality or party autonomy, but because they realize that the provided advice may further fuel conflict instead of reconciling the parties. Reconciliation appears to be the central concern in the approach adopted by religious actors. This may even be the case when not requested by the individuals asking for help and/or advice, such as when someone is seeking to obtain a (religious) divorce<sup>55</sup>.

“An important thing in the religious approach is... we never pronounce ourselves about a divorce, we do not have that competence. ... I mean we do not divorce people, you see, that, in the Islamic

<sup>53</sup> Interview on 9/12/2013 with a local imam from Liège.

<sup>54</sup> *Ibidem*.

<sup>55</sup> There were no Islamic authorities delivering religious divorce decrees found in Belgium, see above.

jurisdiction; it's the role of a judge to take care of that. Here we try, with the mediations we propose, we try to reconcile the points of view towards a solution and we do everything to convince the two parties uh to find a solution for uh to restart together and restore peace and harmony within the home."<sup>56</sup>

The wording in this quote is interesting in several ways, as the term "mediation" clearly appears to be used as a synonym for reconciliation, opposed here to the role of a judge or jurisdiction, while the term "convince" is exactly the opposite of what the professional/academic definition of mediation entails, namely to maximize party control over the outcome and not to exert pressure on parties towards (a particular) agreement<sup>57</sup>. Another imam explicitly said he differentiated between his role as an advise-giver (*mufti*) and his role as "mediator", as will be seen below. The distinction between both roles is not that evident to make, though.

#### 4. Being "a judge without a court": Lost in translation?

Processes of faith-based third party intervention are subject to very little professionalization, with religious "mediators" rarely having any degree of training in the field of conflict resolution or family relations or law, but being exclusively schooled (to various degrees) in religious matters. Described practices have very little to nothing in common with classical models of conflict resolution in Islamic law<sup>58</sup>. Neither do these practices appear to be reproductions of traditional forms of dispute resolution existing in countries of origin, transplanted into new contexts. Rather, these practices appear as local, hybridized and very privatized new forms of dispute handling. In fact, the dispute resolution processes referred to as "religious mediation" seem to point to an ideal rarely or never realized in practice and in which the role of the *mufti* or religious preacher and of the "imam-mediator" are more mixed up than distinguished. It seems as if religious

<sup>56</sup> Interview with a mosque advisor and imam from Brussels on 15/01/2013.

<sup>57</sup> There is no unanimously accepted definition of mediation, but there is consensus on a number of essential characteristics. PALI and VOET clarify these essentials as follows: "Mediation is a process in which a *neutral and impartial third party*, the mediator, helps disputants resolve a dispute. The mediator's goal is to facilitate dialogue and negotiation and *help the parties themselves* to reach a *mutually acceptable agreement*." Parties "retain until the end the right to make their own decisions". B. PALI and S. VOET, *Family mediation in international family conflicts: The European context*, Leuven: Institute of Criminology, Katholieke Universiteit Leuven, 2009, p. 27.

<sup>58</sup> The terminology used by religious actors sometimes refers to classical Islamic forms of dispute handling, such as *sulh* (conciliation) or *tahkim* (arbitration), but shows no (evident) similarities. For more information on these Islamic concepts see A. OTHMAN, « "And Amicable Settlement Is Best": Sulh and Dispute Resolution in Islamic Law », *Arab Law Quarterly*, vol. 21, March 2007, n° 1, p. 64-90.

actors are in a way “lost in translation”, not really knowing what their role in family conflicts could or should be, but sensing a dire need to respond to demands from families in the midst of a crisis<sup>59</sup>.

The described “informal” mediation/conciliation processes are rarely conceived of as an explicitly elaborated process following specific steps or procedures. In exception to this, one imam explained he worked on the conceptualization of a multiple-step approach to Islamic “mediation” to be applied by his mosque and other mosques in the region. The first step in his approach always is to try to reconcile parties and help them to better understand each other, he explained, based on religious teachings and reminders. If this fails, a second phase of the process is more geared towards providing Islamic information about the parties’ Islamic rights and duties. The aim of the approach is to help people reconcile and/or reach an agreement, based on and in accordance with religious teachings, but not to impose a particular outcome to the dispute, because “parties wouldn’t accept it anyway”, he said.

