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Translating Religious Principles into German Law: Boundaries and Contradictions

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Chapter 10

Translating religious principles into German law: boundaries and contradictions

Pascale Fournier and Régine Tremblay

Introduction: religious principles as a 'social' order?

Over recent decades, two important debates have echoed each other in Western European countries. The first argument, which is quite ancient, touches upon the place of religious principles in a legal system and their distinction from (state) law. The second discussion, of more recent origin, pertains to the 'integration' of minorities through recognition of their distinct religious normative orders. Despite fundamental differences, both discourses share many interesting meeting points and raise important issues. Some of these matters, which only become more complex when one tries to translate religious normative principles into state law, will be the watermarks in this chapter.

First, one must keep in mind that religious principles are stateless: they are not tied to a state per se and they do not have a fixed form (or state). This raises the question of how one can translate religious normative principles within a specific state and in a comprehensive fashion. Secondly, it is difficult to evaluate to what extent state law is secular and to study the various forms of state law over time. How, then, can a state translate religious principles within its boundaries and in line with its laws? Some authors have defended recognition of all non-Western customs in the name of 'progressive integration of what is after all [...] a single world' (Kollewijn 1951: 325). Others have argued in favour of 'allowing [Muslims] to have the social space within which *Shari'a*-mindedness can flourish, thereby allowing pious Muslims to live a faith-based life' (Turner and Arslan 2011: 156). Many have idealised religious principles as harmonious. In this chapter, we problematise such an idealised picture of religious principles and explore elements that should be taken into account before religious principles can be translated into positive law. Based on fieldwork, we present religious family law as contested from the inside and open to decisions, strategies and manipulations that incessantly alter its content and meaning.

The product of our fieldwork arises from the particular context of Germany, a country that shares many traits with other continental European polities as far as recognition of religious laws is concerned. Germany has been the focus of debates regarding the search for 'pluralistic modes of incorporation' (Koenig 2005: 228)

of communities along the lines of their religious socio-legal orders. These discussions specifically addressed whether Muslims might organise their community along religious lines through an entity called a 'public law corporation', as Christians and Jews are allowed to do in Germany (Rohe 2004: 87). With very few exceptions, Germany does not recognise religious law in a domestic context but a debate is raging about translating religious norms into positive law. This chapter outlines the challenges to eventual recognition. It argues that while these hurdles are considerable, they are downplayed or underestimated by many legal scholars. In order to support our claim, we present the findings of fieldwork undertaken among Jewish and Muslim communities in Germany and introduce data from formal interviews with eight Jewish and Muslim women conducted in 2011. The fieldwork focuses on Jewish and Islamic religious laws and their relation to state law in Germany.

First we present the basic rules of Islamic and Jewish law and the German state law that regulates them. Next we contend that the boundaries for shaping and applying religious norms are blurry. Indeed, principles are constantly redefined by parties and adjudicators, while adjudicatory outcomes and procedures for religious marriage and divorce are often uneven and depend on the choices and decisions of particular parties, adjudicators and stakeholders. We argue that these conflicting outcomes might be explained by boundless discretion and informality in the religious adjudication process, but that this structure is not foreign to so-called secular family law. Thus, if the project of recognising religious principles is to be maintained in the context of family law, it must take stock of the conceptual and practical conflicts that inhere to the sphere of family law and indeed to law more generally. These arguments are intended as a contribution to the burgeoning literature on the interaction between secular state law and 'unofficial' religious norms (Moon 2008; Nichols 2012).

The German legal landscape: religion and the state

When Jews and Muslims marry in Western countries, their ceremony often includes both a religious and a civil element. Under both traditions, husbands and wives have distinct rights and responsibilities within marriage. Access to religious divorce is drawn sharply along gender lines (Estin 2008: 464). Under Islamic family law, marriage establishes a system of reciprocity in which each party is assigned a set of contractual rights and duties towards the other (Abu-Odeh 2004). A marriage contract can only be concluded through the principles of offer (*ijab*) and acceptance (*qabul*) by the two principals or their proxies (Nasir 2009: 45). Upon marriage, the husband acquires the right to his wife's obedience (ibid: 98) and the right to restrict her movements outside the matrimonial home (ibid: 80). For her part, the wife acquires the right to her *mahr*[1] (Esposito and DeLong-Bas 2001: 23; Fournier 2010: *passim*) and the right to maintenance (Esposito and DeLong-Bas 2001: 25). Like Muslim marriage, Jewish marriage is finalised according to contractual principles. The parties execute a marriage contract (a *ketubah*, plural *ketubot*), often written in Aramaic (Reiss and Broyde 2005: 202), 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. As put by Elliot Dorff and Arthur Rosett: 'the parties may determine by contract only those elements of the relationship which the law permits them to decide' (1988: 453). 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 a sum to maintain the wife in the event of death or divorce (traditionally, the sum necessary for the woman to support herself for one year) (Epstein 1927: 163).

