

Calculating claims: Jewish and Muslim women navigating religion, economics and law in Canada

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Abstract

This article presents an empirical study of Jewish and Muslim women who go through divorce in Canada, drawing on a 'left law and economics' methodology. Religious law and family law have long been considered outside the market and, as a result, are more rarely accounted for in the law and economics literature. According to dominant narratives, religious family law is experienced by women either as an exceptional form of oppression or as a form of spiritual religious identity. In this article, I apply a 'left law and economics' approach to deconstruct these notions. On the basis of my socio-legal fieldwork with Jewish and Muslim women in three Canadian cities, I identify the background formal and informal legal rules, social norms and distributional practices that help produce asymmetric bargaining locations for women. I employ the economic language of costs/benefits to illustrate the ways in which religious parties bargain strategically upon divorce, although these market claims are surprisingly underrecognised by the legal system. Such empirical knowledge helps disenchant the idea that religious law is systematically used as punishing forces that make women worse off economically or morally inferior. It also allows for a distributive analysis which reveals how husbands and wives negotiate economic resources, desires and day-to-day decisions in all kinds of fair and unfair ways, flying in the face of conventional narratives surrounding women and religion.

'Religion is something we pick and choose the things we're comfortable with. [...] If I like this about conservative and this... It's like, you know, picking from a Chinese menu, you know? Right, I'm making a combo; I want A from this column and C from that column!' (Religious participant)

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In Canada, the use of religious arbitration recently sparked public outcries and gave rise to an ongoing discussion on the limits of multiculturalism. Proposed solutions to this phenomenon have varied from a complete ban¹ to a form of state-supervised legal pluralism.² Despite the varied political positions presented along the spectrum, both supporters and critics of the use of religious law in family law matters tend to adopt a dichotomous view of the relationship between religious law and secular law. Those who perceive religious law as a form of oppression towards women envision the secular law as capable of ensuring gender equality and propose to emphasise a more meaningful accessibility to civil courts for minority women.³ On the other hand, those who advocate the legitimacy of religious law claim that men and women use the religious narrative as a form of identity and that this private and parallel sphere of normative expression should be respected as such in a multicultural state.⁴ Unfortunately, these positions fail to consider how religious men and women in Canada *actually* put forth religious claims inside and outside the courtroom and participate or resist in subversive ways to conventional disciplinary mechanisms.

In this article, based on my socio-legal fieldwork in Toronto, Ottawa and Montreal, I argue that the religious and secular spheres are *not* experienced by Jewish/Muslim women as two mutually exclusive domains but rather as one highly complex battlefield which distributes differentiated costs and benefits. In fact, the family is often conceived and understood as a *market* in which shadow husbands and wives negotiate, in different aspects of their individual and collective life, their poverty or wealth, their national affiliations, their sexual freedom or submission, their marital conditions and their relation to God. Borrowing from the language of law and economics, this article attempts to shed light on the following questions: Are the interests of the different stakeholders in Canadian religious communities, such as rabbis/imams, Jewish/Muslim men, judges, family/community members and Jewish/Muslim women, overlapping, and if so, in what regulatory ways? How do differentially situated Jewish and Muslim women engage, within institutions and as individuals, in day-to-day bargains with their husbands to obtain a religious divorce which is at first refused to them? Are men and women strategically ‘flirting with God’⁵ in such a way as to get the optimal economic outcome from both the secular and religious courts? How is this informal and fluid process operating?

I explore this intellectual endeavour in three main sections. Section I presents the methodology and theoretical framework employed in this article. Section II describes the concepts of marriage and divorce within the Jewish and Islamic traditions, portraying husbands and wives as agents whose relationship is shaped by contractual rights and duties. Section III paints a juxtaposition of the ‘law in books’ and the ‘law in action’ by offering a series of narrative descriptions based on interviews conducted with ten Jewish and Muslim women in Canada. It outlines the unexpected and complicated ways in which Jewish and Muslim women who live on the religious margins perform their agency, identity and gender according to distributive motives which are often ignored by institutional authorities. Finally, section III identifies the costs and benefits of both the religious and

1 See in general Manji (2004). See also specific submissions by the *Canadian Council of Muslim Women*, ‘Review of the Ontario Arbitration Act and Arbitration Processes’ and the *Muslim Canadian Congress*, ‘Review of Arbitration Process’, on file with the author. For similar positions adopted by other individuals or NGOs, see Boyd (2004, pp. 29–34).

2 See Gaudreault-DesBiens (2005, p. 23), Farrow (2006, p. 81), Shachar (2005, pp. 49–88), Korteweg (2008), Bakht (2006) and Emon (2009).

3 See Stopler (2003). In the specific context of Canada, see Rahnema (2006, p. 21) and Alia Hogben, ‘The Laws of the Land Must Protect All of Us, Irrespective of Gender or Religion’, *Toronto Star*, 1 June 2004. For a critique of civil law’s pretence of ‘protecting’ minority religious women by setting aside religious law, see Fournier (2011).

4 See Razack (2007; 2008), Bakht (2007) and Abu-Lughod (2002, pp. 783–90).

5 I borrow this expression from my previous work on the adjudication of *Mahr*; see Fournier (2010a). A translation of the article has appeared as Fournier (2010c).

secular spheres as experienced by religious women and highlights the background legal rules and social norms that help produce, formally and informally, different bargaining endowments.

I. Methodology and theoretical background

This socio-legal study is based on my fieldwork within religious communities in Canada over the summer and fall of 2009. It included visits to mosques and synagogues, discussions with practising and non-practising men and women, rabbis, imams and other religious experts, as well as ten formal interviews with Jewish and Muslim women which were conducted in Toronto, Montreal and Ottawa.⁶ The women were chosen from a variety of denominations (e.g. Traditionalist and Liberal Islam; Orthodox and Conservative Judaism) and socio-economic backgrounds. They had all been married⁷ and were civilly divorced, religiously divorced, or both. The interviews lasted about two hours and incorporated demographic, religious, secular and community profiles.⁸ They were held in women's homes, at their workplaces, in closed offices or at a café. Recruitment was done indirectly, as per the advice of the ethics committee, through community groups, women's organisations and religious leaders.⁹

The article applies a 'left law and economics' methodology¹⁰ to approach religious subjects through a 'story-telling'¹¹ narrative. Religious law has long remained the ultimate outsider of market considerations and, as a result, is rarely accounted for in economic analysis literature.¹² In neoclassical welfare economics, consumers are portrayed as rational actors whose aim is to maximise 'utility' when they make choices.¹³ The law and economics methodology,¹⁴ which has been applied mostly to public-related issues,¹⁵ predicts individual behavioural responses to

6 It is important to acknowledge that this qualitative research cannot cover every Jewish and Muslim community. The women with whom I conducted interviews are not necessarily representative of all Jewish/Muslim communities in Canada. Therefore, this data must be treated with caution as a method to reflect the subjective and individual experiences of religious women who go through divorce.

7 Given the topic of this article and the religious laws governing Muslim and Jewish marriage, only heterosexual marriage is considered in this context.

8 See Appendix A for the questionnaire used during the interviews. The format of the interviews was reviewed by the University of Ottawa's ethics committee, which ensured that safeguards were in place for the safety and wellbeing of the participants.

9 I selected the interview participants through many different channels. None of the women were approached directly; rather, a third party identified and contacted them on my behalf. I also benefited from the assistance of community organisations and personal contacts in religious communities. Although signs were placed in Jewish and Muslim community centres and religious places soliciting for the participation of women, this method proved unsuccessful. Rabbis and imams were also approached: few of them responded, and those who did made contact with women who later declined to participate.

10 I borrow specifically from the methodology of 'left law and economics' scholars such as Kennedy (1982; 1992), Olsen (1983) and Mnookin and Kornhauser (1979).

