Please give me my divorce: an ethnography of Muslim women and the law in Senegal

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3 A Family Code: Contestations over State, Islam and Women

Introduction

In the period shortly after independence (1960), the Senegalese government deemed the creation of a uniform Family Code of central importance to the forging and modernization of the new nation. Religious leaders, on the other hand, regarded the eventual code – which entered into force in 1973, and, among other changes, abolished unilateral divorce (repudiation) – as an incursion into their sphere of influence, and they mounted serious opposition. Threatening to isolate their followers from the code's impact, they stated that Islamic law should retain the centrality it had had in the Muslim courts (*tribunaux musulmans*) and native courts of the colonial legal system, and they expressed their intention to continue their role as intermediaries in the Senegalese hinterland. The issue was never truly resolved. With the democratic openings in Senegal, Sufi religious authorities and reformist actors saw a chance in the early 2000s to renegotiate the topic of family law. They drafted and proposed an alternative Islamic Code – yet without success. Since then, the situation is perhaps best described as a stalemate: religious actors do not actively push for reform, yet their critiques persist.

This chapter discusses the introduction of the Family Code and its contestation since independence. It focuses on the two major episodes of opposition but also discusses other moments of resistance. Because the history of state family law in Senegal dates back to colonial times, this chapter also analyses how the French colonial power created and imposed a dual legal system and how, from the 1930s onward, family matters, and marriage and divorce in particular, came to be regulated from above – meaning that law was no longer primarily to reflect actual practices but rather to change these, a process that continued after independence with the creation of a Family Code.

In delineating this history, I initially zoom in on two matters of particular importance: First, I will consider the fate of Muslim courts (*tribunaux musulmans*) in the French core territories – that is, in what would eventually be the *quatre communes* (four communities) (Chapter 2). While the French attempted to bring all inhabitants of these core territories under the French (Napoleonic) Civil Code and abolish Muslim courts, this effort was successfully resisted by the Muslim population of these communities, who consequently carved out a space for a 'Muslim civility'. Hence, family

law has long been an issue of contention in Senegal. Second, I will consider what the custom was that was to be applied in family law cases brought to the 'native courts' the French established in 1903 in the French-controlled territories *beyond* the core territories – that is, in the protectorate, an area that had increased dramatically in the late 19th century and that by 1890 covered the region of current-day Senegal beyond the cities of the core territories (Chapter 2, footnote 17). It is likely that only a small share of conflicts over marriage and divorce made their way to these 'native courts' of the protectorate; however, these type of disputes made up the majority of their caseloads, thus raising questions about the law that was applied in these native courts. Despite the central French policy of promoting custom, it seems that in practice in many of the native courts in the protectorate a particular interpretation of Islamic law predominated.

Figure 2: Map showing the core territories (quatres communes) of St. Louis, Gorée, Rufisque, and Dakar[1]

1 Map adapted from Bigon 2012.

The Development of a Colonial Legal System and the Struggle for Muslim Family Law in the Core Territories (Quatre Communes)

Whereas there is little detailed information on the law and dispute resolution in precolonial Senegal, it is known that disputes were handled by chiefs, who arbitrated on the basis tradition, and, because of the spread of Islam, increasingly frequently also by qadis (Lam 2019, 24-27). As a consequence, from the time of 'their first sustained contact in the sixteenth century the French operated within a plural legal environment' (Roberts 2010, 85). In the coastal communities of St. Louis and Gorée[2] – where more and more French began to settle – conflicts among and between the different populations were adjudicated on an ad hoc basis and on the basis of different sets of norms. This changed in 1830. In that year, the Napoleonic Civil Code of 1804 was introduced in the areas under control of the French and French citizenship was extended to all inhabitants of Gorée and St. Louis born free.[3] Yet, while the expansion of political rights was welcomed by the original inhabitants (*originaires*) of these communities, the reception of the Napoleonic Civil Code also meant that the inhabitants of these communities were forced to submit to French civil law. No longer were Muslims originating from these communities permitted to resort to their own – Islamic – courts to regulate matters of the family, even if the Islamic laws were informally preserved (M. Diouf 1998, 686).

Twenty-five years of opposition from Muslim *originaires* followed. Prominent Muslims sent regular petitions to the French colonial administration demanding the establishment of a Muslim court in the colony. A central argument relied on comparison with Algeria: there, Muslims were not subject to French civil law in matters of marriage, divorce, and inheritance (M. Diouf 1998, 687). In response, in 1847 the French annexed an advisory council to their civil court for cases involving Muslims; under further pressure from Muslim *originaires*, this Council became authorized in 1854 to 'give its advice on questions of Muslim law, problems that are submitted to it by the courts' (M. Diouf 1998, 89). Yet pressure persisted. The Muslim Petition of 1856 enumerated the differences between French civil law and Islamic law, emphasizing topics of polygyny, 'bastards', paternity, divorce, inheritance, gifts, and wills. In 1857, the Governor-General put an end to the discussions and opened a court for dispensing Islamic law in Saint Louis in 1857. Shortly afterward, Muslim courts opened in Dakar and Rufisque.[4]

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2 In the course of the 18th century, the first local assemblies appeared in St. Louis and Gorée, which would serve as the basis for the later municipal institutions; see glossary entry on 'quatres communes'.

3 This code had put a definitive end to the diversity of laws in the French metropole.

4 By 1903 there were Muslim courts in St. Louis, Dakar, Kayes (Mali), Rufisque, and Kaolack. The Kaolack court was definitively closed in 1913 (Lydon 2010).

However, the establishment of the three Muslim courts would not resolve the issue for long. By the end of the 19th century, the French had greatly expanded their territory. Beyond the coastal communities, the Napoleonic Civil Code was not in force, and clarification of the legal situation in the colony through the development of a comprehensive legal system became more and more pressing.

On 10 November 1903, the Governor-General issued the Ordinance on Judicial Organisation, which introduced such a system. It continued to rely on a duality in jurisdiction that was primarily territorial: there were two jurisdictions, each with three different courts. French civil law was to apply to 'citizens' (i.e. French nationals) and people originating (*originaires)* from the – by now – four core territories controlled by the French.[5] In contrast, local custom was to apply to all others, who were considered 'subjects' – notably, the 'non-European' inhabitants of the hinterland, which had the legal status of 'protectorate'.[6] At the top, both jurisdictions were conjoined, as appeals from both jurisdictions would move to one and the same superior court. In the four core territories, the new legal system thus brought an end to what French jurists regarded as the 'anomaly' of Muslim courts. Muslim *originaires* would have to choose between having their family conflicts adjudicated by the French civil law court in town, or by a native court outside in the protectorate.