“First, I try to calm down the minds... we have God’s word, He says, ‘reconciliation is best’... so we talk, ‘what exactly is the problem? ’... But if there is no agreement, at that moment I say, ‘sharia says [this or that] ’, at that moment I become a judge. But that is the very last resort.”<sup>60</sup>

In fact, “phase one” of this model displays a facilitating mode, where the parties largely bring in normative considerations themselves, all the while they are being guided by religious teachings encouraging kindness, forgiveness and reconciliation; while in “phase two”, the “imam-mediator” moves towards taking up an expert-role, clarifying to those involved, as a *mufti* does, what “the sharia says”<sup>61</sup> on the particular matter(s) at hand.

Although the wording – I become a judge – is confusing, suggesting an arbitration-like process, in his further explanation, the interviewee makes clear that he bears no decision-taking authority in the dispute, but rather attempts to guide the parties towards reaching a “sharia-compliant” outcome. This religious actor insisted on what he called the “sharia of the contracting parties”. Anything the parties would agree upon, provided it does

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<sup>59</sup> This should be put in relation to the evolving roles of Muslim clerics in Western contexts. See e.g. F. FRÉGOSI, « L’imam, le conférencier et le juriconsulte : retour sur trois figures contemporaines du champ religieux islamique en France », *Archives de sciences sociales des religions*, vol. 125, 2004, p. 131-146.

<sup>60</sup> Interview with imam from Liège, see *supra* n. 53.

<sup>61</sup> Interview with imam from Liège, see *supra* n. 53.

not contradict divine prescriptions, becomes the “sharia”, he explained. As long as it is clear to everyone involved that the outcome of the process remains in the hands of the disputants, as it seems it does, the process still is a “mediation-like” process. But then how does that fit with the mentioned figure of the judge?

Another imam used a similarly confusing wording, comparing his position as an advice-giver to that of a judge, while making it very clear that he could not issue any binding “decisions”. Although he was aware of his potential impact on disputants’ lives, he had in fact very little authority, he stressed:

“In fact, you almost play a judge, if I may call it like that, a judge, but then without a court. A judge who luckily doesn’t issue judgments, but who tries to make life better for both (...) because in fact you have a bit of religious authority, people listen to you. So that is what I mean by judge (...) your decision in fact has impact on the future of that couple, the future of the children.”<sup>62</sup>

Hence, the similarity with the judge’s position is not residing in the judicial authority, – the religious figure “luckily doesn’t issue judgments” – rather it lies in the effort to formulate “legal” opinions, what he calls “decision” here, in each particular case, as illustrated by the continuation of the previous quote:

“Here you have to make sure your advice is very well-founded, and in terms of religion as well, you do not just have to know the [Islamic] schools of law, you have to know the objectives of the sharia. So, so to speak, who am I dealing with here, and what interests have to be upheld here today?”

What these quotes refer to is again the role of religious advice-giver or “jurisconsult”<sup>63</sup> taken up by many imams, interpreting how Islamic norms are to be understood and applied in a particular situation. This role probably is the most important, but it hardly ever is a single role. As one imam said, referring to the collaboration between imams and psychologists:

“Do not think imams only deal with the letter and the norm, unfortunately our roles are mixed up. Today, we are being asked all kinds of questions about family matters, advice and so on... so it is good that in Islamic centers different types of expertise come

<sup>62</sup> Interview with imam from Ghent, see *supra* n. 50.

<sup>63</sup> F. FRÉGOSI, « L’imam, le conférencier et le jurisconsulte », *op. cit.*

together... This complementarity between specializations is important to address those family questions.”<sup>64</sup>

The processes described above seem miles away from the practices of accredited family mediators, especially because of the omnipresence of religious language and normativity. If we try to leave aside for a moment the exotic taste of religion in a largely secularized society, then what exactly is so particular in these “mediating” practices of imams? In the next section of this article, I propose a few thoughts on how the (inter)normative nature of the conflicts at play could be better taken into account in mediation(-like) practices, both by religious and professional actors.