11 See, for instance, Van Praagh (1996; 1999a; 1999b), Campbell (2009; 2010) and Sarat and Kearns (1993).

12 For scholarship addressing specifically the impact of religious identity on economic patterns, see Cogel and Minkler (2004). For general analyses of the impact of identity on economic behaviour, see Akerlof and Kranton (2002; 2005), Darity, Mason and Stewart (2006) and Fang and Loury (2005).

13 See Gilboa and Schmeidler (1997), Encarnación (1990), Chipman (1960), Hartman, Doane and Woo (1991) and Michael and Becker (1973).

14 For an introduction to law and economics literature, see Trebilcock (2007), Shavell (2004), Kaplow (1986) and Posner (2004).

15 Law and economics scholars have long been attached to the analysis of commercial law (Gomez, 2006), international trade law (Trachtman, 2008), criminal law (Garupa, 2009), securities law (Duggan, 2005) and constitutional law (Lee, 2008).

current or proposed legislation and policies based on the assumption that human beings are motivated by rational self-interest. Law and economics scholars have also included in their scientific gaze private-related domains such as contract law¹⁶ and tort law,¹⁷ but less so family law,¹⁸ which is perceived as emotional and situated *outside* the market. This sharp distinction between the family and the market has been challenged by several scholars¹⁹ for its refusal to see the first as a pivotal productive entity, one which is an ‘important economic actor in the national and global economy’ (Halley, 2011, p. 83). Reconnecting the family *within* the market allows us not only to view its role as ‘a crucial site of social-welfare provision’ (p. 84), but also to perform a distributive analysis of how husbands and wives negotiate economic resources, desires and day-to-day decisions in all kinds of fair and unfair ways.

Despite its flaws,²⁰ the ‘left law and economics’ methodology remains a powerful tool to understand how family members behave upon the dissolution of marriage.²¹ In the context of this article, it helps develop a useful framework to appreciate how religious women act in a self-interested manner upon divorce and to identify the kind of power they deploy in utility-maximising ways when navigating the religious/secular divide. Admittedly, my hope is to be attentive, through the stories of women, to the multiplicity of mechanisms through which religious divorce is filtered as a *distributive* practice. Reconstructing the field in this way makes it possible to conceive individuals – men and women, husbands and wives, fathers and mothers – as making choices based on preferences and the likelihood that benefits will be more profitable than the costs incurred at any given moment of their marital relationship. This is not to suggest, of course, that agency is ‘free’; it is always-already constrained by external and internal forces pulling in diverse directions. Rather, in an implicit and subversive way, my goal is to show that the family/market binary should be criticised and perhaps abandoned, especially in the religious context where other misleading binaries permeate the discourse (private/public; religious/secular; spiritual/civil).

II. Jewish and Muslim marriage/divorce in contractual terms

When Jews and Muslims marry in Canada, their ceremony often includes both a religious and civil element. Under both traditions, husbands and wives have distinct rights and responsibilities within the marriage and access to religious divorce is drawn sharply along gender lines.²² This section presents the institutions of Jewish/Muslim marriage and divorce as articulated in contractual terms, emphasising the elements of agency, bindingness and legitimacy of the adjudicator. By employing terms traditionally reserved for a contractual framework to illustrate the convergences and divergences between Jewish and Muslim traditions, I envision and present the religious family as a *distributive* legal space.

16 Ayres and Gertner (1989, p. 87), Kaplow and Shavell (2004), Shavell (2006), Jolls (1997), Schwartz (2004).

17 Donohue (1989), Landes and Posner (1987).

18 Key articles on the topic include Cohen (1987), Trebilcock and Keshvani (1991), Trebilcock and Elliot (2001), Kaplow (1996). For recent work on law and economics in family law matters, see Dnes and Rowthorn (2010).

19 See Olsen (1983) and Halley and Rittich (2010).

20 The law and economics approach has been strongly criticised in the context of family relations. For instance, Nobel Prize winner of economics Gary Becker (1993) argued that sex differences justify the sexual division of labour observed in contemporary societies because such division is efficient. For an analysis of the tension between economic methodology and feminist thought, see Tsoukala (2007) and Kotiswaran (2011, pp. 185ff).

21 It is worth noting, for instance, that Canadian courts specifically and convincingly used the law and economics approach to view unmarried cohabitation as generating claims in unjust enrichment. See the Supreme Court of Canada decision *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38.

22 As argued by Estin (2009, p. 464), Shachar (2008, p. 576) and Moghissi (1999, pp. 20–21).

A. Marriage in Judaism and Islam: a set of contractual rights

Under Islamic family law, marriage establishes a reciprocity system in which each party is assigned a set of contractual rights and duties towards the other party.²³ An Islamic marriage contract can only be concluded through the principles of offer (*ijab*) and acceptance (*qabul*) by the two principals or their proxies (Nasir, 2002, p. 45). Upon marriage, the husband acquires the right to his wife's obedience (Wani, 1995, p. 49; Maghniyyah, 1995, p. 359) and the right to restrict her movements outside the matrimonial home (Nasir, 2002, p. 80). The wife acquires the right to her *Mahr*²⁴ and the right to maintenance (Esposito and DeLong-Bas, 2001, p. 25; Wani, 1995, p. 195).

Like Muslim marriage, Jewish marriage is finalised according to contractual principles. The parties execute a marriage contract (a *ketubah*, pl: *ketubot*), often written in Aramaic,²⁵ which lists the duties of each spouse. Unlike the Muslim marriage contract, which is negotiated between the parties and is therefore unique to them and their relationship, the *ketubah* is fairly standard.²⁶ Based on the Torah's articulation of a husband's duties towards his wife, this contract includes requirements for adequate food, clothing, shelter and regular intercourse, as well as the sum of a payment for the wife in the event of death or divorce (traditionally, the sum necessary for the woman to support herself for one year) (Epstein, 2005, p. 163).

B. Divorce in Judaism and Islam: agency, bindingness and legitimacy of the adjudicator

Observations about the vulnerability of women within traditional family law systems are not new. Scholars have noted that women 'face greater restrictions on their rights to marry, their rights to pass on their nationality or membership to their children, their options and access to divorce, their financial circumstances and their opportunities to be awarded custody' (Estin, 2004, p. 600). In this section, I articulate divorce claims in terms of agency, bindingness and legitimacy of the adjudicator, so as to conceive later the interaction between religious and secular law in an overlapping and intersectional space. I borrow a contractual language to grasp women's agency and give centrality to the consent they give and the bindingness of the agreements they conclude when they are 'bargaining with patriarchy'.²⁷ In so doing, my aim is to move away from religious 'gendered images' or 'symbolic roles' (Shachar, 2008, p. 591) and closer to an image of women entering conflicting and multiple worlds of negotiation.

1. Agency

Agency, as determined by the governing legal structure at the time of divorce, points to which party can initiate the divorce proceeding under what circumstances. In a way, divorce becomes an instrumentalisation of agency: it determines the roles and (im)balances of each party while

²³ See Abu-Odeh (2004).

²⁴ *Mahr*, meaning 'reward' (*ajr*) or 'nuptial gift' (*sadaqa* or *faridah*), is the expression used in Islamic family law to describe the 'payment that the wife is entitled to receive from the husband in consideration of the marriage' (Esposito, 1982, p. 23). See generally Fournier (2010b).

²⁵ Nowadays, Hebrew *ketubot* are also available. However, this is still seen by American courts as a linguistic obstacle to the enforcement of the financial provisions of the *ketubah* (Reiss and Broyde, 2005, p. 202). In Canada, despite judicial sympathy towards the enforceability of this type of agreement, the *ketubah* is still considered unenforceable before civil courts. See Fournier (forthcoming 2012).

²⁶ As put by Dorff and Rosett, 'the parties may determine by contract only those elements of the relationship which the law permits them to decide' (1988, p. 453).