However, the abolition of the Muslim courts did not withstand new outbursts from the Muslim community for long. The latter found support in more pragmatic administrators, who wished to 'maintain the loyalty of Muslims at a time of considerable political disorder and religiously inspired rebellion' (Sarr and Roberts 1991, 136) – a consideration that also informed their cooperation with marabouts who presented what the French regarded to be a tolerant Islam (Chapter 2). Thus, bowing to the pressure from the Muslim *originaires*, the colonial administration decided to reopen the courts

5 Key dates for the establishment of the *quatres communes* are the following: in 1840 a General Council for the Colony was established; it 1848 Senegal was granted a seat in the Chamber of Deputees in Paris; in 1872 the communes of Senegal were officially established (St. Louis and Gorée); in 1880 and 1887, respectively, Rufisque and Dakar would follow and accede to the status of a *commune de plein exercise* (M. Diouf 2000, 568); and in 1929, Gorée and Dakar were merged into a single commune.

6 The legal distinction between the core territories and the protectorate dated from earlier, when the French abolished slavery in 1848. Because it was felt that applying the decree on abolition across all French-controlled regions would undercut support for French rule from indigenous authorities, the French applied the decree selectively. They introduced a distinction between the 'core territories' and the 'protectorate'. While slaves were freed in three French-controlled territories along the coast, slaves in other regions were not (Roberts 2010, 88). This distinction became central to the 1903 legal system, yet the same 1903 ended the legal recognition of slave status throughout French West Africa.

in 1905.[7] However, there was to be increased surveillance of the activities of the court (M. Diouf 1998, 692). 'Legal cases were to be systematically numbered, translated and communicated to the French *tribunal de première instance* within forty-eight hours of being sentenced' (Lydon 2010, 137). As Lydon (2010) shows, this led to the routinization of the Islamic legal practice of the Islamic judges who served as civil servants of the colonial administration.

Later, in 1946, citizenship was extended to all inhabitants of French colonies, and the sharp distinction between the core territories and the rest of Senegal came to an end. The link between citizenship and personal status, moreover, was definitively broken. Nevertheless, in family matters a dual legal system, with two types of courts and applying different norms, remained, and citizens retained the right to choose and maintain their own family law.[8]

'Local Customs', Islamic Law and the Imposition of Uniform Marriage Law

The 1903 legal system relied on the distinction between core territories and protectorate, but also on a corresponding second distinction: between citizens and 'subjects'. Citizens included French nationals and the *originaires*. With the exception of French nationals who had settled there, inhabitants of the protectorate, by contrast, were all subjects. From 1903, these subjects could bring their family law cases to French-created native courts, where they were adjudicated on the basis of local custom. This raises questions about what this custom was.

7 While the Ordinance was issued in 1903, its implementation began in 1905.

8 The extension of citizenship was the result of the work of the African deputies in the French Parliament. The interwar period had seen a rise in political activism, culminating in the period after the Second World War. The results were momentous: all inhabitants of Senegal now had to be treated equally with their counterparts in the metropole. Senegalese inhabitants obtained equal access to the civil service, with the same pay and benefits. The right to vote was extended to a significant number of categories of people, but suffrage was not immediately universal (this would take place only in 1956). With the extension of citizenship, Senegalese workers were to be granted the same rights and protections as workers in the metropole; there could be only one labour code. This was an important gain: labour rights were a central point of contention in the Senegalese colony at the time (F. Cooper 2014). Moreover, the same year saw the abolition of the *indigénat* (see below in this chapter), codified in the Houphouët-Bougny law.

The three different native courts (village, provincial, and appeals courts) dealt with both civil and criminal matters. They were run by French colonial administrators and French-appointed chiefs and assessors.[9] In practice, the large majority of the cases the native courts handled were family cases. These cases were brought by litigants – often women (Yade 2007) – who drew on the court to make claims about marriage, divorce, and inheritance (Geismar 1933; Robinson 1992).[10] Next to the courts, a central institution of the 'native' legal system was the *indigénat*, introduced in Senegal in 1887 and extended to the rest of French West Africa in 1904, regulating the French system of forced labour and administrative punishment.[11]

But what was the 'local custom' that was to be applied in the family law cases brought to the native courts, and how was this to be ascertained? Article 75 of the 1903 ordinance stated: 'native justice applies in all matters of *local customs*, insofar as they are not contrary to the principles of French civilization'.[12] What were the effects of the stipulation that all customs contrary to French civilization were to be brushed aside (repugnancy clause)?[13] And, given that a number of subjects were Muslim, was there a role for Islamic law?

9 The village court was to seek reconciliation of the parties and was presided over by the village chief. If without success, parties could go to the provincial court, headed by the provincial chief, 'the historic or invented ruler of the region' (Roberts 2005, 74). He was assisted by two assessors, appointed by the French district officer and chosen for their knowledge of community custom. If litigants were Muslim, at least one of the assessors had to be a Muslim judge, a qadi (Roberts 2005; Robinson 1992). Judgments in this court had to be recorded either in French or in Arabic, and the French district officer was often closely involved in the operation of the court: its sessions often took place right next to their headquarters, and, since they were sometimes the only ones capable of recording judgments, they often attended sessions (Roberts 2005, 75). Litigants who were not satisfied with the judgment of the provincial court could appeal to the appeals court (*tribunal de cercle*), headed by the district officer, who often had no legal training (Conklin 1998, 436). He was assisted by two 'indigenous notables' (Ponty in Roberts 2005, 75). An important function of the appeals court was to create jurisprudence that provincial chiefs would feel obliged to conform to. Note that in criminal matters all native courts had serious punitive powers, far greater than those of the civil courts where citizens went (see Conklin 1998).

10 For the adjacent French Soudan, see Roberts (2005, 10).

11 The *indigénat* allowed French commanders to regulate 'offenses' – often loosely defined – thus giving them the power to 'jail, fine or bind people' (Mann 2009, 333) without appeal. The *indigénat* underwent reforms from the 1920s onward and was abolished in 1945–1946 (F. Cooper 2014, 67–68).

12 Rapport au Président de la République, suivi de décret portant réorganisation du service de la justice dans les colonies relevant du gouvernement général de l'Afrique occidentale (10 novembre 1903), *Journal officiel de la République française* (24 novembre 1903), 7094-7097.

13 The instruction of AOF Governor General Roume (1902–1907) to local administrators to codify custom and his successors Ponty's call to map and collect custom, in order to contain the – in his opinion – 'corrupting influences' of Islam (*politique des races)* raise similar questions.

The colonial legal archives are yet to be fully exploited by historians, and any definitive answers to these questions are lacking so far; nonetheless, there are indications that, in their handling of the cases justice seekers chose to bring to the native courts, the colonial administrators' use of the repugnancy clause altered the customs applied. Their push to render custom acceptable in accordance with their own conceptual categories, and on the basis of information provided by local elites, likewise seems to have altered custom. Snyder's study demonstrated how, in the early 1950s among the Banjal Diola in the south of Senegal, the imposition of French legal categories had created new and persistent customary conceptions of land ownership (Snyder 1981).[14] In the adjacent French Sudan, beyond colonial Senegal, provincial tribunals in Sikasso, as Burrill shows, tried to eradicate marriage practices that ran counter to French civilization (Burrill 2015, 63). These studies suggest that French legal categories, bureaucratic standards, and ideas about what did and did not run contrary to French civilization distorted custom in Senegal as it was applied in the family law cases litigants brought to the native courts.