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 each 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 initiated judicially by the woman, although with the understanding that such a route will dissolve the husband's duty to pay the deferred *mahr* (El Alami and Hinchcliffe 1996: 27–28; Abdal-Rehim 1996: 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 (Abdal-Rehim 1996: 105). 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: 29). Finally, the *talaq* divorce (repudiation) is a unilateral act which dissolves the marriage contract through a declaration by the husband only. The law recognises the power of the husband to divorce his wife by saying '*talaq*' (meaning 'divorce') three times without the need for him to ask for enforcement of his declaration by the court (ibid: 22). However, this unlimited 'freedom' of the husband to divorce at will in the private sphere involves the (costly) obligation to pay *mahr* in full as soon as the third *talaq* has been pronounced (Esposito and DeLong-Bas 2001: 23).

Unlike Muslim women, who may initiate divorce through *khul* or *faskh*, Jewish women are not in a position to obtain a religious divorce from their husbands. In order to be '*halachically*' correct (Jacobs and De Vries 2007: 251), a Jewish marriage may only end in the death of a spouse or the voluntary grant of a divorce (*get*) by the husband (Haut 1983: 18) and its simultaneous acceptance by the wife (Yefet 2009: 443–44). The husband thus has the exclusive power to deliver a *get* (Bible Deuteronomy 24: 1), which comes in the form of a surprisingly brief document written mostly in the Aramaic language. If a Jewish woman is entitled to a *get* and has not received one owing to her husband's refusal, she is referred to as an *agunah* (plural *agunot*) (Bible Ruth 1: 13); literally, a 'chained' or 'anchored' woman. Several limitations are placed on a divorced Jewish woman who wishes to enter into religious remarriage without a *get*. First, if she marries a man by civil ceremony, the relationship is considered adulterous under Jewish law. Therefore, the woman is never permitted to enter into religious marriage with that man

(Cohn 2004: 66). Secondly, children born to a woman who has not received a *get* are labelled *mamzer* (plural *mamzerim*). Such children are sometimes 'effectively excluded from organized Judaism' (Nichols 2007: 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*: '[a] man who remarries 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' (ibid).

The German legal system only very scantily recognises Islamic and Jewish divorce law. Until 1999, a citizenship applicant had to provide evidence of at least one German ancestor in order to receive German citizenship, making it almost impossible for foreigners to become citizens (Article 116 of the Grundgesetz, the German Basic Law). Germany's citizenship policy has thus been described as 'one of the most restrictive in the EU' (Green 2005: 922). In short, even though foreign law is made applicable to all non-German citizens, of which there are many in the Muslim immigrant communities, *talaq* and *get* divorces are only recognised if all relevant gestures were conducted outside of German territory. Moreover, German domestic family law, which applies to German citizens, does not allow for pronouncement of *talaq* divorces or delivery of *get* divorces. German courts have been consistent in their treatment of *talaq* divorce: this form of religious divorce will be recognised only if it has been carried out entirely in a jurisdiction which allows such a divorce (Siehr 2005: 352).

In general, German courts will not perform *get* divorces themselves nor will they pressure the husband to grant the divorce, but will refer the parties to the appropriate jurisdiction: the rabbinical authorities.[2] Refusal to grant a *get* is problematic for the wife, since she can legally obtain a divorce before a German court, but without a religious divorce she will remain an *agunah*. German courts have confirmed that freedom of religion exonerates Jewish men from all coercion as to giving a *get*, whether coercion results from domestic court decisions or recognition of foreign judgments.[3]

For a German citizen, German divorce laws and procedures are the same whether or not one follows the laws of a religious tradition. Like most Western countries, Germany has a no-fault divorce system (Robbers 2006: 286; Foster and Sule 2010: 520–21).[4] Provisions related to divorce are found in sections 1564–48 of the Bürgerliches Gesetzbuch (BGB), the German Civil Code. The first of these provisions specifically states that 'a marriage may be dissolved by divorce only by judicial decision on the petition of one or both spouses' (section 1564 of the BGB). A religious authority does not have jurisdiction to grant a divorce under German law (Siehr 2005: 352). In Germany, only a court can pronounce a divorce.