²⁷ I borrow this expression from Kandiyoti, who examines the coping strategies and lifestyle choices that women make under patriarchal constraints. She writes that 'these patriarchal bargains exert a powerful influence on the shaping of women's gendered subjectivity and determine the nature of gender ideology in different contexts [and that they] influence both the potential for and specific forms of women's active or passive resistance' (1988, p. 275).

admitting the co-existence of each actor's moral agency. Parties' strategic behaviour can also be understood within the context of agency, insofar as such framework demonstrates the immediate relationship between the spouses, but also the latter's extended relationship with the religious community at large.

a. Agency in Muslim divorce

Islamic legal institutions such as *Talaq* divorce, *Khul* divorce and *Faskh* divorce determine the degree to which each party may or may not initiate divorce and the different costs associated with such transaction. According to classical Islamic family law, women have the agency to use the *Khul* or *Faskh* divorce, but may not use the *Talaq* divorce. The *Khul* divorce is introduced judicially by the woman, however with the understanding that such route will dissolve the husband's duty to pay the deferred *Mahr* (El Alami and Hinchcliffe, 1996, pp. 27–28; Abdal-Rahim, 1996, p. 105). The *Faskh* divorce is a fault-based divorce initiated by the wife before the Islamic tribunal, and it is by nature limited to specific grounds.²⁸ In the case of termination of marriage by *Faskh* divorce, unlike in the case of *Khul* divorce, the wife is entitled to *Mahr* (El Alami and Hinchcliffe, 1996, p. 29). Finally, the *Talaq* divorce (repudiation) is a unilateral act which dissolves the marriage contract through the declaration of the husband only. The law recognises the power of the husband to divorce his wife by saying '*Talaq*' three times without any need for him to ask for the enforcement of his declaration by the court (p. 22). However, what comes with this unlimited 'freedom' of the husband to divorce at will in the private sphere is the (costly) obligation to pay *Mahr* in full as soon as the third *Talaq* has been pronounced (Fyze, 1974, p. 133).

b. Agency in Jewish divorce

Unlike Muslim women who may initiate divorce through *Khul* or *Faskh*, Jewish women are not in a position to divorce their husbands religiously. In order to be 'halachically'²⁹ correct, a Jewish marriage may only end in the death of a spouse or the voluntary granting of a divorce (*Get*) by the husband (Haut, 1983, p. 18) and its simultaneous acceptance by the wife (Blecher-Prigat and Shmueli, 2009, p. 281; Carmit Yefet, 2009, pp. 443–44). The husband thus has the exclusive power to deliver the *Get*,³⁰ which comes in the form of a surprisingly brief written document written mostly in Aramaic.³¹ The most important passage of this document essentially states that the woman is now free to marry any man and, in so doing, she will not be guilty of committing adultery. If a Jewish woman is entitled to a *Get* and has not received one due to her husband's refusal, she is referred to as an *Agunah* (pl. *Agunot*);³² literally, a 'chained' or 'anchored' woman.

28 Grounds to issue a decree of *Faskh* include impotence on the part of the husband, insufficient material support and companionship ('the loneliness of the marriage bed'), non-fulfilment of the marriage contract, mental or physical abuse, or a husband's lack of piety. See Abdal-Rahim (1996, p. 105), Tucker (1985, p. 54) and Esposito and DeLong-Bas (2001, p. 25).

29 *Halacha* is the entire corpus of Jewish law which draws on the Torah, rabbinical laws and customs. See Jacobs and De Vries (2007, p. 251).

30 The biblical foundation for this prerogative is found in Deuteronomy 24:1: 'When a man has taken a wife and married her, and it comes to pass that she finds no favour in his eyes because he has found some unseemliness in her, then let him write her a bill of divorce and give it in her hand and send her out of his house.' This passage was interpreted as bestowing upon the husband the exclusive privilege of initiating divorce (Kaplan, 2004, p. 61).

31 For an English translation of a *Get* divorce document, see Appendix C.

32 The situation of the *Agunah* is mentioned but once in the Bible, at Ruth 1:13. However, the Mishnah and Talmud both refer to it frequently, as does the subsequent literature in response: see Hacothen and Greenberg (2004). Originally, this term was reserved for women whose husbands had disappeared and it was unknown whether he was dead or alive. Unless a woman had proof of her husband's death, she could

Several limitations are placed on a divorced Jewish woman who wishes to re-marry religiously without a *Get*. First, if she marries a man civilly, the relationship is considered adulterous under Jewish law. Therefore, the woman is *never* permitted to marry that man religiously (Cohn, 2004, p. 66). Second, any children born to a woman who has not received a *Get* are labelled *mamzer* (pl. *mamzerim*). Such children are sometimes ‘effectively excluded from organized Judaism’ (Nichols, 2007, p. 155), as they are illegitimate and may never marry anyone but another *mamzer*. Although a wife can in theory refuse a *Get* issued by her husband, in practice the consequences for the man are neither as serious nor as far-reaching as they are for an *Agunah*. As put by Nichols, ‘A man who marries without a Jewish divorce has not committed adultery, but has only violated a rabbinic decree mandating monogamy; he is nonetheless considered married to his second wife, and his children are legitimate’ (p. 155).

2. Bindingness

Bindingness highlights the conditions under which a contractual agreement becomes compulsory. In the case of Muslim and Jewish divorce, bindingness depends on the unilateral will of the husband and thus highlights the potential for gendered power imbalances. Bindingness can therefore design an outcome that is not necessarily shared by but applicable to both concerned parties. Such bindingness brings about not only the legal dissolution of marriage but also, and often most importantly, a modified social status in the broader community. That being said, the bargaining parties complicate this narrative of unilateral bindingness in many ways, some of which this section outlines.

a. Bindingness in Muslim divorce

If a man repudiates his wife by issuing three ‘*Talaq*’, the divorce is binding despite lack of consent on the part of the wife. The apparent potential for extortion of the *Talaq* divorce has long been recognised in the literature on Islamic divorce.³³ However, the formally unequal rule of *Talaq* play out differently in practice depending on the amount attached to *Mahr* in the marriage contract. *Mahr* is conceived by Islamic jurists as 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 (Schacht, 1982, p. 167; Coulson, 1964, pp. 207–208; Tucker, 1985, p. 54). Indeed, if *Mahr* is very high, chances are the husband will hesitate before repudiating his wife. Indeed, as put by Hoodfar, ‘the larger the sum of the mahr, the more effective the wife’s leverage’ (1996, p. 131). In most cases, this constitutes a source of security for wives who do not want to divorce. However, for those who do want a divorce,³⁴ high *Mahr* can be disconcerting: it may only be at the price of behaving in a disgraceful manner that the woman can obtain a *Talaq* from her husband.³⁵ In addition to *Mahr*, the Qur’anic innovation of the *idda* also modulate the bindingness of *Talaq* divorce. This three-month waiting period after the man’s pronouncement of the first *Talaq* gives him time to reconsider his actions, withdraw the pronouncement of divorce and potentially

not re-marry religiously (Greenberg-Kobrin, 1999, p. 359). However, the modern *Agunah* problem has more to do with recalcitrant rather than missing husbands (Broyde, 2001, p. 8).

33 See Romney (1982, p. 17) and Anisah (2003, p. 41).

34 This can often be the case. For instance, Judith Tucker, in analysing peasant women in nineteenth-century Egypt, affirms that ‘many women who wanted a divorce preferred that their husbands repudiate them [because of] the material advantages of *Talaq*’ (1985, p. 55).