Yet other authors highlight how, in the early 20th century, despite a continued policy by the central leadership of the colony to minimize the influence of Islam and promote custom over Islamic law, 'the experience with indigenous tribunals themselves […] was very different from the original intention' (Robinson 1992, 234). In practice, a particular version of Islamic law predominated in the native tribunals headed by the village and provincial chiefs, and 'no meaningful representation was given to […] custom' (Robinson 1992, 234) (see also Burrill 2015; Jeppie, Moosa, and Roberts 2010; Marty 1917, 288; Roberts 2005). In part, this was also the result of a conscientious reliance on French translations of Maliki jurisprudential handbooks in the courts of appeal, books that were falsely understood as similar to a legal code.[15] Moreover, as Robinson points out, 'Muslim assessors familiar with Islamic law constantly came forward, while fetishist notables hung back' (Robinson 1992, 235). This suggests that the many cases concerning marriage, divorce, and inheritance that litigants brought to the native courts were largely dealt with according to Islamic law.

14 Yade (2007) does not address this in her article. I am aware of her 2011 PhD thesis *Approche ethno-historique du mariage et du divorce judiciaire au Sénégal de 1903 à 1959* (Université Cheikh Anta Diop), but I have been unable to access it.

15 The French colonial administrators largely relied on the French translation by Seignette (published by Challamel in 1878) of an influential Maliki jurisprudential commentary by Ibn-Khalil (Seignette 1878). The earlier Perron translation of the *Mukhtassar* by Ibn-Khalil appeared in 1854 (Extrait du Journal des Savants 1982). Note, however, that contrary to what Roberts (2010) and Robinson (1992) state, the Seignette translation does not include the volume of the *Mukhtassar* dealing with religious prescriptions on marriage and divorce.

Indeed, the studies on custom conducted in the 1930s by Geismar and in the 1950s by Chabas and Gamble, which detail custom as applied in the native courts, often refer to Islamic norms, both explicitly and implicitly (Chabas 1952; Gamble 1957).[16] This is also shown in the 'innovations' that the native courts in Sine Saloum, introduced in 1905, brought about in marriage and divorce, as described by Yade (2007, 7). Taken together, it seems that the subsuming of Islamic law under the category of local customs of the 1903 legal system and the promotion of custom did not mean that Islamic family law was marginalized; quite the contrary. It also seems that Islamic law and custom pertaining to family were distorted in the native courts.

Of course, not all disputes made their way to the colonial courts; in fact, it is likely that very few did. In 1933 Geismar noted: 'to judge by the statistics the native of the countryside has not yet found the path to our courts', and he explained how the litigants of these courts came almost exclusively from the rail towns (such as Tivaouane) and European centres (Geismar 1933, 8-9). Instead, the majority of disputes were probably handled within families or with the involvement of authorities beyond the colonial state. Because this happened largely outside of the purview of the colonial authorities, the latter likely had little impact on the norms applied in dispute resolution and adjudication. Nonetheless, the possibility to resort to a colonial court alone may have had an impact on how families and informal authorities handled disputes.[17] As we shall see in the subsequent chapters, together, this would suggest a reality that is possibly not so different from that of today.

From the late 1930s onward, the legal policy, particularly pertaining to family law, changed significantly. The 1939 Mandel decree and the 1951 Jacquinot decree marked important turning points. They introduced reforms 'from above' in the whole of French West Africa, expressing an explicit concern with the position of women in marriage and with women's rights. The Mandel decree mandated marriage reform across French West Africa and Equatorial Africa. From 1939 onward, consent was to be the basis of any marriage; moreover, an age of consent was set at 14 for girls and 16 for boys (Burrill 2015, 133). The Jacquinot decree mandated that divorcees, and unmarried women of 21 years or older, had the right to freely choose their own partner without consent from parents and family members (Burrill 2015, 153). However, these measures had little impact on the ground. As Burrill noted:

16 Geismar's 1933 study on the 'civil customs' of different ethnic groups in Senegal (1933) was commissioned by the Governor-General in 1931. Geismar gives a highly detailed account of the custom applied in different regions and by different ethnic groups and notes a strong influence of Islam. The studies of Gamble and Chabas are less detailed; moreover, the latter concentrates on the urban centres of Senegal in particular.

17 While it is clear that native courts received a high number of marriage and divorce cases, often introduced by women, it is not known whether women also experienced particular restrictions in going to court.

> the more and more fixed African marriage became through legal decree and code, the less these definitions of marriage reflected the contours of marriages that were actually forged by African men and women. (Burrill 2015, 133)

Together, the decrees thus also heralded a new vision and use of the law in relation to the family. The law was no longer to reflect local practices and beliefs, however (mis)understood, but became a tool of the state to 'civilize' the population and protect the rights of individual women.

A Uniform Family Code for a New Nation

At independence in 1960, the new Senegalese state, in addition to a dual jurisdiction, inherited multiple family laws: French civil law and a plurality of customs. With the extension of French citizenship in 1946, family law had become a matter of choice for all of the population. Everyone was a citizen, and people either opted for French civil law or for their own custom. At the same time, the Mandel and Jacquinot decrees required that this custom be in line with the stipulations about marriage set out in them.

Upon independence, the country adopted a republican and secular constitution that made mention neither of Islam nor of custom. The government swiftly unified jurisdictions and closed native courts and Muslim courts.[18] It also created a single civil registry. Substantively, the unification of family law was another central priority of the government. For President Léopold Sédar Senghor, a uniform Family Code was essential for the development of the nation-state (Villalón 1995, 228). As the then Minister of Justice M'bengue stated: 'a strong state requires that the Nation is endowed with one and the same personal status law' (Options Committee Tome I);[19] in many other newly independent states of Africa and beyond, there was the same strong belief in the urgency of nation-building as well as in the central

18 The judicial system of 1960 included 11 justices of the peace (*juges de paix*) situated throughout the country, including one in Tivaouane (Lam 2019, 69). Because of limited resources and a limited number of qualified judges, the newly created judicial system was premised on general jurisdiction – meaning that judges are competent to judge in various fields of law (Lam 2019, 27). In 1984 and 2014, the judicial system was reformed. The justices of the peace changed names to departmental tribunal (*tribunal départemental*) in 1984, and these were renamed to *tribunal d'instance* in 2014. This did not have consequences for family law procedure. Over the years, the number of courts has grown: in 1984 there were 25 departmental courts (Lam 2019, 100), and in 2019 there were 35 courts of first instance (45 were created but 10 were not yet installed) (Lam 2019, 117). For more on the structure of the judicial system in Senegal, see also AfriMAP and OSIWA (2014, 19–26), and Samb (2004; 2013).