Formal recognition of religious norms in German law is not yet accomplished. One exception, however, is the possibility for Jewish and Muslim individuals to have recourse to religious arbitration. Unlike in other polities such as parts of

Canada (Fournier 2010: 120), religious arbitration is not precluded in Germany, whether in family law or in other private matters (Rohe 2009: 97–98). The possibility of seeking religious arbitration is attracting heavy questioning and criticism in Germany (Popp 2011).

From plural belongings and boundaries to the shaping of religious principles

By interviewing eight Muslim and Jewish women in Germany, we aimed to investigate the socio-legal reality and understanding of religious family norms. The interviews took place mainly in Berlin in summer 2011. The original plan was to interview women in Berlin only, without translators. This meant that the women we would interview had to be able to speak English, a trait that in itself would limit the number and type of women participating. As it proved difficult to find English-speaking women in Berlin willing to talk about their divorces, in the end some of the interviews were conducted through translators, while one participant was from outside Berlin. The interviews took place in the midst of intensive networking and fieldwork in sectors of the German Muslim and Jewish communities. Although we advertised for volunteers through a website (http://talaqgetgermany.wordpress.com), emails to academic groups and public posters, the majority of interviewees came to us by word of mouth and contacts within the Berlin Jewish and Muslim communities, a method approved by the Office of Research Ethics and Integrity of the University of Ottawa in response to our application.

Our participants come from a variety of backgrounds. Two of them had converted to their current religions: one to Judaism, the other to Islam (Participants #5 and #6). Despite our concern for a varied sample, some groups remain underrepresented. For example, none of the Jewish women interviewed is Orthodox, and none of the Muslim women would describe herself as very conservative or fundamentalist. None of them was extremely poor, although several were by no means well off. Many of the women spoke English as a third or fourth language. Almost all were educated at the undergraduate level and were working. All of these traits must be taken into account when trying to draw any conclusion about what the women's accounts say about divorce and use of religious principles in Germany. The women interviewed are not representative of their entire communities, although some similarities in experience among the participants point to consistent themes. All were asked the same basic questions. Depending on the answers, these were then followed by more specific queries.

We use a 'story-telling' approach to depict how legal agents navigate the religious and socio-economic endowments that community life produces. If it is difficult to draw policy conclusions from mere stories (Fajer 1994: 1845), we have nevertheless tried to combine our stories with empirical data and socio-legal literature, to draw some general conclusions from our fieldwork. Qualitative interview analysis brings new, marginalised accounts of religious customs as experienced by religious women and thus builds on existing scholarship from its

margins. More specifically, this section explores the context of religious law, its internal boundaries and its interactions with the civil law, focusing on how parties and adjudicators redesign those boundaries through legal behaviours.

Under classical Islamic law, the Islamic court (*qadi*) usually does not arbitrate *talaq* divorces – for instance, a woman in Malaysia can ask the court to declare a *talaq* divorce (Pelezt 2002: 169) – but rather adjudicates *khul* divorces[5] and *faskh* divorces. In the latter instance, 'a wife who is unhappy in her marriage and who wishes to obtain a dissolution must petition the court but only in so far as she can demonstrate to the court (*qadi*) that the limited grounds under which divorce can be granted have been met' (Elī Alami and Hinchcliffe 1996: 29; see also Abu-Odeh 2004: 1106). In Germany, no organised system of *qadis* exists, so religious leaders known as imams, a word literally translatable as 'prayer leader', 'fulfill more responsibilities that could be attributed to the Islamic religious sphere' (Kamp 2008: 143). German imams celebrate Islamic marriages and adjudicate divorces (ibid: 144). In this way, they 'become central figures of the community' (Kastoryano 2004: 1237).