35 The forms of disobedience used by Muslim women to *push* men into the direction of repudiation are manifold. In her study, Judith Tucker noticed the following: ‘Having enlisted the cooperation of the local shaykh al-bald, one woman managed to bully her husband into pronouncing a divorce. Another used blackmail: she threatened to take her husband to court and claim that he had stolen her jewelry unless he divorced her; so she “frightened him” and he indeed complied with a repudiation’ (1985, p. 55).

reconcile (Wani, 1995, p. 195). However, during this time, the husband is obliged to provide financially for the woman (Nasir, 2002, p. 142). If the woman does prove to be pregnant, the support obligation will be extended until the birth of the child (Schacht, 2000, pp. 151–53). The husband could, even against his wife's will, take her back during the waiting period. It is also theoretically open to the husband to take his wife back at the end of the *idda* period only to divorce her again, leaving her in 'divorce limbo' (Schacht, 2000, p. 151). The Qur'an (4:24) recognises this possibility and specifically prohibits it, supplying the wife with an offsetting religious claim. Indeed, to conform to Qur'anic requirements, reconciliation must be genuine and not entered into for the purpose of influencing the woman to give up *Mahr* (p. 152).

Thus, upon closer investigation, the bindingness of the *Talaq* divorce is revealed as highly contingent upon other religious institutions such as *Mahr* and *idda*, which interlock with the *Talaq* in complex, contradictory ways. These various religious doctrines can be manipulated by bargaining spouses to affect the bindingness of the *Talaq* and the outcome of the divorce proceedings in such a way as to maximise benefits and minimise costs.

b. Bindingness in Jewish divorce

If a Jewish man refuses to grant the *Get*, the wife is left with very little religious recourse.³⁶ Hence, the opportunity for 'strategic behavior' (Estin, 2009, p. 464) in civil divorce proceedings is remarkable, making the *Get* an ideal tool for blackmail.³⁷ Lisa Fishbayn writes that 'the power men enjoy under Jewish law to withhold a *Get* is of concern to civil law because this power becomes an effective bargaining endowment in the resolution of civil family law disputes' (2008, p. 85). In its seminal *Bruker v. Marcovitz* decision,³⁸ the Supreme Court of Canada similarly suggested 'For example, the spouse could say, "Give up your claim for support or custody of the children and I will offer the *Get*."³⁹ In 1987, Canadian Jewish family law attorney John Syrtash completed a study for *B'nai Brith Canada* and analysed 311 cases of conflict surrounding the *Get*; he found that 'Of the 311 cases, 26 were delayed due to child custody and access disputes, 148 due to the *Get* being used for spite and vengeance, 86 due to maintenance and property disputes, and 51 due to a combination of all three elements' (1992, p. 121). The *Get* thus appears as a formidable unilateral blackmailing tool.

That being said, the Jewish *Agunah* has been provided with *some* countervailing bargaining instruments. If Jewish women cannot grant the *Get* of their own initiative,⁴⁰ they may refuse their husbands' *Get*, which will prevent rabbinical authorities from dissolving the marriage contract. Jewish women may refuse consent to the *Get* for reasons related to the best interests of their children, to extract further concessions from the husband or for pecuniary incentives.⁴¹ In

36 The situation may be worse in Israel, where civil divorce is non-existent (Halperin-Kaddari, 2000–2001, p. 346). For a critical appraisal of the Israeli context, see Fournier, McDougall and Lichtsztral (forthcoming 2012).

37 Nichols notes several examples from the United States: '[O]ne recalcitrant husband agreed to issue a *get* only after receiving \$15,000 and a promise that his former wife would not press assault charges against him after he broke her leg. Other examples include a woman who mortgaged her house for \$120,000 to pay the amount demanded by her husband for issuance of a *get*, a woman who was forced to drop charges against her husband for sexually abusing their daughter so that she might obtain a *get*, and the increasing demands of a recalcitrant husband who asked for \$100,000 (which he received), then \$1 million, and then his wife's father's pension – in addition to demanding full custody of the children' [citations omitted] (2007, p. 158).

38 [2007] 3 S.C.R. 607.

39 *Bruker v. Marcovitz*, *ibid.* at para. 8.

40 It is regarded as against the spirit of Jewish Law for a wife to be able to dismiss her husband by granting him the *Get* (Mielziner, 1987, p. 117).

41 Although little evidence exists with regard to the frequency with which this bargaining power is used by women, a study issued by the Chief Rabbinate of the State of Israel reports that within divorce proceedings

practice, however, this bargaining chip is severely limited by the fact that the Jewish husband can marry a second wife in the absence of a *Get*.⁴² Much more potent is the bargaining power provided by s.21.1 of the *Divorce Act*.⁴³ With the introduction of Bill C-61 in 1990, the *Divorce Act* was specifically modified to address the problem of the *Agunah* and provide courts with a discretionary power to prevent a husband from obtaining civil relief under the *Divorce Act* if he refuses 'to remove a barrier to religious remarriage'.⁴⁴ The Minister of Justice of the time, Doug Lewis, thus justified the amendments:

'A spouse should not be able to refuse to participate in a Jewish religious divorce – called a *get* – in order to obtain concessions in a civil divorce. [...] 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. For example, a wife may feel compelled to agree to custody arrangements which are not truly in the best interests of a couple's child in order to obtain a *get*. [...] 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.'⁴⁵

Thus, the law surrounding Jewish divorce is revealed as replete with strategic avenues for spouses to explore. Its bindingness, just like that of Islamic law, is permeated and conditioned by the plural bargaining options parties are differentially endowed with.

3. Legitimacy of the adjudicator: the Islamic *Qadi* and the Jewish *Beth Din*

In Jewish and Islamic law, both elements of agency and bindingness may be played out in the presence of an adjudicator. This section illustrates how the voluntary will of the parties and the backdrop for the negotiation of divorce proceedings are legitimised by the structural nature of religious law. It outlines the ways in which sites of adjudication fuel and complicate husbands' and wives' bargaining power.

a. The Islamic *Qadi*

Under classical Islamic law, the Islamic court (*Qadi*) usually does not arbitrate *Talaq* divorces⁴⁶ but often adjudicates *Khul* divorces⁴⁷ and *Faskh* divorces. In the latter instance, 'a wife who is unhappy in

commenced from 2005 to 2007, some 180 women were 'chained' to their husbands and a slightly higher number were 'chained' by their wives. In nearly 350 divorce cases that were active as of 2005, 19 per cent of the cases continue to be unresolved because of the man's refusal to grant a *get*, while 20 per cent of the cases showed that women failed to co-operate with the divorce proceedings. Among the most common reasons cited for this 'divorce blackmail' was the negotiation of custody agreements and spousal support. See Hillel Fendel, 'Rabbinic Stats: 180 Women, 185 Men "Chained" by Spouses', Israel National News: www.israelnationalnews.com/News/News.aspx/123472 (last accessed 14 August 2011).

42 In Israel, a man may even obtain an official permission to marry a second wife. Although bigamy is prohibited under Israeli law, a permit obtained by a rabbinical court to marry a second wife is a valid defence to the crime of bigamy (Blecher-Prigat and Shmueli, 2009, p. 282). See also Bitton (2009, p. 120). Throughout the first half of the 1990s only, the Israeli rabbinical courts had issued an average of eleven permits per year to marry a second wife (Halperin-Kaddari, 2004, p. 243).

43 R.S.C. 1985, c. 3 (2nd Supp.).

44 *Divorce Act*, *ibid.*, s.21.1. For a comparative analysis of this legal mechanism, see Fournier (forthcoming 2012).

45 *House of Commons Debates*, vol. VI, 2nd Sess., 34th Parl., 15 February 1990, at pp. 8375–77.

46 For instance, a woman in Malaysia can ask the court to declare a *Talaq* divorce (Peletz, 2002, p. 169).

47 In cases of mutual consent where the wife waives the deferred portion of *Mahr*, divorce can be finalised 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, p. 583).