19 ['*Il n'existe pas d'État qui ne recouvre une Nation dotée d'un seul et même statut.*'] Travaux du comité des options pour le code de la famille; Tome 1; Allocution prononcée le 26 Mars 1966 lors de l'installation du Comité des Options par M. Alioune M'bengue Garde des Sceaux, Ministre de la Justice, p. 4.

role of law for this project (Allott 1980; M. Diouf 2001, 206; Otto 2010b, 2).[20] Hence, Senghor commissioned the creation of the Family Code promptly after independence. It would take another 12 years, however, before the code was finally drafted and adopted.

In the meantime, the Senegalese state maintained different personal statuses; accordingly, while everyone was a citizen, there were those who opted for civil law and those who opted for their own custom in matters of the family and personal status (Y. N'diaye 1978). This also meant that Senegal maintained a duality in terms of marriage: civil marriage, and customary marriage. In 1961, the different marriage customs were fixed at a total of 68 (Guinchard 1978, 817) and categorized on the basis of ethnicity and religion, often labelling fusions of ethnic custom and religious law (see Arrêté no 2591 du 23 Février 1961), such as '*Ouoloff islamisée*'. This was also likely the most common custom in Tivaouane.

This plurality in family law was mirrored in the organization of the legal system. The unification of jurisdictions and the suppression of the indigenous and Muslim courts in 1960 did not lead to the abrogation of the pluralist system, at least not initially (M. N'Diaye 2012, 142). Until the implementation of the Family Code on 1 January 1973, *justices de paix* (justices of peace), who constituted the first rung of the legal system, were given special jurisdiction to adjudicate on matters of Senegalese citizens who did not want to be judged on the basis of the French civil code and retained their '*statut particulier*'. The justices of peace were to judge questions pertaining to the intimate sphere, among others, of marriage, divorce, and inheritance, and they had to do so on the basis of the custom of both parties involved (Touré 1975, 54). To this end, they were joined by two assessors, who informed the judge about the relevant customs (ibid.).

All the while, preparations were underway to draft and introduce a single code for all Senegalese citizens. Just over a year after independence, on 12 April 1961, the government established the Commission for the Codification of Personal Status Law and Law of Obligations (Commission for the Codification),[21] the first of a total of three commissions that would subsequently work on the code. '[T]he Senegalese authorities were careful in their elaboration of the Family Code and [..] codification [thus] took place in several stages' (Guinchard 1980, 36).

20 Note that the French West African Muslim-majority countries of Niger and Burkina Faso maintained a dual system; Mali enacted The Law on Marriage and Guardianship, but it did not codify inheritance law. In 1995, Burkina Faso enacted the Code of Persons and Family *(Code des Personnes et de la Famille*) (see Paré 2017). So far (September 2021), Niger does not have a Family Code (see Barbara Cooper 2010 and Villalón 1996).

21 *Commission de Codification du Droit des personnes et du Droit des obligations*

The Commission for the Codification worked on the Family Code for about four years. As a first step in the drafting processes, they devised a lengthy questionnaire to collect information on the different customs in use. The answers collected, however, would remain incomplete. To continue the task, the government appointed the Options Committee (*Comité des Options*) in December 1965. The total of 32 members included lawyers, members of parliament, former qadis, and religious and customary authorities. Members prepared reviews on different topics, which were subsequently discussed by the full committee in sittings over a number of weeks in April 1966 (Camara 2007, 788).[22] Afterward, the government as well as the leadership of the ruling party, *l'Union Progressiste Sénégalaise* (UPS, which would turn into the *Parti Socialiste*, PS, in 1976) reviewed their work and by a decree of 22 July 1966 the Senegalese government assigned the drafting of the Family Code to a special committee, a task completed by 1967.[23] However, the political crisis of 1968-1969 led Senghor to delay discussion of the Bill in Parliament until 1972: on 1 July of that year the code was unanimously adopted.[24] Shortly afterward, on 1 January 1973, the law entered into force. From then on, civil registrars, justices of the peace, and the different appeal judges were to apply 'Senegalese' family law.

Character of the Family Code: Modernity, 'Islamic Law', and 'Custom'

The Family Code that entered into force in 1973, and is still valid today, comprises 854 articles and synthesizes French civil law, Islamic norms, and customary norms. It is the only Senegalese legislation that codifies norms deriving from Islam and 'custom'. Overall, the code favours the French sources, evidence of a strong wish to 'modernize' Senegalese society.[25] Thus, the nationalist impetus behind the abrogation of plurality in personal status and the elaboration of a uniform code went hand in hand with ideologies of modernization; unification was to contribute both to nation-building and to social and economic progress. This is also evident from the terms of

22 The total of 32 members included lawyers, deputies, qadis, and religious and customary authorities and worked from 8 to 26 April 1966 (Camara 2007, 788).

23 The committee was called the 'Drafting Committee of the Family Code' (*Comité de Rédaction du Code de la Famille*). Their 1967 draft was examined by both a Parliamentary Commission and the Supreme Court. This led to ten amendments.

24 The crisis weakened Senghor's power, and he preferred to wait until the situation had calmed down (M. N'Diaye 2012, 280). The draft was under consideration of Parliament between 30 May and 1 July 1972. How many of the Members of Parliament were present when the law was voted is unknown (Brossier 2004a, 35).

25 The character of the Family Code has been analysed by many scholars, not in the least because of the ambitious nature of the code. Commentators address the modernizing nature of the code, as well as the duality evident in the law; even so, their evaluations differ (Brossier 2004a; M. N'Diaye 2012; Sow Sidibé 1987; Y. N'diaye 1978; I. Y. N'diaye 1996).

reference provided to the Options Committee. In the words of the Minister of Justice, customs could stand in the way of progress, evolution, and socio-economic development; and if they did, they had to be abolished (Options Committee, Tome 1, 4-5). Custom was to be an important source of law, but the minister cautioned: 'The Code should be an instrument of evolution and emancipation, not a collection that chronicles a dead or dying African society'. More generally, references to progress, modernity, and advancement pervaded the discussions held during the long elaboration of the Family Code.

Whereas French civil law accorded few rights to married women, in the period in which the Senegalese Family Code was elaborated French family law underwent significant reform: the financial independence of the wife in marriage was enhanced (1965), and the institution of paternal power was abolished (1970) (see Greenwald 2018). In Senegal, modernization clearly included the amelioration of the position of women (Options Committee).[26] The abolition of unilateral divorce by the husband (i.e. repudiation) was central to this endeavour. It was one of the expressed aims of Senegalese President Senghor to ban this practice from Senegalese society (Camara 2007, endnote 7) and to restrict divorce to the court; and whereas there was no complete unanimity on the matter in the Options Committee, the great majority of members were in favour (Options Committee).[27] Nevertheless, an analysis of the deliberations of the Options Committee shows that there was little explicit consideration of women.[28] Drafters were measured in their insistence on emancipation; instead, the position of women was framed as both a matter of protection, and a matter of progress and modernity. Hence, women appear both as the objects of state protection and as symbols of a modern nation-state. During the elaboration of the Family Code, women were conspicuously absent; they were not part of the Parliamentary Commission or the Options Committee, even if there were female members of Parliament and women working in the legal professions (M. N'Diaye 2012, 300).