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* (plural *battei din*). This tribunal of three Jewish judges (*dayanim*) functions according to formalities born of centuries of religious tradition. The *beth din* oversees the process but does not execute the divorce. 'No one – not the government, not the courts, not even a rabbi – is authorized to divorce a couple except for the husband' (Yefet 2009: 442–43). Therefore, the power of the *beth din* lies in its persuasive authority rather than its ability to mandate results. As a result of the Second World War (Bodemann 1990: 40), German Jewish communities have relied on American, British and Israeli rabbis, given their institutional disorganisation and demographic instability (Eddy 2006). The influence of foreign rabbis and *battei din*, a recurrent occurrence in our participants' testimonies, participates in shaping the boundaries of religious principles in Germany.

The contemporary German Muslim context also seems to leave some space for a decline in importance of the religious sphere among immigrant communities. Recent surveys reported by the German weekly *Der Spiegel* in August 2012 show a rising will among Muslim Germans of Turkish origin to 'integrate into German society' and secular institutions, along with a paradoxically increasing religiousness (Hawley 2012). This uneven influence of the religious sphere was another recurring theme in our fieldwork. The ability of religious individuals to pick and choose normative belongings contributes in important ways to fashioning religious law in action. Many participants mentioned that religious rules and rulings could be ignored by one party, who would then turn to the civil sphere to uphold his or her interests:

> Participant #1:
> Interviewer: During or before your marriage, did you ever discuss the *talaq* type of divorce with your husband [...]?
> Participant: No, never, because we were both not that religious. I mean, we were both just very young, and I think for us the legal [civil] marriage was a lot more binding than the other thing, that was just a show for the family [...].
> [...]
> Interviewer: What did your ex-husband think of the religious divorce?
> Participant: I think he didn't care at that point because he was more involved with English and German people, when he broke away from me he broke away from the Muslim society and he just lived as he pleased.

Sometimes, the Jewish or Islamic authorities will themselves contribute to lessening the influence of their religious normative order by aligning with the civil sphere and 'surrendering' to its grasp. This will be the case, for instance, when a woman convinces the adjudicator to recognise a civil divorce, even though the latter cannot in itself lead to a religious divorce by strict application of Jewish or Islamic legal rules:

> Participant #2:
> Interviewer: Once you have the secular divorce you're also divorced in God's eyes.
> Participant: Yes, normally in our religion you have to have a divorce [...] but because I was never overly religious and because in my case, this is a special case. My case was my mom died when I was very little, so the family sort of broke apart a bit. [...] So in my case it was all a lot more liberal.
>
> Participant #4:
> Interviewer: So did your rabbi recognise your civil divorce from Germany?
> Participant: Yes, of course. He was living here, of course.

It would thus appear that civil law sometimes trumps religious law. However, it should be noted that there is no uniformity in this civil/religious interaction. In some other situations, the adjudicators will stubbornly refuse to consider what the civil law decrees, and will instead stick to their own internal legal rules and criteria to grant religious divorce and to celebrate religious marriages (Participants #1 and 2).

Reciprocally, religious law sometimes trumps civil law. For Jewish participants, one theme was that if their families or their spouses were from Israel, then the German civil marriage was of especially little consequence: in Israel, virtually all marriages are religious (Lerner 2009: 447). One woman said that her spouse, whose family was from Israel, did not tell his parents they had celebrated a German civil marriage. His mother was upset until the man clarified that it had only been a civil ceremony. The couple had a religious ceremony soon afterwards, and the parents considered that their absence from the civil ceremony was of no consequence:

> Participant #3:
> The religious marriage was for my parents-in-law very important, because they didn't know [what] a civil contract [is], they didn't know that; they're from Israel. [...]
> And then in the afternoon [...] we went for dinner [with the husband's parents]. [...] [M]y husband stood up and [told his parents we were married]. And [...] my mother-in-law was up and down the ceiling: 'How could you marry without me!' It was a mess [...]. Then my husband said it was not a Jewish ceremony, it was a civil. [...] So, then she says: 'That's ok, I don't care! Ok, fine fine'. [...]. We made the Jewish [ceremony] and then everything was ok.

It would thus seem, from the perception of the participants, that religious and civil norms are constantly reconfiguring their respective spheres of influence in unpredictable ways. Some religious individuals will attempt to bend the religious adjudication in their favour by making it align with the civil sphere. Whether that strategy is successful or not, both parties will often (but not always) have the opportunity to ignore religious law and turn to the civil sphere, thus rewriting religion's boundaries every time.