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, p. 29).⁴⁸ However, in the absence of Islamic courts in Canada, imams act as judicial authorities in religious family law matters (Boyd, 2004). Julie Macfarlane, one of the few scholars conducting actual empirical research on Muslim practices in North America, 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, forthcoming 2012). Thus, the informal practices of Islamic adjudication in Canada produce myriad bargains and outcomes, shaping agency and bindingness in ways that require empirical assessment, diverging as they do from the classical Islamic law model.

b. The Jewish *Beth Din*

Unlike the heterogeneous venues and audiences of Islamic religious divorce, the act of Jewish religious divorce is systematically overseen by one party: a *Beth Din* (pl. *Battei Din*). This tribunal of three Jewish judges (*Dayanim*), who are usually male rabbis,⁴⁹ functions according to formalities born of centuries of religious tradition. Although the *Beth Din* oversees the process, it does not execute the divorce. This is undertaken by the parties themselves, and more specifically by the man: '[n]o one – not the government, not the courts, not even a rabbi – is authorized to divorce a couple except for the husband' (Carmit Yefet, 2009, pp. 442–43). Therefore, the power of the *Beth Din* lies in its persuasive authority rather than its ability to mandate results, especially in Diaspora countries where an order of the *Beth Din* will not necessarily be respected or enforced.⁵⁰

That being said, some *Battei Din* do implement measures to pressure the husband into giving the *Get*. For instance, a *Beth Din* can decree a *cherem*, an order on the community to marginalise the recalcitrant husband (Fishbayn, 2008, p. 83). A wife can also apply for a *siruv* (sometimes spelled *seruv*), a contempt citation ordered against a person who refuses to appear before a *Beth Din* to which he or she is summoned (Wolf, 2009, p. 1191; Guthartz, 2004, p. 48). The *siruv* is often accompanied by sanctions of public shaming and exclusion.⁵¹ However, these bargaining chips are sometimes difficult to use because of the halachic rule according to which a *Get* must be freely given (Bitton, 2009, pp. 117–18; Kaplan, 2004, p. 61). This rule will sometimes result in rabbinical reluctance to implement disciplinary measures (Breitowitz, 1993, p. 15) out of fear that the latter will render the *Get* halachically invalid. What constitutes undue compelling or inversely,

48 For example, under *Egyptian Law No. 100 (1985)*, a wife could only obtain a *Faskh* divorce if her husband habitually failed his duty to provide her maintenance, he suffered from a serious disease, he was absent for a lengthy period, he was imprisoned for a long-term sentence or she suffered 'harm' as inflicted by her husband (Abu-Odeh, 2004, p. 1106).

49 The rabbinate has been closed to women for centuries. However, in recent decades, female rabbis have been ordained, even though the importance of this phenomenon varies greatly according to the denomination involved: see Joseph (2005, p. 582).

50 Civil courts will bow out of enforcing the *Beth Din's* order for lack of jurisdiction. As Greenberg-Kobrin bluntly puts it, 'Today the *Beth Din's* power exists only to the extent that it is recognized' (1999, p. 368). Kleefeld and Kennedy analogise the *Beth Din's* order to the equitable declaratory order, 'in which a civil court makes a statement about the disputants' rights without granting monetary or other substantive relief' (2008, p. 211).

51 For instance, the Rabbinical Council of America established a policy to enforce orders of *siruv* in synagogues against men who are using the *Get* as a bargaining tool in their divorce procedures or against men who refuse to give the *Get*. Various forms of excommunication exist and mostly deal with procedures that take place within the synagogue. The possible consequences related to this are that the recalcitrant husband could 'not be permitted to occupy any elective or appointed position, or position as employee, within the Synagogue' or be downright 'excluded from membership in the Synagogue'. See Rabbinical Council of America, 'Resolution: Matter of Pre-Nuptial Agreements & Recalcitrant Spouses': www.rabbis.org/news/article.cfm?id=101025 (last accessed 3 August 2011).

legitimate pressure, is a much contested line-drawing exercise which the warring spouses carry through in the shadow of the law.

III. A cost-benefit analysis of religious and civil divorce

This section describes the interaction between religion and economics, focusing on the distributive conflict between husbands and wives as they move back and forth between the religious and the secular realms upon divorce. For the female participants interviewed, the outcome of divorce is often perceived and played out as a conflict over economic *distribution*. In this process, the background rules act as forces that shape the individual's capacity to bargain and influence distributive outcomes. Sometimes the religious sphere distributes benefits to the man and corresponding costs to the woman; at other times, it creates costs to the man and benefits to the woman. The secular sphere similarly distributes uneven costs and benefits.⁵² Drawing on the testimonies of ten religious women in Canada, I present in this section an economic analysis of religious identity and family law arrangements, inside and outside the courtroom.

A1. The religious sphere as a benefit to the man and a cost to the woman

This section presents the conflicts of interest between husband and wife as they penetrate the religious sphere upon divorce. Female participants have suggested to us that Jewish and Muslim husbands behave strategically before the religious authorities and use God to their own benefits. In each case illustrated here, the husband purposefully employed one narrow religious methodology in order to ensure that his priorities (monetary or not) prevailed.

Participant #5

'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?" you know, 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.'

In this case, the husband not only completely ignored civil law norms but also twisted his understanding of Islamic law to yield the outcome he desired, that of marrying someone new. Paralleling this Muslim woman's experience, Jewish participants noted that their husbands purposefully ignored the fact that it is the man's religious duty to pay for the *Get*. The rabbis, complicit with the men, did not rectify the situation. Quite the contrary, the women had to financially assume the costs in order to obtain a religious divorce before the *Beth Din*.

Participant #3

'Now remember, it's the man's duty to give the women the divorce, but the *Vaad* [council of rabbis] does not give a shit as to who pays! Excuse my language. So when I paid, when he's technically supposed to pay for it, they didn't even ask him "Why aren't you paying for it?"

⁵² For a schematic outline of my findings on the various costs and benefits of the civil and the religious sphere, see respectively Appendices D and E.

Nothing! They asked him for nothing! I had to run [get the money] the day before to bring them eight hundred dollars. Otherwise, I would never get a *Get!*

Participant #4

'At the end he agreed [to give the *Get!*], but with the stipulation that he would not pay or share in the cost [...] and if I wanted it, it would be up to me to come up with the money. It was not inexpensive, but it was important and my only chance at getting it done.'

Participant #8

'I did not want to go there but I felt the husband should pay for some things. He should be obligated! But I did not push it because I did not want to risk not getting the *Get!* In a way, it is a type of black mail.'

When religious authorities fail to enforce religious rules existing in women's favour, a benefit in the religious sphere turns into a cost. These examples illustrate that religious divorce is far from being a static, unitary legal institution. Rather, it often functions as a disciplinary mechanism whereby husband and wife employ diverse strategies to lift some aspects of religion to the fore while downplaying other aspects when 'performing' agency. Furthermore, the gendered positioning of that religious adjudicative audience can tip the cost-benefit analysis of the religious sphere; the painful emotions that frequently accompany divorce can be replicated and exacerbated in religious contexts. The feelings of judgment, shame, powerlessness and alienation that several participants reported feeling during the religious divorce process worsen the emotional vulnerability that typically accompanies divorce. As these participants pointed out, religious authorities replicate and reify male privilege which leaves women marginalised.

Participant #6

'I felt very much like this is a man's club and I'm not welcome. It really felt so anti-woman! Like where is my cheering team, you know, everybody here is supporting him. All men all together and here's me, the woman, who is allowed to come in for a little bit and then has to go out while they write the whole damn thing.'

Participant #2

'I'm literally listening to all this [the adjudication of the divorce] and standing there, [...] I mean, like, I'm sobbing! For the whole time! And nobody said to me "Do you need a tissue; are you okay?" They don't give a crap! They just keep going with their thing and it's so disgusting! You know if they would have said to me beforehand "maybe you want to bring somebody for moral support", that would've been fine! They don't tell you anything, they just say "Come on!" [...] It was probably one of the most devastating moments of my life.'