In content, the Family Code provides for near equal rights in divorce. It distinguishes between two types of divorce (art. 157): consensual divorce (*divorce par consentement mutuel*) and contentious divorce (*divorce contentieux*) – which are respectively established and pronounced by a judge.[29]

26 Travaux du Comité des options pour le code de la famille, Tome I-III.

27 Travaux du comité des options pour le code de la famille; Tome II; Séance du Lundi 18 Avril 1966, p. 39–67

28 Members of the Options Committee only rarely referred to equality, and no mentions of international human rights were made, even if their discussions occurred at a time when the idea of universal human rights had gained some purchase.

29 Note that the French Civil Code recognized consensual divorce only in 1975.

Consensual divorce:

The spouses together introduce the request for consensual divorce, either in writing or in person. Before the divorce can be established (*constater*), the judge needs to verify the consent of the parties and check whether or not it has been freely arrived at. If he deems that true consent is lacking, he rejects the request. The judge also ensures that the agreement of the spouses is not contrary to the law, public order, and morality. If all conditions are met, the judge renders judgment establishing the divorce. (Article 159 and Article 161)

Contentious divorce:

Grounds for contentious divorce: Contentious divorce may be introduced by either of the spouses, in writing or in person. The code lists ten grounds for divorce. 'Divorce may be pronounced: (1) For declared absence of either spouse; (2) For adultery by either spouse; (3) For the sentencing of either spouse with a penalty involving the loss of civil rights; (4) For neglect of the wife by the husband; (5) For failure by either spouse to honour commitments made when entering into marriage; (6) For desertion of the family or marital home; (7) For serious ill-treatment, excesses, abuse, or insults rendering continued marriage intolerable; (8) For permanent and medically proven infertility; (9) For the serious and incurable illness of either spouse, discovered during the marriage; (10) For mutual incompatibility rendering continued marriage intolerable.' (Article 166)[30]

Conciliation hearing:The contentious divorce procedure is mandatorily preceded by a conciliation hearing, which may last a maximum of a year. (Article 169)

Contentious procedure: If conciliation is without success the judge opens the 'contentious procedure'. (Article 171)

Temporary measures: Throughout the different phases, the judge can order temporary measures. If the couple has children, the judge may request a survey detailing the social and financial situation of the family. (Articles 168 and Article 170)

In addition to near equal divorce rights, the Family Code includes a number of what are framed as safeguards for women, but these are combined with the codification of a number of manifest inequalities between husband and wife. On the one hand, for instance, in line with the Jacquinot and Mandel decrees, for a marriage to be valid the consent of both spouses is required. On the other hand, the husband is legally appointed head of the family (Art. 152) and has the exclusive right to choose the marital home (Art. 153) and

30 [*Le divorce peut être prononcé: Pour absence declarée de l'un des époux; Pour adultère de l'un des époux; Pour condamnation de l'un des époux à une peine infamante; Pour défaut d'entretien par le mari; Pour refus de l'un des époux d'exécuter les engagements pris en vue de la conclusion du marriage; Pour abandon de la famille ou du domicile conjugal; Pour mauvais traitements, excès, sévices ou injures graves rendant l'existence en commun impossible; Pour stérilité définitive médicalement établié; Pour maladie grave et incurable de l'un des époux découverte pendant le mariage; Pour incompatibilité d'humeur rendant intolérable le maintien du lien conjugal*]

exercise parental authority (Art. 277, §2). Polygyny is possible up to four wives (Art 133). If the couple decides on a marital regime that limits the number of wives the husband can marry, this can be revised only 'in the direction of a reduction in the number of wives' (Article 134, see Sow Sidibé 1993, 426). The default regime is four wives – meaning that if no choice is made, the marriage is placed under the regime of four wives (Art 133). The provision on polygyny thus includes a safeguard for women, as well as for men.

In marriage and inheritance, the Family Code provides a duality of options. Whereas the aim of the Senegalese government was to create a uniform Family Code, they recognized that complete uniformity would be impossible. The terms of reference for the Option Committee reflect this: the document stipulates that, overall, older interpretations of Islamic rules, traditions, and practices that were not directly in line with the Quran were not to stand in the way of 'reforms necessitated by modern life' (Options Committee, Tome I).[31] When the Committee did record an Islamic rule in their draft and this rule was 'manifestly inadmissible to non-Muslims', the Committee had to propose exceptions (ibid.).[32] Thus, the code recognizes both civil and customary marriage (art. 144). Civil marriage is concluded by a registrar; customary marriage, on the other hand, is performed in accordance with (a recognized) custom and subsequently recorded. In addition, a marriage concluded informally but on the basis of a recognized custom may be recorded retroactively (art. 147 and 87). The Family Code also provides two inheritance laws: *droit commun* and Islamic law – where *droit commun* is the default option (Sow Sidibé 1987; N'diaye 2012, 353). As Article 571 of the Family Code provides, only if the deceased has – explicitly or through their comportment – indisputably manifested the will to have his/her succession divided on the basis of Islamic law, is Islamic law as set out in a separate title of the Family Code applied. By introducing this duality, the Senegalese government demonstrates a certain pragmatism: it is clear that civil marriage and inheritance were favoured by the government, yet it is also clear that the government knew that to restrict marriage and inheritance to these forms only would not be feasible.

Hence, the Family Code distinguishes on the one hand between *customary* marriage and *civil* marriage, and on the other between *common* law and *Islamic* law. Somewhat similarly, academic commentaries on the Family Code contain references that are not based on French law, using terms such as 'tradition', 'custom', and 'Islam' – although these terms remain ill-

31 ['*ne doivent pas nous arrêter sur la voie des reformes lorsque celles-ci sont commandées par les nécessités de la vie moderne.*'] Travaux du comité des options pour le code de la famille; Tome 1; Allocution prononcée le 26 Mars 1966 lors de l'installation du Comité des Options par M. Alioune M'bengue Garde des Sceaux, Ministre de la Justice, p. 5.

32 ['*sera manifestement inadmissible pour les non islamisés*']

defined. How were the categories of custom and Islamic law approached by the Senegalese legislator?