In addition to considerable paradoxical interplay between the civil and religious spheres, our fieldwork suggests that the voices of the law are plural and internal to the religious normative order. That is to say, the legal power of official figures such as imams or rabbis is overshadowed and influenced by other stakeholders in religious communities, such as friends, families and members of the community. Such reactions spur the parties to adopt several tactics to secure the approval or support of some stakeholders, effectively 'bargaining in the shadow of the law' (Mnookin and Kornhauser 1979: 950). However, there is no way to predict what the stakeholders' influence will be:

> Participant #2:
> I was lucky. There are many families that put a lot of pressure on women so that they cannot get divorced, simply because they are very religious. But in my case, my family is rather relaxed and more liberal and this is why I consider myself lucky that I could just make my own decision and follow it through.

We see that the concrete implications of religious law are dependent on the actions of third parties, so that the law is constantly mediated by intricate family loyalties, community networks, friendships, and what Michel Foucault called 'the little tactics of the habitat' (Foucault 1977: 149). This perpetual redesigning of the boundaries of religious customs serves as a reminder of legal pluralism's insight that 'law arises from, belongs to, and responds to everyone' (Macdonald 2002: 8). Normative orders do not simply exist, with clear contours and outer

limits, but are constantly created by legal subjects themselves, as they 'participate in the multiple normative communities by which they recognize and create their own legal subjectivity' (Kleinhans and Macdonald 1997: 38). It is this 'everyday law' that we have tried to unearth in the context of religious norms, discovering that many on-the-ground difficulties to idealising and conceiving religious principles as a fixed legal entity.[6] Translation of religious norms under conditions of German positive law thus becomes a complex enterprise.

From adjudicatory contradictions and boundaries to the application of religious principles

This section shifts the analysis to the mechanisms of religious law, focusing on the roles of Islamic and Jewish adjudicators, namely on the application of religious principles. Julie Macfarlane, one of the few scholars conducting empirical research on Muslim practices in the West, has found that imams in North America often assume roles that go beyond those assigned by classical Islamic law to *qadis*. Macfarlane has noted that the adjudicatory role of imams is inconsistent, generating wildly diverging outcomes (2012). We have sought to examine whether decisions and adjudication by German imams present any consistency. Our findings mirror those of Macfarlane: religious adjudication and bargaining in Germany leads to wildly diverging results.

Often, the adjudicators and the parties will disregard the substantive and procedural rules of Islamic law. This leads to strikingly varied results, such as uneven requirements for marriage celebration. For instance, a marriage will sometimes be performed in the absence of the imam, as in the case of Participant #8, even though other women, such as Participant #2, asserted that the presence of the imam is an essential condition for a valid Muslim marriage:

> Participant #8:
> We did the marriage at home, and you don't need an imam [...] to do this. You can go to an imam or to a mosque, but you can do it at home. And there was my father, and his father – the family. And brothers and sisters. So we had witnesses, and everything. [...] His father made the *nikah* [Muslim marriage contract].

The same selective observance of procedural and substantive rules can be noticed among certain Jewish *battei din* and rabbis. Specifically, the *get* ceremonial requirements were sometimes bent by rabbis, who would create their own *get* procedures, humiliating and insulting women (Participant #4). However, other religious adjudicators bend the procedural rules in favour of women. It would thus seem that the vagaries of religious law can go both ways. Some imams allow women to pronounce the *talaq* divorce, which under Islamic law can only be done by the man (Hussain 2011: 120–22):

> Participant #1:
> Participant: Well I did the divorce with an imam. My husband wasn't there [...]. [The imam] just said something and I had to say it three times and then I was divorced.
> Interviewer: Do you remember what you had to say three times?
> Participant: [...] [I]t was uh 'I divorce with Allah's permission, I divorce you, I divorce you, I divorce you' and that was it. [...] It took 30 seconds or something.
> Interviewer: So they let you initiate the religious divorce without his consent?
> Participant: Yes, because by that time we'd lived separately and everybody knew he was violent, everybody knew that he was having loads of extra-marital affairs, you know, loads of them, and so he was considered unworthy of being a Muslim [...].