Participant #3

'It's just the way they look, you get the sense that they're looking down at you, as a failure. It's funny because we were talking about it today at work, and most women feel like it. Because they make you feel like you're the failure, it's not the man. And, as a matter of fact my girlfriend did say to the rabbis "Why don't you ask him how abusive he was?!" But they don't, they can't comprehend things like that. Because it has to be the woman's fault! It's almost like a natural thing [to them].'

Acting alongside the negative aspects of the religious sphere described above is the transformative significance and direct benefits that religious divorce brings to the lives of observant religious women, which I now turn to.

A2. The religious sphere as a benefit to the woman and a cost to the man

In all of the scenarios presented in this section, women used the religious script because they claim it is in their interest to do so. This avenue either gave them emotional freedom, co-operative respect from well-known religious leaders and community members, or both. Distributive considerations play a central role in assessing what path women choose to adopt, often under considerable constraints: 'To me, to finally take, to empower myself completely, that I've got no connection to him, whatsoever, and that's it!' (Participant #3).

Several Jewish and Muslim participants explained to us how they seek identity benefits while avoiding identity costs. This bargaining strategy often involved reference to family and community members as a medium capable of using threats and other emotional penalties towards the husband during the divorce process. Power can thus be deployed in concrete ways to provoke shame and displeasure.

Participant #4

'After thinking about how I could convince him [to give the *Get*], I came to the conclusion that it would be impossible to persuade him on my own and enlisted the help of those I thought would be most embarrassed by his behavior. I called an aunt of his with whom he was quite close and has a great deal of respect for. [...] She was quite disappointed to hear this, as her daughter had had a similar experience. She is an observant Jew and understood the importance this held for me, and after having gone through the same thing she said she would absolutely speak to him and encourage him to do the right thing. [...] To this day, I don't know for sure what led to his finally agreeing to a *Get*, but I think the pressure and embarrassment of my exposing his behaviour in front of others led to success. I think he simply didn't want to look bad to those he respected.'

In a sense, this participant used one aspect of her religious foundation (community assistance) against the negative influence of another aspect (the right of a husband to grant or refuse a *Get*). When negotiating within the process of religious divorce, this participant was able to mitigate a religious cost by drawing on a positive aspect of the same rubric. Many Jewish women whose husbands refused to give them a *Get* enlisted the help of rabbis, in the hope that they put pressure on the husbands through emails and phone calls, a strategy which often proved successful. Community members, including lawyers belonging to the same religious faith, can also play an influential role on the husband: 'The attorney that he retained is also Jewish. From what I understand, but I am not a hundred percent sure, I think he was told that his attorney would not represent him, unless he promised to give me the *Get*' (Participant #6). Here, the lawyer's actions (presumably motivated by his own religious ethics) yielded a direct benefit to the woman.

The participants indicated that not only do community resources have the potential to pressure and influence religious outcomes, but they also reach out into the civil sphere and compensate costs incurred before civil courts. For instance, a participant calculated that it was more advantageous to waive spousal support in order to gain the custody of her children, since the economic loss of renouncing support was compensated by community resources and networks:

Participant #6

'He decided that he would take me to court and take the kids away from me and I won! [...] But I don't get spousal support anymore since we signed this custody agreement a couple of months

ago. The spousal support thing was all part of the negotiations [for custody]. So I was lucky that I was getting it up until the end of July. I mean now it's hard, but we'll manage, you know. In the beginning when he left, I didn't have money for two or three months. My community sent me food, they sent me money. I found envelopes of money on my doormat! People knew that I needed it and there's no, like, "please pay back". The community organizations brought us milk and eggs and bread and cheese and all that kind of stuff. There are wonderful organizations there, and it is not [conditional on whether] you are religious or you are not religious. It is for the community, you know?'

Thus, the autonomy and 'clean break' that some participants needed was not attained solely through the equitable treatment promised under the civil law route.⁵³ Instead, many women used the religious/cultural resources available to them to yield the desired result.

In addition to the informal techniques of influence described above, one Jewish participant (who is still without a *Get*) reported another religious doctrine being used to counter her husband's refusal to give the *Get*. The woman had resorted to use a *siruv*, a disciplinary order issued by a *Beth Din*. In this particular case, the woman was requesting an order of *siruv* issued against her husband since he was summoned to the *Beth Din* three times and refused to appear before the Jewish court. This powerful bargaining tool illustrates how community religious mechanisms, networks and resources can be used as a benefit to the woman in the religious sphere, in conjunction or in parallel with the civil sphere.

B1. The civil sphere as a benefit to the man and a cost to the woman

Stories shared by participants in this project systematically suggest that, upon divorce, husbands adopt highly distributive strategies: they pursue the path leading to the maximisation of (often economic) outcomes. They manipulate the civil side of the law to their own advantage, in order to either pay less or get more assets out of the divorce, even if such strategies are in direct violation of the espoused beliefs of their religious communities. One might assume that parties who adhere more closely to religious marriage and divorce would adopt a pro forma approach to the civil law site. However, from my discussions with participants, this does not seem to be the case. Instead, the secular courts were used as an additional bargaining venue of a weighty strategic interaction. In fact, religious advantages were leveraged against civil disadvantages and vice versa.

Participant #5

'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.'

Participant #7

'It really bothered me when he tried to get my pension and I wrote a letter to him. I didn't talk to him but I wrote a letter to him. I said "You know this family patrimony became law because of the feminist movement, because then women did not have pension, women did not have a job. So when a marriage broke women were left with nothing. [...] And you who is anti-feminism,

53 Canadian civil divorce law presents itself as a channel to ensure the operation of free bargaining on the part of equal rational individuals. This was at the core of the 'clean break' approach to post-divorce alimony: see McLachlin (1990, p. 136) and Leckey (2008, p. 105).

against all this women's movement, now you are taking advantage of the law that was brought up by women." So I said "you should be ashamed of yourself."

Many of the other participants similarly reported that their husbands consciously made a calculation of which venue, religious or civil law, would yield them the greatest benefits, and acted accordingly. This tactic is commonly referred to in economics literature as the 'threat point' (Pollak, 2003). This 'point' is the maximal level of utility attainable outside the marriage. Often, the civil sphere becomes a cost to the woman because of the civil court's failure to sufficiently verify reported assets. In fact, several Jewish and Muslim women mentioned to us that their husbands had been running a business and declared close to nothing on their income statements, despite the fact that they were financially comfortable. In their opinion, the secular system is complicit in such dishonest behaviour:

Participant #3

'He gave me a lump sum of money, he kept the house and whatever. Today I kinda regret it because he's a multi-millionaire and I helped him start the business, but that goes way back when! The sad part is I find men know how to hide money. And the law allows them to hide things from their wives, they make it easy for them. So he gave them papers [stating that] he's making, I don't know, maybe thirty thousand a year. And I'm thinking "What kind of legal system do we have here?" Here is a man: two cars, a house, making thirty thousand dollars a year... whatever!'

Participant #4

'That's what he wanted and he really wasn't interested in financial contributions. He felt that it was my idea and, he, you know, painted a picture of himself as being rather destitute, though we had lived a fairly comfortable life. So he got away with a lot of that!'

Participant #8

'My husband had a judgment in 1996 for child support. I never sued for alimony. My lawyer told me to only go after child support. We went to court many times. He would claim poverty. "Severe poverty"?! He got himself into a government property with 2 vehicles!'

Participant #9

'[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. I didn't believe him, because I knew his budget.'⁵⁴

Much like those who only go through a civil law divorce, spouses who go through both the religious and civil law divorce processes fail to disclose to the court information that puts them at a disadvantage. It is normally the responsibility of the civil court to verify that all assets have been reported. Is there a connection between courts' failure to verify adequately the husbands' assets and the religious context in which these divorce proceedings are occurring? There is irony in the fact that, precisely because religious authorities know their members well, they are more

⁵⁴ Translated from French.

likely to notice when a husband attempts to lie about his income. Civil courts, by comparison, can be disempowering for women from whom assets are concealed.