It is first notable that – with the exception of customary marriage, which may be Islamic or not – norms laid down in the Family Code that do not have French civil law as their source of inspiration can all be said to be in line with conventional Maliki interpretations of sharia. This is echoed in Camara's evaluation, who argues that the Senegalese Family Code is 'hostile' to customary law and favours Islam (Camara 2007).[33] However, during the drafting process of the Family Code, custom and Islamic law are often used interchangeably. While the Options Committee's terms of reference at some points distinguished between 'Islam' and 'customary law', at other points they conflated these categories. Possible conflicts between customary law and Islam, moreover, were not really accounted for in this document. The discussions of the Options Committee also demonstrate how, for the majority of its members, custom and Islamic law were understood as being one and the same in principle; only when a custom was not also an Islamic rule or vice versa would the categories of custom and Islamic law be distinguished.[34] It is clear that the Options Committee understood custom as largely informed by Islamic norms. The statements of the Minister of Justice, when commenting on the title 'Muslim inheritance law' (*successions de droit musulman*) during the Parliamentary discussion of the Family Code, convey a similar position:

> [I]n practice, what we call Muslim law is an amalgam of Quranic law and customary law. It would be appropriate to speak rather of customary law, but it's [Muslim law] an established term and we don't want to change it (Les débats parlementaires 1972, 324 cited in M. N'Diaye 2012, 149).[35]

Together, the way that categories of custom and Islamic law have been employed in the final text of the Family Code, as well as during its elaboration, thus reveal a certain continuity of colonial lines of thought. Just as before, the category of custom lumped together a variety of normative and legal sources, and people's beliefs, norms, and practices were characterized as inauthentic but acceptable forms of Islam.

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33 Camara's argument is useful in that it lays bare a distinction that commentaries on the Code have often overlooked (see footnote 57), yet what I am interested in here is how these categories were used in the elaboration of the Family Code.

34 Two of the qadis who were members of the *Comité des Options* and that spoke up with some regularity routinely referred to the Quran and God. They also referred to Islamic law. In rare cases, references were made to Islamic jurisprudence. These refer to 'Khalil' and the 'Risâla', respectively a Maliki work of jurisprudence by Khalil ibn Ishaq al-Jundi (14th century, Egypt) and a Maliki work of jurisprudence by Ibn Abi Zayd al-Qayrawani (10th century, Tunisia).

35 [*'dans la pratique, ce qu'on appelle droit musulman est un amalgame de droit coranique et de droit coutumier. Il conviendrait de parler davantage de droit coutumier, mais le terme est consacré par l'usage et nous n'avons pas voulu y revenir.'*]

Opposition to the Family Code

The Senegalese government attached great importance to the creation of a Family Code. From the outset, however, Sufi leaders regarded the initiative to introduce uniform legislation as an attack on Islam and their position. Timing also played an important role. As we saw in Chapter 2, the 'Senegalese social contract' would prove to hold. Yet during the run-up to independence and after politicians and religious leaders were confronted with uncertainty about their relative positions and their interrelations. At this crucial moment in the negotiation of their relationship with the state, Sufi leaders saw the initiative to introduce a Family Code as an incursion into their sphere of influence (Villalón 1995). Hence, their opposition was vehement.

In the absence of competitive elections, Parliament was exclusively composed of Members of Parliament of President Senghor's UPS, and when the code was adopted in 1972, Parliament unanimously voted in favour of the law. Beyond Parliament, the code had already become the subject of critique in 1970 when the Bill was first announced, and the major marabouts of the country spoke out against it. The *Conseil Supérieur Islamique du Sénégal* (Villalón 2013, 253), a council they had created during the period leading up to independence, was revived for the occasion. Under its umbrella the leaders of the different orders asserted their opposition against the law in a letter:

> For us Muslims, we have to stress that the Quran, the supreme Constitution, which has foreseen everything and omitted nothing with regards to marriage, divorce, inheritance and other acts that touch society has governed Islam for over thirteen centuries already. Its immutable and irrefutable precepts are respected and applied across the world, without the slightest modification, by all scholars and all governments which have been instituted. We are astonished to see that now, in Senegal, *while the colonizers had accepted the Muslim code and created special jurisdictions for Muslims* [italics mine], one wants to introduce innovations, not to say infringements. (cited in Coulon 1979, 32-33)[36]

To study and analyse the Bill, the council established three commissions, and each produced its own report: one (1) rejected the Bill categorically and in its entirety; the second (2) pointed out each article that contradicted the sharia, noting for each the position of Islamic law on the subject; the third

36 ['*Pour nous Musulmans, peut-on lire, nous nous devons de souligner que l'islam est régi depuis plus de 13 siècles par le Coran, constitution suprême, qui a tout prévu et n'a rien omis en matière de mariage, divorce, succession et autres actes touchant à la société. Ses prescriptions immuables et irréfragables sont respectées et appliquées à travers le monde – sans moindre modification – pas tous les érudits et des gouvernements qui ont été institués. Nous nous étonnons de voir que, maintenant au Sénégal, on veuille y apporter des « innovations » pour ne pas dire des entorses, alors que le colonisateur avait admis le Code Musulman et crée des juridictions spéciales pour les islamisés.*']

(3) critiqued the document and suggested the creation of a special advisory chamber on religious matters to Parliament, as well as listed over 80 articles that contradicted Islamic law, without making further comments (Villalón 1995, 227-228). In January 1971, the council presented the last document to the government.[37] When it appeared that the government ignored their opposition and failed to heed their advice, the council followed with another letter stating that they regretted that the revised Bill had not been submitted to them for inspection, though they 'had the right to expect it'. While the letter remained polite, the council made it abundantly clear that they opposed the law, going as far as threatening to disobey.

> [B]y virtue of the obligations that result from the roles assigned to us by our religious positions, we must necessarily remove any ambiguity about our positions by solemnly reaffirming our unshakeable conviction *to categorically reject any measure, even an official one, which does not respect the sacred principles of our religion*. (cited in Villalón 1995, 228; emphasis in the original)

This vehement opposition to the state was 'unprecedented' (Camara and Seck 2010, 878) and stemmed from the different marabouts' convictions that the adoption of a uniform Family Code not only contradicted a large number of religious norms, but also constituted a departure from the established practice of the 'social contract' (Chapter 2) (see Villalón 2013).

While the council had presumed that their suggestions would be taken up by the government, the latter adopted the code without their approval, even after the second council letter. As Villalón argues, this was largely due to the 'extreme importance' that the state, and particularly its President Léopold Sédar Senghor, attached to the code (Villalón 1995, 228). The marabouts, on their side, maintained their opposition, largely by isolating their followers from the code's impact. As Coulon reports, in the electoral period of late 1977 / early 1978, the *Khalife Général* of the Muridiyya, Serigne Abdoul Mbacke, declared to the press that the Family Code would not reach Touba. The *Khalife* of the Layennes, Seydina Issa Laye, stated that none of his followers would go to an official court for marriage, divorce, or inheritance. And Aboul Aziz Sy, *Khalife Général* of the Tivaouane branch of the Tijāniyya, asserted that the code had no place in Senegal (Coulon 1979, 34). Ibrahim Niasse, *Shaykh* of the Koalack *zawiya* of the Tijāniyya, adopted a more conciliatory tone. In his speech on the Family Code he at once recognized the right of the state to legislate and the right of Muslims to follow the stipulations of their religion in their family practices.[38] Notably, reformist actors did not put up (vocal) opposition to the code. The private archives

37 As Villalón (1995, 307 note 59) explains, it is unclear from the discussion of Mbaye why the Council chose this third report.