## **2. Broader implications of the empirical findings for the field of family justice and mediation**

### ***A. A “wall of separation” between the secularized legal world and informal Islamic conflict resolution practices***

Several empirical findings have been presented in this paper. Among them is the fact that a strong reproduction of a “wall of separation” could be observed, where complex real-life family disputes are “split-up” between state law related aspects and religious aspects. Imams are only dealing with purely religious questions, often in a very “legalistic” way, while legal professionals, including family mediators, are dealing with legal aspects based on state law, and work according to professional models shaped by dominant social norms that may be unfit to work with diverse families.

On the one hand, mediation theory and practice currently lack a model allowing to clarify when and how to engage with various types of normativity without endangering the very nature of the mediation process. On the other hand, an important weakness of informal “Islamic mediators” is that they have no theoretical models nor practical guidelines, and generally lack training in mediation. Religious and other actors involved in family justice practices, would clearly benefit from training efforts focused on the interaction of religion, (family) law, relationships and mediation, elements that could for instance be integrated in the newly announced imam trainings in Belgium.

In many cases, “classical” mediation has a lot to offer to Muslim families and communities, but suffers from a lack of familiarity. Amr Abdalla,

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<sup>64</sup> Imam from the area of Liege in group discussion on 12/11/2013 (Mid-term conference, see n. 42).

who has worked extensively on the topic of conflict resolution in Muslim contexts, and has been giving conflict resolution skills training to imams and others for several decennia, considers that within Muslim communities, all conflicts are not equal, depending on the type(s) of elements involved<sup>65</sup>. He estimates a vast majority of conflicts within Muslim families are interest-based conflicts, possibly dressed-up in religious language, and can therefore perfectly be approached with “classical” mediation techniques. In a number of conflict situations, though, additional approaches may be needed, he argues, such as when the clarification of a Islamic “legal” norm is needed in order for the parties to be able to make informed decisions.

The question whether imams can take on a mediating role, given their role as interpreters of religious norms, is a question that concerns the role of (different types of) norms, and their entanglement, in mediation. That is exactly the fifth and last question this contribution will attempt to address: can mediation and internormativity be brought together, and if so, how?

In its commitment to leave decision-making power to the parties themselves, mediation holds a clear potential to accommodate cultural and religious diversity. This however contrasts with the fact that family mediation struggles to reach a socially and culturally diverse audience<sup>66</sup>.

According to Damien d’Ursel<sup>67</sup>, the mediation model in its premises is not value-neutral, but rather promotes a certain type of family model and as such does not correspond to the same extent to the needs of different people. Indeed, as a structured process, mediation largely follows the communication codes proper to Western communication modes, and it function as a family justice institution that promotes “familial modernity”, in which “traditional people”, particularly men, are or may feel disadvantaged or disempowered<sup>68</sup>. Others have described as well the disarray of some people in the face of the myth of a “good” divorce, that lies at the basis of family mediation practice.

For mediation to truly open up a space for the singularity of each family or couple, it needs to free itself from dominant social norms, argues d’Ursel. It is therefore valuable to conceptualize more explicitly mediation’s

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<sup>65</sup> Lecture and training by Amr ABDALLA in Brussels on 8/11/2019 and personal exchanges. See also A. ABDALLA *et al.*, « “Say Peace...”: Islamic Perspectives on Peace and Conflict Resolution Teaching and Training Manual », *s.l., s.n.*, 2016. He proposes several frameworks for conflict resolution in Muslim conflicts, among which the “Islamic wheels of conflict” referred to here.

<sup>66</sup> *Supra* n. 10 and n. 11.

<sup>67</sup> D. D’URSEL, *La médiation, entre tradition et modernité familiales*, *op. cit.*, specifically p. 25-72.

<sup>68</sup> *Ibidem*, p. 49-53; p. 59-69.



relationship to social and legal norms. I will attempt to do this, taking as a starting point the work of Louise Lalonde<sup>69</sup>, Ellen Waldman<sup>70</sup> and Amr Abdalla<sup>71</sup>. In doing so, I will focus on the internormative potential of mediation and the role of social norms in mediation, before enquiring whether “internormative mediation could be an alternative to “Islamic mediation”.