B2. The civil sphere as a benefit to the woman and a cost to the man

Religious women in this study reported making choices in a utility-maximising fashion, using the civil law either as a means to get an equitable outcome or as a way to punish and discipline, even if such strategies often meant bearing corresponding personal and social costs in the religious sphere. It was often the case that notwithstanding women's families actively promoting the husbands' interests, participants persisted in obtaining the equitable results they sought before the civil court. Some participants defied their husband's efforts by making a distinction between their loyalty to their family and their right to a fair settlement upon divorce:

Participant #9

'The uncles came to see me and they tried to get me settle and to abandon the court, and I said "No, I made my deposit, I have my lawyer, and I will continue. I want my rights! I respect the family; I respect the elders; I respect the religion, but it doesn't work for me." And that's what I explained to my uncles. Even if my father, the most important man in my life, rises from his tomb, I would refuse to proceed in this manner.'⁵⁵

Oftentimes, the most efficient way for a civil court to impose disciplinary measures on the husband is, paradoxically, to reach out into the religious sphere and to blur the boundaries between church and state. Section 21.1 of the *Divorce Act* does just that in allowing for sanctions to be imposed on the husband who does not 'successfully remove barriers to religious remarriage'. The sanctions imposed upon the refusing spouse can be the refusal of the courts to look at any applications, pleadings or affidavits made by the refusing spouse.⁵⁶ One participant described the great efforts her lawyer made to try to yield this religious benefit:

Participant #8

'So then I went to a new lawyer. He was a crazy guy. In the business, he is known as crazy. He is the one I went to work with to try and get the *Get*. He sent a lot of letters back and forth, [there was] a lot of legal interference and money. When we were going to court we used the clause in the law [whereby the husband is] not going to get anything unless he gave a *Get*. Once he was explained he could lose his claim to the house, he did [give the *Get*].'

The lawyers in these participants' cases were, consciously or not, part of a divorce process which stretched far beyond the secular context. In strategically employing the civil law against religious practices and norms concerning divorce, the courtroom became engaged in the religious as well as the secular divorce processes, whether the judge realised it or not. However, for women to be able to profit from these legal innovations, access to justice mechanisms must be implemented. 'Civil' family law attorneys, if they are to provide thorough counselling, must be familiar with the mechanisms that allow civil courts to discipline the religious husband.⁵⁷ If lawyers shun these unfamiliar recourses or fail to inform women adequately of their existence, civil law's 'benefits'

⁵⁵ Translated from French.

⁵⁶ *Divorce Act*, *supra* note 43 s.21.1(3)(c).

⁵⁷ These include s.21.1 of the *Divorce Act*, but also the possibility, created by the Supreme Court of Canada in the *Bruker v. Marcovitz* decision, *supra* note 38, of resorting to contract law to coerce the giving of the Jewish divorce.

can be circumvented.⁵⁸ For instance, a Jewish woman mentioned that while going through her civil divorce, the issue of the *Get* surprisingly was not brought up or considered by her lawyer. She believes lawyers should be trained to ask, as one of the preliminary questions, whether there are any religious issues related to the marriage:

Participant #4

‘One of the questions when you’re first going through a consult should be, you know, “Are there any religious issues?” And that did not come up. [. . .] I really do think that, you know, family law attorneys should be aware that sometimes there are really strange religious issues that come up in divorce and it should be addressed.’

Finally, Jewish and Muslim participants indicated to us that they were willing to lose economically if such strategies allowed them to gain something else of value in exchange, such as a religious divorce that would otherwise be refused to them or simply some peace of mind for themselves and their children. Though some Jewish and Muslim participants could be seen as having suffered economic losses, they described themselves as what we, in the economic lexicon, would call rational maximisers of their own self-interest. They discussed how husbands used the promise of financial security as a way to maintain control over their wives after separation. To undermine this strategy, some women affirmatively refused an obvious economic benefit in an active repudiation of this assertion of male power. For participants, this often translated in not wanting to obscure the religious process by involving alimony and other payments and leaving everything in the house for their husbands, as a way of showing their freedom and independence:

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 dowry.”’⁵⁹

Participant #7

‘So I took the two kids, rented an apartment and left. I didn’t even take furniture, nothing. I just packed, we just packed our clothes, left home and started buying our own furniture.’

The decision to walk away from a clear civil law monetary benefit is often perceived as worth the immediate freedom and ‘clean break’ it provides. Many women see this outcome as a benefit and act accordingly. For instance, a Muslim participant valued the wellbeing of her child more than the benefit of some additional dollars. Speaking in purely economic terms to her lawyer, she assessed the risks at stake and reasoned from this premise.

Participant #5

‘He [the lawyer] said “It’s going to be costly if you do it [negotiate a civil settlement] because obviously you’ll have to fight for it; he doesn’t sound like he’ll give it to you, you know.” So I said “You know what? I don’t want to do all of these things. It will drag my child out. It will be tough on my child because he’s probably going to keep on fighting. I don’t have the time or the energy to fight him so let’s just walk away from it”, and I did.’

⁵⁸ See Founier (forthcoming 2012).

⁵⁹ Translated from French.

Interestingly, this distribution scenario is far from peculiar to Muslim women's strategies. The comments of one Jewish woman reflect the pride involved in *not* begging for money. She explained how her ex-husband used money as a form of power over her. If she had to beg and plead for more financial assistance for her children, he perceived this as a form of control. Eventually, the woman felt that it was not worth fighting with him any more and settled for the minimal child support payments. Oftentimes, choosing to withdraw from the 'battleground' of divorce negotiation does not mean the caving in of a position but can rather constitute an active breaking of the grasp of male power.

Participant #3

"To him, it was all about control. You see, to him money is control. And if I asked and begged and this and that, it gave him more power over me. And it came to a point where it wasn't even worth fighting with him over that. So we went a long time like that. [...] With [him] there is nothing else to accept! [He] is not the kind of person you want to start with. I've had him arrested, I had a restraining order, I've done all of those things. To get to the point where I want to beg him for more money? Absolutely not! And the lawyer looked at me, like, "You're crazy!"

Some religious women valued and benefited from the equitable division of property granted in the civil sphere; others traded money for freedom or for their children's wellbeing, which were not perceived as antithetical to their own interests. In all instances where the religious participants mobilised civil resources to achieve their aims, the 'civil sphere' revealed itself as a plural, composite entity which, far from translating into systematic 'gender equality' or 'clean break', distributes highly differentiated endowments. The women I interviewed reached from one civil recourse to another and from the civil to the religious spheres, intertwining custody, property, spousal support, community standing, dispute settlement and tranquillity for their children in one multi-faceted, fascinatingly complex bargaining terrain.

Conclusion

Upon divorce, a Canadian Jewish or Muslim woman is faced with a puzzling dilemma which only highlights the complex relationship between the civil and religious spheres: under the civil family law regime, she may divorce her husband without his consent, whereas under Jewish or Islamic law, she may involuntarily remain married to him. A Muslim woman cannot repudiate her husband (*Talaq*). She can use either the *Faskh* or *Khul* divorce, but these forms of divorce are either difficult to obtain or financially costly. A Jewish wife can never religiously divorce her husband. Moreover, her husband's decision to give her the *Get* must be 'freely' made, which means that rabbinical courts will not intervene easily to force a man to grant such a divorce. Thus, some religious women, though divorced by civil courts, might remain religiously married to a husband who refuses to religiously divorce them. Through a series of interviews, I explored the distributive consequences of the secular/religious divide on differentially situated religious women in Canada. By understanding their *agency*, i.e. how different women use the law as 'it lives' out in the real world, I attempted to examine the ways in which Jewish and Muslim women navigate the interplay of legal systems and religious norms in various multidimensional contexts.