38 https://www.youtube.com/watch?v=Qc9Ziptklsg, accessed on 8 April 2022

of the reformist organization, the Muslim Cultural Union (*Union Culturelle Musulmane*, UCM), instead revealed their 'conciliatory attitude' regarding the Family Code (Gomez-Perez 2005a, 212 note 49). Likely this was due to the relative marginalization of reformist actors in the 1960s; moreover, while the 1970s had seen a renewal of the Islamic activism of the 1950s (see Chapter 2), no charismatic figure emerged from within this movement (Gomez-Perez 2005b, 2005a; Loimeier 1998; M. N'Diaye 2012).

Since the 1970s, critiques against the Family Code have resurfaced, not only from Sufi religious authorities but now also from reformist actors. By contrast, human rights and women's organizations as well as secular feminist scholars started criticizing the Code because it discriminated against women. During the multiple events organized on the occasion of the ten-year anniversary of the Code in January 1983 (Brossier 2004b, 82), for instance, several points of criticism were raised: disapproval concerned, among other points, the absence of the possibility for a paternity action; others demanded the reinstauration of Muslim courts (Brossier 2004b, 82). In 1986, Cheikh Touré, a key figure in the UCM and founder of the reformist organization *Jamaatou Ibadou Rahmane* (JIR) in 1978, published an alternative Muslim family code (Loimeier 1998).

In 1989 significant reforms of the Family Code were passed.[39] They can be attributed both to a growing women's movement, as well as the Senegalese government's ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1985.[40] The changes had been prepared during a research seminar in 1987 that was to generate a reflection on the compatibility of the Family Code with the constitutional values of equality, secularity, respect of religion, and protection of the family, and that was initiated by the Ministry of Justice (see Brossier 2004a, 43). The reforms reinforced the position of women, and addressed – among other issues – the age of (marital) consent, women's professional activities, and partner maintenance (Sow Sidibé 1993). Men could no longer oppose the choice of their wives' professions, and girls who were married under the age of consent could have their marriage nullified, even if a child had been conceived during the marriage (Scales-Trent 2010, 132). Men who were found at fault for '*incompatiblité d'humeur*', as well as men who wanted to

39 Previously, two minor procedural reforms to the Code were introduced: in 1974, a reform was passed to facilitate the re-establishment of the civil record; in 1977, 'the burden of proof of the unregistered customary marriage' was lowered (Sow Sidibé 1993, 423).

40 CEDAW was adopted by the United Nations General Assembly in 1979; it entered into force in 1981.

divorce their wives because they had a serious and incurable illness, would have to pay maintenance (Sow Sidibé 1993).[41]

Whereas the 1989 reforms did not elicit targeted critique, reformist groups in the 1990s voiced their disapproval of the government's regulation of the family on multiple accounts. In 1993 JIR again condemned the government for adopting a Family Code of Judeo-Christian essence; and, in 1997, an umbrella organization of 15 prominent reformist organizations wrote an open letter to the President that criticized him for stating to foreign journalists that 'the balanced family is a monogamous family', and that Senegalese society 'should come prudently to monogamy' (Augis 2013, 85). While the late 1990s also saw an increased activism on the part of women's organizations to abolish the Code's appointment of the father as the head of the family, their actions were without success.[42] They faced opposition, and with the change of government in 2000 the process of the drafting of a new Bill was dropped (Brossier 2004a, 43). Instead, the initiative in proposing reform of family law came to lie with Islamic actors.

Democratic Openings: New Contestation over Family Law

The polemics culminated in 2002. In that year the Islamic Committee for the Reform of the Family Law Code in Senegal (CIRCOFS), a newly established committee uniting reformist Islamic actors and the main maraboutic families of the country,[43] presented a fully fledged Islamic draft code, which had been in the making for six years. The committee wanted to replace the current family code with a dual system: their draft code for Muslims, which

41 The other reforms were the following: (1) The wife's place of residence was no longer deemed to be that of her husband; instead, it was decided on the basis of where she actually resided and where she conducted her professional activities. (2) Women whose husband had disappeared were no longer dependent on a curator but could administer their husband's assets themselves. (3) Divorced women were given the option to keep their husband's surname after divorce, to prevent a 'setback in [a woman's] professional career by having to change her surname' (Sow Sidibé 1993, 424). (4) Because husbands were often reluctant to surrender the official family document, a copy of the document was now given to the wife upon registering the marriage (ibid.).

42 Up to today, the article has not been taken out of the Code. In the 2000s, some of its financial consequences were nonetheless remedied: in 2006, the government reformed the law concerning health benefits, in order for working women to be able to obtain health benefits for their husband and children; in 2008, the government passed a law on fiscal equity. Married women with children now receive the same tax deductions as married men with children (see Scales-Trent 2010).

43 The initiative for the creation of CIRCOFS came from the collective of Islamic organization of Senegal (*Collectif des associations islamiques du Sénégal*), a collective that regroups, among others, the following reformist organizations: JIR; the association of students of Senegal (*Association des élèves et étudiants musulman du Sénégal*); Al Falah; and the organization of Islamic Action (*Organisation de l'action islamique*) (see Gomez-Perez 2005a).

would thus effectively apply to 94 per cent of the population, and another code for non-Muslims (Mbow 2010, 339). The document was presented at a conference in Dakar, which was attended by 29 delegates of the main maraboutic capitals of Senegal,[44] including the Sy family of Tivaouane, evidencing support among the key religious authorities in the country.

The draft code consisted of 278 articles detailed in seven different books,[45] notably stipulating the return of repudiation. Other articles, for instance, prescribed the wife's obligation to obey her husband and the prohibition of adoption. The Bill was accompanied by a call to reopen the Muslim courts of the colonial period, where the code would be applied in the adjudication of family cases (Brossier 2004a, 68); qadis were to apply an Islamic code, rather than rule on the basis of the body of Maliki jurisprudence.[46]

CIRCOFS argued that replacement of the current uniform Family Code with a dual system would conform to the wishes of the overwhelming Muslim majority of the country (CIRCOFS in Mbow 2010, 4), that '[t]he Family Code […] contains numerous provisions totally contrary to Muslim law' (Me B. Niang in Brossier 2004a, 64),[47] and that 'the rules decreed by God, or revealed by the Prophet (Peace and Salvation on Him), represent the supreme authority [for Muslims] and not the rules decreed by deputies or Parliament' (Le Quotidien, 28 March 2003, quoted in Mbow 2010, 5).[48] Their argumentation largely relied on the fact that the majority of the Senegalese population is Muslim and that the Family Code contradicts Islamic law. In addition, CIRCOFS defended the draft code on the basis of its legal quality and the benefits it would bring to the family (Brossier 2004a, 53-54). In a newspaper article, the lawyer Bacar Niang, leader of CIRCOFS, whose person as a former left-wing politician exemplifies the blurring of political and religious spheres (Chapter 2),[49] stated that the reintroduction of repudiation protected women and freed them from the uncertainty of long and unfamiliar legal proceedings (Niang 2003 in Brossier 2004a, 53). Finally, and in parallel, CIRCOFS attacked the Family Code for being a product of the colonial imposition of – French – *laicité* (Brossier 2004a, 80-81).