### **B. The internormative potential of mediation**

Lalonde posits that the “transformative potential” of alternative modes of conflict resolution, including in particular mediation, lies in their (potential) capacity to comprehend various conflict regulating normativities, and therefore to deal with the very internormativity that is inherent in any conflict. By the very fact that, in court, conflicts are “resolved” by being transformed into legal disputes (litiges), judicial decisions are unable to capture this internormativity. Mediation in contrast, offers the possibility to take into account normativities beyond the sole normativity of state law. In her view though, the realization of this potential requires additional theoretical efforts to conceptualize processes that allow to move beyond the mere recognition of plural norms and values in conflict, towards integrating normative plurality into the decision-making process, with the aim to construct and reach a consensus based on these norms and values<sup>72</sup>. In her analysis of mediation practitioners’ discourses, Lalonde detects an internormative “opening”, in the sense that practitioners tend to see law as one of many reference frameworks, together with people’s interests and values. However, most practitioners merely use these “value-type” of normativities to facilitate communication, and not to formulate a purpose that, in the light of these values and other normative statements by the parties, incorporates the internormativity involved in the conflict. In that sense, Lalonde concludes, mediation still appears as a prolongation of state based judicial processes.

### **C. The role of social norms in mediation**

Few authors have explicitly directed attention to the role of (various types of) normativity in mediation. In exception to this, Waldman argues that “what passes as mediation today constitutes not one, but three separate

<sup>69</sup> L. LALONDE, « La médiation, une approche “internormative” des différends ? : analyse comparative des approches de G. A. Legault et de R. A. Macdonald », *Revue de droit de l’Université de Sherbrooke*, 2002, p. 97-131.

<sup>70</sup> E.A. WALDMAN, « Identifying the role of social norms in mediation: A multiple model approach », *Hastings Law Journal*, vol. 48, 1997, n° 4, p. 703-770.

<sup>71</sup> A. ABDALLA *et al.*, « Say Peace... », *op. cit.*

<sup>72</sup> L. LALONDE, « La médiation, une approche “internormative” des différends ? », *op. cit.*, p. 116-117.

models” that differ in how they deal with existing social and legal norms. She distinguishes a “norm-generating”, a “norm-educating” and a “norm-advocating” model of mediation. These models are not always nor usually used singly, rather, “many mediators will combine these various models, depending on the nature of the dispute”<sup>73</sup>.

What characterizes the norm-generating model is “its inattention to social norms”; “The only relevant norms are those the parties identify and agree upon”, situating “party discussion in a normative *tabula rasa*”<sup>74</sup>. In contrast, the norm-educating model’s “consideration of social norms is thought to enhance autonomy by enabling parties to make the most informed decisions possible”<sup>75</sup>. In the case of a divorce mediation for instance, the mediator may inform the parties about existing norms in the field of child psychology and/or inform them about prevailing legal norms. However, parties are still viewed as free to choose a resolution that does not (entirely) correspond with these societal norms, and for instance waive certain rights or entitlements provided by them.

In some contexts though, for instance when the power imbalance between the parties is so extreme that one party cannot provide a trustworthy waiver, or when there is a mandate to enforce statutory law, a “norm-advocating model” may be indicated. The idea here is that “within the open boundaries that the [invoked imperative or protective] norm establishes, the parties are free to bring their own interests, concerns, and creative thinking” to the table<sup>76</sup>.

In order to engage in the conceptualization efforts demanded by Lalonde, reflecting on how mediation relates to (various types of) normativity is indispensable. Failure to explicitly recognize the role of societal norms in mediation, including legal ones, may moreover result in ambiguities and inconsistencies. There lies an important challenge in conceptualizing how norm-generating, norm-educating and norm-advocating models of mediation can deal with norms beyond the sole legal norms of the state. If mediation is to achieve its internormative potential, these models need to deal with the norms that matter for the disputant parties and not (only) with those viewed as legitimate by the “neutral” mediator. What if the mediator’s and the parties’ conceptions of what is “fair” differ? What, for instance, if the enhancement of disputant autonomy requires information about (different

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<sup>73</sup> E.A. WALDMAN, « Identifying the role of social norms in mediation », *op. cit.*, p. 756.

<sup>74</sup> *Ibidem*, p. 718.

<sup>75</sup> *Ibidem*, p. 731-732.

<sup>76</sup> *Ibidem*, p. 755.

interpretations of) religious norms to be given to the parties? What if power imbalances between parties makes it difficult, but not impossible, to reach a fair outcome, provided all the internormative elements of the conflict are made explicit and dealt with?