The insights of the 'left law and economics' approach I proposed were used to identify the background formal and informal legal rules, social norms and distributional practices that help produce asymmetric bargaining locations for Jewish and Muslim women, both between and among themselves. In this article, I employed the economic language of cost/benefits to argue that religious parties bargain strategically upon divorce. The interviews I have conducted with religious women strongly refute the market/family distinction by bringing these underrecognised

market claims to the fore. As women, wives and mothers, participants have described their bargaining strategies in the religious *and* the secular domains as sometimes beneficial and sometimes detrimental to them, depending on various factors. In approaching the relational dynamics of religious subjects moving inside and outside the secular realm, I noticed that the participants' invocation of religious law was often strategic, serving distributional purposes. For instance, if the woman could get benefits from the religious sphere that she would not be able to secure under the secular legal system, she would follow this advantageous path. Such empirical knowledge helps disenchant the idea that religious law is systematically used as a *punishing* force that makes women worse off economically or morally inferior. Indeed, in today's globalising world, religious families are walking inside the courtroom and across the gender line in unanticipated and contradictory ways. Is there anything left once we dismantle law's secular impulse and religion's sacred aspiration? Is the family just another market consideration? Are religious claims really about God, ever?

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Appendix A: Questionnaire used for the interviews

Dimension 1 – Religious normative framework

1. What are your religious practices?
2. At the time of your wedding, what was your understanding of religious marriage and divorce?
3. (For a Jewish person: did you sign a *ketubah* at the time of your wedding, and if so, what was its content?)
4. (For a Jewish person: before or during your marriage, have you discussed the *Get* and its unilateral nature with your husband?)
5. (For a Muslim person: did you sign a *nikah* (Islamic marriage contract) at the time of your wedding, and if so, what was its content?)
6. (For a Muslim person: before or during your marriage, have you discussed the *Talaq* and its unilateral nature with your husband?)

Dimension 2 – Secular normative framework

7. How was your married life, and for what reasons did you opt for a civil divorce?
8. How were the divorce procedures in the civil court?
9. What were the key elements discussed before the court and the arguments of both parties?
10. Who were the persons involved in the process and how would you describe their role?
11. Is your civil divorce recognized by the religious authorities of your community?

Dimension 3 – Personal, family and community normative framework

12. How would you describe your present situation?
13. During the divorce procedure, did you benefit from the approval of your family and your community?
14. Which events left you with the strongest impression?
15. What were your expectations and to what extent have they been satisfied?
16. Are there any aspects of the divorce process that you would like to see changed, on the secular level as well as on the religious level?
17. Would you like to add anything to what was previously discussed? Would you like to clarify anything that was said earlier?

Appendix B: Requirements relating to the *Get*

Several technical requirements have developed in order to make a *Get* effective:

1. Date. The *Get* must be dated and, according to the usually prevailing custom, it is dated from the year of the creation of the world (i.e., 1983 C.E.=5,743). If the date was erroneous or omitted, the *Get* is not valid.
2. Names of the Parties. If it well established that a *Get* must be written for particularly specified individuals. Thus, the husband must specifically request that the *Get* be written for his wife, and the exact names of the parties must be included therein by the scribe preparing the *Get*. In addition, any nicknames by which the parties are known must also be inserted in the *Get*.
3. Residence of the Parties. The place of residence of the parties must be set forth.
4. Words of Separation. Since the *Get* certifies divorce, and establishes the termination of the marital relationship, it is necessary to have words of complete separation set forth in it. It must therefore be explicitly stated that the wife is henceforth permitted to remarry at her will.
5. Attestation. A *Get*, having been written at the specific request of the husband, must be signed by two competent witnesses.
6. Delivery. It is fundamental to Jewish law that a *Get* be physically delivered by the husband, or by his agent, to his wife or her agent, or that it be delivered to a place that is under her actual and physical control. This rule was established to ensure that the wife has actual or presumptive notice of its contents. Hence, at the time of delivery, the husband or his agent is obligated to inform the wife that a *Get* is being delivered.
7. Agency. Under Jewish law, either a husband or a wife may appoint an agent to 'give' or 'accept' a *Get*. This agency can be revoked (Haut, 1983, pp. 27–30).

Appendix C: English Translation of a *Get*⁶⁰

On the _ day of the week, the _ day of the month of _, in the year _ from the creation of the world according to the calendar of reckoning we are accustomed to count here, in the city _ (which is also known as _), which is located on the river _ (and on the river _), and situated near wells of water, I, _ (also known as _), the son of _ (also known as _), who today am present in the city _ (which is also known as _), which is located on the river _ (and on the river _), and situated near wells of water, do willingly consent, being under no restraint, to release, to set free, and put aside thee, my wife, _ (also known as _), daughter of _ (also known as _), who are today in the city of _ (which is also known as _), which is located on the river _ (and on the river _), and situated near wells of water, who has been wife from before. Thus do I set free, release thee, and put thee aside, in order that thou may have permission and the authority over thyself to go and marry any man thou may desire. No person may hinder thee from this day onward, and thou art permitted to every man. This shall be for thee from me a bill of dismissal, a letter of release, and a document of freedom, in accordance with the laws of Moses and Israel.

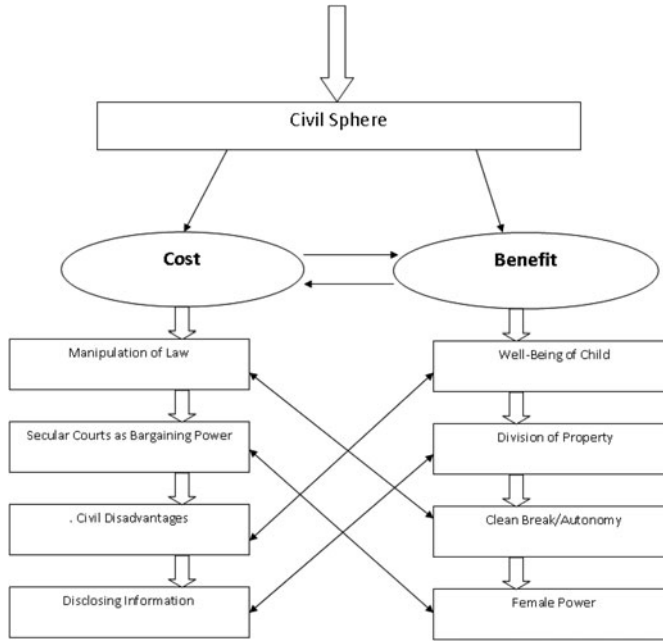
_, the son of _, witness.

_, the son of _, witness.

⁶⁰ Taken from Kleefeld and Kennedy (2008, p. 281). See also Cobin (1986, p. 406 ftn 2).

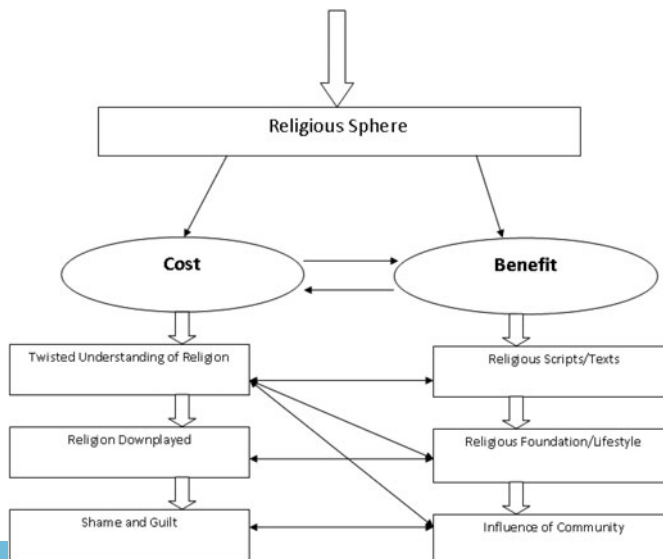
Appendix D: Women and the Civil Sphere

Women



Appendix E: Women and the Religious Sphere

Women



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