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44 These are the cities of residence of the main maraboutic families: Touba (Mbacke), Tivaouane (Sy), Kaolack (Niasse), and Ndiassane (Kounta) (see also Chapter 2).

45 The code was written in French. Book 1: the conclusion of marriage; Book 2: the dissolution of marriage; Book 3: adoption, filiation and foster parenting; Book 4: guardianship; Book 5: will; Book 6: inheritance; Book 7: endowment (*waqf*) (Brossier 2004a, 53)

46 This mirrors a longstanding trend in Islamic countries to codify and incorporate sharia in national legislation (Otto 2010a).

47 ['*il détient de nombreuses dispositions totalement contraires à la loi musulmane*']

48 ['*les règles décrétées par Dieu, ou révélées par le Prophète (Paix et Salut sur Lui), représentent l'autorité suprême comparée aux règles décrétées par les députés ou le parlement.*']

49 Another prominent figure of CIRCOFS likewise blurs these boundaries: the reformist imam Mbaye Niang turned to politics in 2000, with the founding of his party *Mouvement pour la Réforme et le Développement Sociale* (MRDS).

The denunciation of the Family Code and the formulation of an Islamic alternative by CIRCOFS should be understood against the political background of democratization described in Chapter 2 (Brossier 2004b; Villalón 2013). At this moment of electoral empowerment and with President Wade's government 'clearly opening the door to discussions of previously unchallengeable issues religious groups saw an opening and attempted to seize it' (Villalón 2013, 254). In addition, as we saw in Chapter 2, relations between the political and the religious had become increasingly interconnected, thus giving way to a rethinking of the role of Islam, President Wade himself also demonstrating an identification with his affiliation to the Muridiyya order, a behaviour previously unseen in Senegalese presidents. Hence, the CIRCOFS attack on the Family Code was an attempt to renegotiate the role of Islam in public life after the democratic opening of the 1990s – at least on the key issue of family law.

As its name suggests, CIRCOFS – the Islamic Committee for the Reform of the Family Code in Senegal – was a one-issue interest group. The committee rallied reformist associations and the different Sufi orders around the topic of family law, one issue the different religious actors appeared to agree upon (M. N'Diaye 2012, 250).[50] The draft code was created in close collaboration with these different actors, and their representatives – including some of the central leaders of the Sufi orders – attended the presentation of the alternative project code in Dakar.[51] The heads of all Sufi orders signed a subsequent request for a meeting with President Wade. However, as Brossier cautions, the central leadership of the Sufi orders was often involved only indirectly, and none of the central leaders of the orders personally spoke out on the matter.

To this day, the reforms proposed by CIRCOFS have not taken place. In response to the meeting request, Wade tried to forcefully end the discussion in May 2003, stating that the Family Code is law and that as President he has to respect the law. He added that the government he led did not have the intention to present a new Bill to parliament (Brossier 2004b, 84). In the summer of 2003, CIRCOFS continued to push for the draft code, putting a programme in place for the popularization of its contents, relying on imams to disseminate the message (Brossier 2004a, 52). Wade later promised to study the project code, but he continued to refrain from publicly speaking out on the matter.

50 Brossier points out that this was the first time these different actors converged (Brossier 2004a, 125).

51 Notably, Seriñ Abdoul Aziz Sy Junior (Tijāniyya order), Seriñ Mourtada Mbacké (Murid order), Seriñ Sidy Moctar Kounta (Qadiriyya order), and Seriñ Moussa Guèye Laye (Layenne order). In total, 29 delegates of the Sufi orders were present (Brossier 2004b, 84).

The issue has now been shelved for almost two decades and has not figured prominently in the public debate. However, the underlying conflict seems far from over. The Family Code is a frequent topic of discussion in the preaching and media performances of a range of Islamic actors. The increased religious presence on radio and television facilitated by the liberalization of the media (Chapter 2) means that there, questions of marriage, polygyny, married life, the rights and duties of the wife, divorce, and the Family Code are a frequent topic of discussion. Topics around sexuality and the family are discussed on religious channels as well as on the religious television and radio programmes of other channels, both by religious actors associated with the Sufi orders and by more reformist actors. Almost without exception the stance vis-à-vis the Family Code is critical (Sow 2005, 292-293). Likewise, issues of sexuality and the family are discussed in the many religious conferences and meetings that are organized by religious associations – both Sufi *daayiras* and reformist associations – that take place in mosques, institutions of Arabic and Islamic teaching, and on neighbourhood squares. As Sow explains, women and the family remain a central topic of debate, and it is particularly on this issue that the relative roles of state and Islam are contested. Through their criticisms, religious actors carve out a political role and legitimize their importance (Sow 2005). Indeed, religious actors – including Sufi marabouts – draw on these topics to position themselves and mobilize a following, which in turn also contributes to the further multiplication of authority within the religious sphere (see Chapter 2).

Conclusion

This chapter considered the history of state family law in Senegal. It showed how contestation over family law predates the Family Code. The chapter also noted a continuity between colonial lines of thought and the assumptions that would inform codification of a number of customary and Islamic norms in the Family Code. In both cases, the category of custom lumps together a variety of normative and legal sources, while Islam is characterized as local and inauthentic yet acceptable.

Primarily, however, the chapter set out to show the nationalist and modernizing intentions behind the creation of a Family Code that, among other changes, abolished repudiation, as well as the code's continued contestation by religious authorities, both reformist associations and the leadership of Sufi orders. As we saw in Chapter 2, from around 1900 a 'social contract' came into existence that connected the population to the heads of the different Sufi orders, and these leaders in turn to the colonial administration. This arrangement continued with the advent of the independent Senegalese state in 1960. Yet while the relationship between state and religious authorities was generally tolerant, the state's introduction of a

uniform Family Code proved a point of serious disagreement. The heads of the Sufi orders condemned the code for being un-Islamic and for regulating what they considered was theirs to oversee. Hence, the period after independence, marked by state modernization and nationalism, on one hand, and by a religious elite trying to protect their sphere of influence, on the other, would prove to be crucial in shaping the terms of the 'woman's question' in Senegal (Kandiyoti 1991, 4). Over the past few decades, relations between Sufi religious leaders (marabouts) and the Senegalese state have undergone significant changes (Chapter 2). Attempting to further seize upon these developments, religious authorities in 2002 tried to re-introduce a dual system and presented a draft Islamic family code; they were unsuccessful in their attempt, but critique of the Family Code remains.

Finally, in delineating the history of the creation of state family law and state legal institutions from the 19th century until today, this chapter showed how family law increasingly came to be seen as a tool for modernization – and how the more this happened, the less family law reflected the actual practices of people.