This reminds me of the two-step model proposed by one of the imams, in which phase one resembles a hybrid style of “mediation”, somewhere between a norm-generating and a norm-educating model guided by religious teachings in favor of reconciliation; and phase two portrays the “mediator-imam” in a norm-advocating mode when he sets the boundaries of possible sharia-compliant outcomes. Such a norm-advocating mode could be adopted to denounce harmful practices and/or misbehavior (of men) and to recognize oppressive situations as unjust, exactly as the Qur’anic quote opening this article exhorts. This is not a current practice, though, as we have seen.

***D. Is there a future for “Islamic mediation” or a need for internormative mediation?***

In some conflicts, clarification of Islamic “legal” norms is necessary<sup>77</sup>. This may be needed to allow the parties to make informed decisions concerning their situation. But failing to clarify, and sometimes “correct”, interpretations of particular religious norms, may also reinforce the power imbalance between the parties and endanger a fair outcome, such as in cases of misconceptions about Muslim women’s right to divorce, for instance. We have seen that religious matters are almost exclusively in the hands of religious actors and organizations and that other types of actors are generally reluctant to engage with these matters. Religious actors in turn, tend to focus exclusively on religious matters and may lack the competence to adequately address other aspects of family disputes, such as the interaction with state law, the role of extended family and broader communities, and many practical considerations, for instance.

These other matters are at least as important to address. The social embeddedness of many Muslim families may for instance require that the role of social and cultural norms that matter to one or more parties, or to their social networks, are made explicit and discussed<sup>78</sup>, something that is

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<sup>77</sup> This is ABDALLA’s blue wheel of “Islamic juristic matters”, which I suggest should also look at interactions with prevailing positive law.

<sup>78</sup> This is ABDALLA’s green wheel of “psycho-socio-cultural matters”.

not usually done when mediation is approached in a very individualistic fashion<sup>79</sup>.

Finally, some elements may need to be excluded from the mediation process, because of their “unnegotiable” nature, be it because they relate to imperative legal rules that need to be respected, or be it because they relate to fundamental value parameters grounded in Islamic norms<sup>80</sup>. In the face of such “red lines”, it is crucial that that these are identified as such, discussed and respected by the different parties involved. Possibly, mediation will have to be stopped if reaching a fair agreement proves to be impossible.

Therefore, starting from Abdalla's model, in addition to classical approaches to mediation, we need to develop innovative approaches to deal with (at least) 3 specific types of conflicts: conflicts in which the psycho-social embeddedness of one or more parties is at stake, conflicts in need of (legal and/or religious) norm clarification, and conflicts in which fundamental value parameters or "red lines" are at play. Internormative mediation not only incorporates the internormative nature of the conflict, it also requires that for each of these “wheels”, a different approach is adopted, depending on the nature of the norms at play and the needs and expectations of the parties involved. Where religious norms are concerned, the inherently plural nature of these poses a particular challenge. Sufficient attention is to be given to which interpretations are relevant and legitimate for the parties and how they see the role of these norms in the conflict resolution process. Particularly, when an “imam-mediator” is involved, a major challenge resides in the risk of role confusion, when such figures of authority provide interpretations of religious norms themselves. It might be useful to develop networks of religious and other actors to provide support to Muslim families, so that different actors can take-up different roles in this regard.

## Conclusion

The findings presented here highlight the need for innovative approaches that dare to engage more with normative issues, making more explicit how party autonomy relates to societal norms and value judgements, whether enacted in state law or in social and religious norms. Realizing the internormative potential of mediation could be exactly that: assuring that the

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<sup>79</sup> D'URSEL, *supra* n. 11, p 131-142, also provides some examples of how mediators can “involve” the social network of disputants.

<sup>80</sup> This is ABDALLA's red wheel, which I suggest to enlarge to encompass imperative legal norms and other societal “red lines”.

ethical basis of mediation opens up to the internormativity of the conflict, beyond the sole norms the mediator deems relevant and/or legitimate.

The findings also show the importance of developing the internormative legal literacy of vulnerable family members, enabling them to make informed decisions in a landscape where norms of different nature interact and intermingle. Anyone who aspires to provide support to families in this context, whatever his or her professional status or background, should be aware of this, or be at risk to produce or reinforce injustices.