The substantive rules of divorce are also bent and applied irregularly, as the case of grounds for divorce illustrates. Under Islamic law, grounds to issue an Islamic *faskh* divorce decree 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 (Abdal-Rehim 1996: 105; Esposito and DeLong-Bas 2001: 32–34). However, some imams apply these divorce grounds unevenly, being reticent to grant divorce for insufficient material support and physical abuse, while favouring divorce claims on grounds of homosexuality or impotence:

> Participant #1:
> [I]f he's gay, then you'll find any imam [to adjudicate the divorce], if he's unable to father a child, again you'll find any imam. But if he beats you and leaves you hungry and you know that kind of stuff, [...] you have to sit there and do all your dirty washing out in front of witnesses in order to [divorce] [...].

We have found that some imams are reluctant to enforce post-divorce alimony (Participant #2), even though the woman is entitled to three months of additional maintenance under Islamic law (Nasir 2009: 142). The *mahr* seems to be an element that is enforced selectively, even though it is central to the Muslim custom of marriage and divorce:

> Participant #1:
> We signed some sort of contract saying in case of divorce what he would have to pay me, which of course never happened. [...] It was never again an issue. The minute it came to finances, there was no Muslim blood in him at all [...]. I know many who sign the religious contract, and then you might as well use it as toilet paper because it has no meaning.

The same complex indeterminacy can be found in some doctrines of Jewish law. If a Jewish man refuses to grant the *get*, the wife is left with very little religious recourse. Hence, the opportunity for 'strategic behavior' (Estin 2008: 464) in civil divorce proceedings is remarkable, making the *get* an ideal tool for blackmail. Lisa Fishbayn writes that: '[t]he 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: 85). The boundary between civil and religious principles is permeable. That being said, the Jewish *agunah* has been provided with some countervailing bargaining instruments. If Jewish women cannot grant a *get* of their own initiative, they may refuse their husbands' *get*, which will prevent the rabbinical authorities from dissolving the marriage contract. It is regarded as against the spirit of Jewish law for a wife to be able to dismiss her husband by granting him a *get* (Mielziner 1987: 117). 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.[7] Jewish men who are citizens of Israel may respond to this bargaining by obtaining official permission from an Israeli rabbinical court to marry a second wife, effectively circumventing the wife's refusal. A line has to be drawn between refusing the *get* and negotiating over granting one. Some of our participants' experiences very well illustrated the indeterminacy of such religious rules.[8]

It would seem that religious law's inconsistencies stem not from its misapplication, but from its structure. Our fieldwork supports Susan Weiss's view that Jewish law 'is not a collection of harsh and uniform rules, but rather embraces various and contradictory voices [and the] outcome of a given case depends upon the rabbinical authority consulted, the "facts" he deems worthy of emphasis, and the voices he chooses to heed' (2004: 63). The same extends to Islamic law, so that religious principles do not seem to be a homogeneous body of oppressive rules but an open-ended toolbox used in various contradictory ways by different rabbis, imams and parties.

The growing mass of feminist scholarship reinterpreting the internal legal doctrines of Jewish law (Graetz 2005: 4; Sassoon 2011) and Islamic law (Barlas 2002: 3; Mernissi 1985: 52) is interesting in this regard, as it underlines that religious norms are, in fact, malleable and can be invoked to support many conflicting conclusions. Undoubtedly, inconsistencies in the application of religious norms often stem from arbitrary applications of the law, a phenomenon exacerbated by the informality surrounding religious family law in Germany. Perhaps these phenomena can be seen as products of the very nature of religious law, which, just like any state law, can be indeterminate and fashioned by the bargaining parties themselves. Recognising these legal rules and practices would thus lead to many unpredictable distributive consequences, which must be acknowledged and studied empirically before a fruitful conversation on the nature of religious law and its translation into German law – or state law generally – can continue.

Conclusion: legal scholarship in times of diaspora and migration

This chapter has outlined several conceptual difficulties and challenges to seeing religious law as a 'social', harmonious sphere of identity that can be easily recognised, translated and valued by the state. We have explored the processes through which the internal and external boundaries of religious normative orders come to be defined and have revealed the incessant cross-cutting of civil and religious orders. It would seem that religious legal subjects are busy constantly redrawing the lines of competing normative orders, so that clear-cut recognition of the boundaries of one or the other is practically unworkable. Parties and adjudicators seem to be able to bend the religious rules to favour one party or the other.

Our conclusions can be extended to other legal orders, including state law (Rittich 2001: 929; Kennedy 2002: 116–17). The instability and openness to manipulation we have outlined may not be peculiar to religious law, but rather constitute attributes of all legal systems. Relying on socio-legal literature and fieldwork, we have suggested that the malleability of religious law is neither due to arbitrary, 'bad' law-making nor to new norms that diverge from black-letter religious law. Instead, the contradictory outcomes of religious principles might be attributable to the indeterminacy of religious law, its internal gaps, conflicts and ambiguities that leave the door open to choice, agency, and 'strategic behavior' in legal interpretation (Kennedy 1998: 180).

It does not follow from our exposition that religious norms should never be recognised. Defending this would be hypocritical, given that many Western legal rules are rooted in Christianity. Nor does our analysis imply that civil, state law is 'better' than religious law or that it is more determinate or egalitarian. There is a need to distance ourselves from the over-valuation of secularity, and to question the false dichotomy between religious law and secular law.

Our study rather offers a humble awareness of the complexity of legal orders. In a context where international migration and the transnational flow of people are ever-increasing, it is imperative for law to take stock of the many conflicting implications of proposed policy decisions. A turn to private relational dynamics thus seems to be lacking in legal scholarship on minority legal systems. To be sure, brilliant legal accounts of the complex hybridity of legal identities and belongings are currently emerging (Van Praagh 1996: 214). Fascinating fieldwork has also been produced on the topic of legal subjects' navigation of informal, religious legal orders (Campbell 2010; Macfarlane 2012). However, a broader turn towards the empirical study of these socio-legal complexities will become even more necessary as time progresses. Moreover, the difficulty of translating stateless normative principles into state law should be explored. Armed with this curiosity, legal scholars can perhaps begin the study of religious legal orders afresh.

Notes

1 *Mahr*, meaning 'reward' or 'nuptial gift', 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 and DeLong-Bas 2001: 23).
2 See Kammergericht (KG) Berlin (Berlin Court of Appeal), 1 January 1993 – FamRZ 1994, 839, 839–40.
3 See Oberlandesgericht [OLG] Oldenburg (Oldenburg Court of Appeal), 7 March 2006 – 12 UF 125/05 – FamRZ 2006, 950; Bundesgerichtshof (BGH) (German Federal Court of Justice), 28 May 2008 – XII ZR 61/06 – FamRZ 2008, 1409.
4 The only ground for divorce is a demonstrable *Zerrüttungsprinzip* – 'an inevitable breakdown of the marriage' (Foster and Sule 2010: 520–21). This doctrine is found in the German Civil Code, which defines a breakdown of marriage as occurring when 'the conjugal community of the spouses no longer exists and it cannot be expected that the spouses restore it' (section 1565 I of the BGB). In principle, the German Civil Code requires that spouses live apart for one year before a divorce is available. However, an earlier divorce may be granted if 'continuation of the marriage would be an unreasonable hardship for the petitioner for reasons that lie in the person of the other spouse' (section 1565 II of the BGB).
5 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*. Moreover, in some countries such as Egypt, the wife can even obtain a *khul* divorce from the *qadi* without the husband's consent (Mashhour 2005: 583).
6 For an empirical study of norm-generating everyday interactions, see Austin Sarat (1990: 344–45).
7 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 commenced from 2005 to 2007, some 180 women were 'chained' to their husbands and a slightly higher number of men 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 cooperate with the divorce proceedings (Fendel 2007).
8 For example, some participants' husbands went to Israel to argue (successfully) that the women were refusing a *get*, even though the husbands had never even attempted to give a *get* and were in fact refusing to do so:

> Participant # 4:
> Participant: I think until today he doesn't understand why I left him, because he was very hurt about this.
> [...]
> Interviewer: But had he tried to give you the *get*?
> Participant: No! Never, never. [...] He didn't have to get a *get*, he just had to get a permission to remarry. [...] He went to the rabbis in Haifa [Israel]. [...] He didn't say why he doesn't have a *get*, and they accepted it like this, so they permitted him to remarry [...]. He argued that I was refusing to accept the *get*.

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